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It is a great pleasure to be here at the University 'Magna Graecia' of Catanzaro and to take part in your deliberations on the theory of law and European legal orders. I owe thanks both to Professor Sergio Ferlito of the University of Catania and to Professor Massimo La Torre for their invitations to be here today.

I wish to discuss the possibility of 'rethinking legal thinking', the title of a project launched at the University of Helsinki in 2010 and which was also continued at the European University Institute thereafter. The project is concerned with the ongoing transnationalisation of law which forces us to rethink our inherited ways of legal thinking[1]. As my title suggests, I will concentrate my remarks on our concept of the state and the logic which has historically supported this concept, while suggesting that there are ways of rethinking the state which are supported by the new logics. The importance of this process of rethinking the state may be sufficiently evident by general knowledge of the process known as 'globalization', but two recent volumes may be cited in support of it,

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[1] See http://www.eui.eu/seminarsandevents/index.aspx?eventid=62468 and the eventual volume edited by K. TUORI, M. MADURO AND S. SANKARI, *Transnational Law*, Cambridge 2014.

those of Martin van Creveld on *The Rise and Decline of the State*[2] and Johanna Guillaumé on *L'affaiblissement de l'État-Nation et le droit international privé*[3]. Whatever the future of the state may be, there already appear to be changes from the concept of the state which has prevailed over the last few centuries. This appears most evident if one attempts to understand the state as it exists now in nearly 200 instantiations across the world, from states which are relatively successful or 'developed' to states which are often described as 'failed', 'failing' or 'quasi' states. How can one think of such a range of institutional variation which would nevertheless be faithful to a single descriptor, that of being a 'state'?

I will start the process of rethinking by recalling the thinking which has led to our present concept of the state, as an autonomous, sovereign social organization which would exist as an entity distinct from the governments which direct it and distinct from the populations which inhabit it. There is a clearly recognizable 'classical' logic which has sustained this concept of the state. I will then turn to what I believe is a larger and more powerful explanation of the state which is that of the state as a tradition, and then attempt to explain how such a concept of the state is consistent with newer, or at least 'non-classical', forms of logic.

[2] M. VAN CREVELD, *The Rise and Decline of the State*, Cambridge 1999.

[3] J. GUILLAUMÉ, *L'affaiblissement de l'État-Nation et le droit international privé*, Paris 2011.

I. *The State as Entity*

We now know the state as an entity which is distinct from its governments and its population. As an entity it exists, moreover, on a defined territory. Space or territory is important for the contemporary state. How we have reached these conclusions is a long story. It has been supported by, and intertwined with, a certain way of thinking or logic of social organization. We must first therefore think of the reification of the state, i.e., its conceptualization as an entity, and then attempt to identify the logic which has assisted in this process.

A. *The reification of the state*

A large number of strands of legal thought have contributed to the reification of the state which we presently know. These range over a number of legal and intellectual disciplines and they have all made important contributions to our present understanding of the state. I number six in all, but make no attempt to be complete in this search for explanation. They are as follows:

i) *The state as nation-state*. This is the probably the most visible and well known of present explanations of the state. It has had great resonance in populations and the word nation-state has become unavoidable in contemporary discussion. This is perhaps most obviously the case in the English language where there is considerable resistance to the abstract notion of 'the state' and where the 'nation-state'

provokes a more spontaneous favourable reaction, in spite of the abuses which have been committed in its name. The notion of the 'État-Nation' is certainly known in other languages, however, and would have had its inspiration in French revolutionary thought and German romanticism. The writing of Abbé Sieyès inspired Article 3 of the French Declaration of the Rights of Man and Citizen, to the effect that «The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation»[4]. There was no French 'nation' on the polyglot territory of France in the late eighteenth century but the idea of a uniform population in terms of language, religion and ethnicity became a major objective of the French state thereafter. In Germany the writings of Herder, the brothers Grimm and Fichte contributed to the rise of nationalism in the world and Fichte expressly addressed the German 'nation' in 1807. His lectures have been described as the «first blueprint for European civil nationalism»[5].

Nationalism flourished during the nineteenth and twentieth centuries, both in popular sentiment and in the academic world. History became largely the history of particular states and nationalism became a mass political force. There is academic work today which describes the nation as 'myth' but it is a myth which has

[4] See also, for the 'nation' as 'l'élément constitutif' in R. CARRÉ DE MALBERG, *Théorie générale de l'Etat*, Paris 1920, 2; J. ELLUL, *Histoire des institutions*, vol. 2, *Institutions françaises,* Paris 1956, 560 (state as 'expression' of nation).

[5] J. LEERSEN, *National Thought in Europe: A Cultural History*, Amsterdam 2006, 113; and for Fichte's 1807 lectures as elevating anti-French sentiment 'almost to the rank of religious sentiment', M. VAN CREVELD, *op. cit.*, 192-3.

become rooted in popular understanding and it has been used for the commission of many atrocities, including the killing and re-location of many populations[6]. It is perhaps therefore surprising that there appears never to have been a nation-state, in spite of all efforts to establish one, and that it appears unlikely that there ever will be one. Movements of population today are such that the minorities (defined religiously, ethnically or linguistically) within each state are increasing in size, such that the state today is moving farther and farther from internal uniformity. Examples of nation-states frequently given in the literature include Finland, Japan, Germany or Iceland but these states have historically been internally diverse and their diversity today is increasing. Nor are smaller states more likely to obtain internal homogeneity. The smallest state in the world is probably Tuvalu, in the Pacific Ocean, with a population of some 10,000 souls. It has diverse religions, different languages and both Polynesian and Micronesian ethnic groups. With an estimated 5000 to 8000 ethnic groups in the world[7], and only some 200 states, it is unrealistic to think that some state would have succeeded in eliminating the diversity of human groups within a given territory, however small.

The idea of a homogenous block of people coinciding with the legal and political structures of a state has therefore been an important factor in the conceptualization of the state as an entity.

[6] P. GEARY, *The Myth of Nations: The Medieval Origins of Europe*, Princeton 2006, notably at 1 for the myth of distant historical formation of stable European ethnicities.

[7] W. KYMLICKA, W. NORMAN, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in W. KYMLICKA, W. NORMAN, *Citizenship in Diverse Societies*, Oxford 2000, 1; W. OPELLO, S. ROSOW, *The Nation-State and Global Order: A Historical Introduction to Contemporary Politics,* Boulder, CO 2004, 257 ('could be as high as eight thousand', 'deglobalization').

Once the state is conceptualized as a nation-state, the state can been seen as having crisp boundaries not only geographically but demographically. It is a simple but powerful idea. It is, however, undercomplex and false.

ii) *The state as subject and object of international law*. Amongst lawyers, who are usually not poets or romantics, the nation-state will often be taken with a grain of salt. Yet the same, underlying idea of the state as entity has led public international lawyers to think of the state as composed of a number of tangible objects, notably those of a territory[8], a population[9] and a government[10]. There is great ambiguity about the character of each of these and great debate about whether the recognition of their existence (by other states, which presumably satisfy the definition) should be treated as simply declarative or constitutive of existence. Whichever is the case[11], the constitutive elements of the state have led to a

[8] See in contemporary international law, e.g. J. BRIERLY, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. by H. WALDOCK, Oxford 1963, 137, ('defined territory'); P.M. DUPUY, *Droit international public*, Paris 1995, 30, 31 ('détermination exacte' of spatial field of sovereignty); cf. M. SHAW, *International Law*, 6th ed., Cambridge 2008, 199 (need for 'defined territory' but 'no necessity . . . for defined and settled boundaries' so long as 'consistent band of territory' . . . 'undeniably controlled'). For ongoing boundary disputes see the website of the International Boundary Research Unit at Durham University, at <http://www.dur.ac.uk/ibru≥.

[9] See the discussion of the 'nation', above, section I.A.i.

[10] For the criterion of 'control', M. SHAW, *op. cit.*, 199.

[11] Professor Crawford rejects both the factual character of the state which underlies the declarative view and the discretionary character of recognition which underlies the constitutive view, in favour of the normative character of any decision taken in the name of existing public international law, but the debate remains

> general conclusion that the state exists as an entity composed of its tangible elements. This view of public international lawyers controlling the existence of states as entities has become widespread, though the case can certainly be made that domestic circumstance and domestic public law play an equal if not greater role. The question remains, of course, of what it *is* that has a territory, a population and a government, but public international law extends only to saying that it is a 'state' or an 'entity' which is a state. This is ultimately a frustrating and unsatisfactory position but public international lawyers consider it an adequate one for what would be the primary function of public international law, that of regulating the relations of states. They do not consider it necessary to plunge excessively into the question of how such entities composed of groups of individual human beings could be said to exist. They will simply pronounce on whether such an entity exists, or not, according to criteria which public international law has generated.

Nor do lawyers of what is known as private international law depart from the view that the state consists of an entity. While private legal relations across borders can be seen as retaining a private character, such that resolution of problems would be particular to the private parties, the law of trans-state problems came to be seen in the nineteenth century as 'international' or in terms of 'conflict of laws', with an underlying premise of trans-state private relations giving rise to 'conflicts of sovereignty'. Private international legal relations were thus 'étatisées' as had been private legal relations within states before

largely dominated by the declarative/constitutive dichotomy. See J. CRAWFORD, *The Creation of States in International Law*, Cambridge 2007, notably at 19 for the 'great debate'.

them. So each trans-state, private legal problem had to be notionally located within a state such that that state's law could be controlling. Rules were necessary to effect such localizations, and private international lawyers for more than a century now have pursued the task of identifying the location of invisible concepts. There is increasing scepticism of whether this is possible and in the United States it has been largely abandoned. The view of states as entities has facilitated the view that there must be a private international law which controls the territorial reach of their authority, beyond the actual territory which they occupy as entities.

iii) *The state as institution of positive law*. An influential group of legal philosophers has taken the view that law should be conceived of not simply as norm but in a broader fashion as an institution rooted in society. This immediately diverts attention away from abstract characteristics of the rule or norm, and even of its source, towards the fundamental question of the rootedness of any particular norm or law in society more generally. In England Hart could be seen as reaching towards this position by describing his *The Concept of Law* as an «essay in descriptive sociology»[12] but more recently the position has been developed at length by such authors as Neil MacCormack and Otto Weinberger[13] and in

[12] H. L. A. HART, *The Concept of Law*, 3rd ed., ed. L. C. Green, Oxford 2012, vi.

[13] See notably N. MACCORMICK, O. WEINBERGER, *An Institutional Theory of Law*, Dordrecht 1986; N. MACCORMICK, *Institutions of Law (Law, State and Practical Reason)* Oxford 2007, notably at 11 (institutional facts as 'facts that depend on the interpretation of things, events, and pieces of behaviour by reference to some normative framework', such as a watch or credit card or coin), and 12 (as omnipresent and inherent elements of social reality.

> this country by Massimo La Torre[14]. These authors have been concerned with what they describe as «institutional facts» and not simply with abstractions or theory expressed in abstract terms. Institutions are here broadly conceived and extend to norms such as those dealing with main areas of law, of contract or property, for example, as well as to institutions in the usual sense such as legislatures or courts. These writings have been influential in that they direct attention to a broader, more inclusive concept of law than that which may be indicated by notions of law as command, or primary rule, or ought-statement.

For present purposes, however, the institutionalist theories of law come together in providing further justification for seeing the state itself as an institution and as an entity. An earlier institutionalist writer, Santo Romano, even defined an «institution» as «any *entity* or body having a stable and permanent framework and forming a body in itself, with a life of its own»[15]. If the state as entity is most broadly seen as flowing from nationalist romanticism and international law (see sections i and ii above), it here finds root in domestic legal philosophy, so we find yet another area of thought concluding that the state represents some form of reified body. It is not itself a norm but it is the largest and most encompassing of the institutions which assume some social reality by their acceptance in society. Of course, this does little to assist us in evaluating the state where it is much less evidently a chunk of social reality, as in many places of the world, and it may be that this persistent difficulty

[14] M. LA TORRE, *Norme, istituzioni, valori*, 2nd ed., Roma-Bari 2002.

[15] Cited in M. LA TORRE, *Institutionalist theories of law*, in IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law, http://ivr-enc.info/index.php?title=Institutionalist_theories_of law, § IV, (emphasis added).

motivated MacCormick at the end of his career to conclude that all forms of law were not so much forms of social reality as contingent and non-monotonic or defeasible propositions[16]. He found that «rule statements ... are always defeasible», that the validity of legal arrangements was only «presumptively sufficient» and that legal certainty could only be described as «at best, qualified and defeasible certainty»[17]. There is always the possibility of «invalidating intervention»[18], such that it appears essential to re-direct our attention away from perceived social reality to encompass as well the grounds and possibilities of such invalidating intervention.

iv) *The state as national legal system.* A further product of domestic or state-centric legal philosophy has been the idea of the state as creator of, or even identical with, a national legal system. In contemporary systems theory a system is defined as a bounded cadre within which the elements of the system are in interaction with one another. So, as in international law, our attention is directed to boundaries which would define precisely the territory of the state, accenting its crispness, and then to that which happens *within* the boundaries which establish the existence of the system. It is a 'black box' theory of law beyond which legal attention must rarely be focussed and which powerfully

[16] See also, for western-style constitutions providing no 'social facts', only 'paper law' and 'paper rights', W. MENSKI, *Comparative law in a global context: The legal systems of Asia and Africa*, London 2000, 202.

[17] N. MACCORMICK, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford 2009, 28, 240, 33.

[18] N. MACCORMICK, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, cit., 240, with resulting 'defeasance'.

> directs almost all legal thought to the interaction of the elements of the system, within the boundaries of the system. For two centuries lawyers have thus concentrated their attention on national legal sources while legal philosophy, and not just legal history, has been directed towards the justification of purely national legal constructions[19]. Transnational law, until very recently, has been one of the victims of this hypertrophy of domestic or national sources, and the concentration on national normativity functioned as a kind of cookie-cutter on a variety of transnational norms in many areas of law (ecclesiastical, family, commercial, maritime, etc). Democracy has been an important ally in this process, but lawyers have concerned themselves most with the notion of a system and democracy has not necessarily been implied by this notion. There have therefore been, and there are, authoritarian national legal systems.

Hart described his ambition in *The Concept of Law* as being that of advancing legal theory «by providing an improved analysis of the distinctive structure of a municipal legal system»[20]. It was meant as an effort of description and has generated a large debate on whether description is possible of an intellectual construction. The debate is important for having shifted attention away from considerations of justice in individual cases towards what Amartya Sen has described as «transcendental institutionalism»[21]. It gave rise, particularly when combined with ideas of the nation state, the

[19] For jurists who 'ne voient pas plus loin que le bout de leur norme', G. TIMSIT, *Thèmes et systèmes du droit*, Paris 1998, 1.

[20] H. L. A. HART, *op. cit.*, 17.

[21] A. SEN, *The Idea of Justice*, Cambridge, MA 2009, 5.

state in international law and the state as institution, to the idea that there is *something there*, an object or entity, which can be the object of description. The idea has been the object of contemporary defence[22] yet remains unconvincing. Hart's was a normative project. He argued that the legal system eliminates what would be the uncertainty and stasis of what he called «primitive societies» and argued therefore both for a concept of change and the means of bringing it about[23]. There are those in the world who oppose both ideas. There is also an underlying idea of the normative worth of rules for purposes of human guidance[24] and there are also those who oppose this idea. Perhaps most importantly, Hart argued for a certain concept of a legal system, a claim which stands beside other such claims and must be evaluated against them, normatively. One can argue about whether Hart or Kelsen is correct and whose legal system is the true one. Neil MacCormick therefore concluded that «[l]egal systems are not solid and sensible entities. They are thought-objects, products of particular discourses rather than presuppositions of them»[25]. Descriptive accounts of legal systems may thus demonstrate a «certain persuasiveness»[26], or not.

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[22] J. COLEMAN, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in J. COLEMAN (ed.), *Hart's Postscript: Essays on the Postscript to the* Concept of Law, Oxford 2001, 99, 110, 111 (conceptual or descriptive must precede the normative, existence necessarily preceding normative defence).

[23] H. L. A. HART, *op. cit.*,156.

[24] S. PERRY, *Holmes versus Hart: The Bad Man in Legal Theory*, in S. J. BURTON (ed.), The Path of the Law *and its Influence: The Legacy of Oliver Wendell Holmes, Jr.*, Cambridge 2000, 158, 169.

[25] N. MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford 1999, 113.

[26] N. MACCORMICK, *Questioning Sovereignty*, cit., at 78.

The idea of a national legal system is today declining in significance because of the decline in significance of national boundaries. States lose their crispness of definition as people, capital and information transgress more and more frequently, and often, state boundaries[27]. A German author has found that «existing frameworks are partially outmoded because the premises of the state systems...have been eroded»[28]. This is not to say that the idea of a national legal system has today lost its intellectual significance. It is a received notion in much popular understanding, the result of several centuries of teaching of how law is to be conceived. So in a number of states of the United States of America we are now seeing legislation or popular referenda the object of which is to ban all references either to any form of religious law or to any foreign law whatsoever, even in a case involving foreign parties or facts. Legal systems are meant to be self-sufficient. Let them be self-sufficient. It becomes necessary to invoke the law of the state, and notably its constitution, as a means to defend against this popular understanding of a legal system[29].

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[27] P. BOBBITT, *The Shield of Achilles: War, Peace and the Course of History*, London 2002, 221 (political authority unable to control international 'information standard', near instantaneous circulation of financial and other information); M. VAN CREVELD, *op. cit.*, 392-3 (states now only able to 'swim with the trend').

[28] W. KRAWIETZ, *Paradigms, positions and prospects of rationality - The changing foundation of law in institutional and systems theory*, in A. BRATHOLM, T. OPSAHL & M. AARBAKKE, *Samfunn Rett Rettferdighet: Festskrift til Torstein Eckhoffs 70-Årsdag*, Otta, Norway 1986, 452, 453.

[29] For such U.S. legislation, congressional Resolutions and popular referenda which would prohibit resort to foreign law, see recently F. PATEL, M. DUSS, A. TOH, *Foreign Law Bans: Legal Uncertainties and Practical Problems*' at http:
//www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf;

v) *The state as the embodiment of national culture.* The notion of culture has become unavoidable in many societies today. It has its origins in eighteenth century Europe and has become an explanatory or interpretive device for many of the social sciences. It requires a 'unit' of culture, the object of the sociological or anthropological (or other) analysis and the contemporary state has lent itself to consideration as such a 'unit' of cultural analysis. There may certainly be others, even overlapping or shared, such as the culture of a club or legal profession or company, and these may be enjoyed at the same time as the culture of a state. There is thus a French legal culture or an Italian legal culture and there are many more particular cultures within these national ones. A culture is therefore something which the unit of culture therefore *has* and it functions both as a means of identification of the group and an explanation of how members of the group act and interact. Historically it now appears evident that this function of differentiation of groups has been one of the major consequences of

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and more generally R. GINSBURG, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, in *Cambridge L. J.*, 64/2005, 575, 582 (concern that resolutions 'fuel the irrational fringe'); S. SYMEONIDES, *Choice of Law in the American Courts in 2010*, in *59 Am. J. Comp. L.* 2011, 303, at 320 (qualified as 'xenophobic hysteria'); and see S. CALABRESI, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, in *Boston U. L. Rev.* 86/2006, 1335, 1337 (American 'popular culture' rejecting idea that United States of America has much to learn from foreign law). Popular referenda prohibiting application of particular laws, such as the shari'a, will however be contrary to the equal treatment guaranteed by the First Amendment: *Award* v. *Ziriax*, 670 F. 3d 1111 (10th Cir. 2012). These enactments may be seen as similar to the 'Zitiergesetze' known in European legal history; see G. TEIPEL, *Zitiergesetze in der romanistischen Tradition*, in *ZRG RA* 72/1955 245.

the notion of culture. A culture has been seen as a unifying or common pattern of group activity and those who do not share in the pattern do not belong to the culture. They are therefore often seen as outside it. Anthropologists have distinguished human groups by their culture and the concept has been criticized as tending «to posit a concept of cultures as unities ….opposable to each other» such that there is a process of «essentializing cultures and quieting the diversity of voices so that only the dominant are heard»[30]. The notion of a 'Kulturkampf' thus became widespread in the nineteenth century, originating in religious struggles within Germany, and the notion of cultural wars remains used today. David Nelken warns against the danger of 'reifying national stereotypes'[31] and there has certainly been a widespread practice of assignation of national characteristics to members of any given state. The law and institutions of a given state thus become the products of this all-encompassing construction which, like that of a national legal system, would exist in spite of its invisibility.

Today there are many critics of the concept and many attempts at re-conceptualization. Leading anthropologists, sociologists and social scientists criticize it for its vagueness and imprecision[32]. It would use a very narrow concept of law to expand

[30] M. CHANOCK, *Human Rights and Cultural Branding: Who Speaks and How?*, in A. AN-NA'IM, *Cultural Transformation and Human Rights in Africa*, London 2002, 38, 41.

[31] D. NELKEN, *Using the Concept of Legal Culture*, in *Australian J. Leg. Phil.* 29/2004, 1-6.

[32] For imprecision, R. COTTERELL, *The Concept of Legal Culture* in D. NELKEN (ed.), *Comparing Legal Cultures*, Aldershot 1997, 13-20 ('failing to identify any particular factors … making a difference'); R. BRAGUE, R. BRAGUE, *Europe, La voie romaine*, Paris 1993, 133 ('no matter what manner of acting'). A cataloguing of definitions listed 164 by mid-twentieth century; F. BARNARD, *Culture and*

the explanatory power of the residual 'culture'. It should be simply abandoned as a superficial idea which nevertheless conflictualizes human relations[33]. Yet it too, like the notion of a national legal system, has become profoundly rooted in both popular and academic discourse, so abandonment does not appear possible. Efforts are therefore made to reconceptualise the notion of culture as 'ever more relational' as opposed to conflictual, and to develop the notion of 'interacting cultures'[34]. There is a notion of the 'transcultural'. These appear to be very encouraging intellectual developments, given the present state of the world and the increasingly evident diversity of human populations. The challenge, of course, is to retain some residual content for the notion of culture while still admitting it is increasingly relational, the object of disagreement, and interactive with other cultures. It has existed in a strong form; whether a weak form can be sustained is an open question. A weaker form will inevitably call attention to its constituent elements; there will be a tendency to concentrate attention on these constituent elements and how they contribute to particular outcomes. Culture in itself, whatever it may be, may not present any causative or interpretive effect.

The final factor leading to consideration of the state as an entity may be the most important but it also the least well-known or

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Civilization in Modern Times, in P. WIENER (ed.), *Dictionary of the History of Ideas*, vol. I New York 1973, 613, notably 613, 614.

[33] For abandonment, A. KUPER, *Culture: The Anthropologist's Account*, Cambridge, MA 1999, x ('more advisable…to avoid the hyper-referential world altogether and to talk more precisely of knowledge, or belief, or art, or technology, or tradition….).

[34] For relationality, D. NELKEN, *Using the Concept of Legal Culture*, cit., 7; and for interaction, J. WEBBER, *Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken*, in *Australian J. Leg. Phil.*, 29/2004, 27, 31.

appreciated. It is the conclusion that the state simply *is* an entity. It need not be reified; it already is. The reaching of this conclusion has, however, been long and tortuous and is not accepted in many parts of the world today. It remains highly controversial and it must be said that no explanation yet advanced has been generally accepted as satisfactory. There is no avoiding the corporate identity of the state, however, in the positive law of many states of the world, including most of those which are most influential in matters of public law today.

vi) *The state as body corporate*. The state we know today has grown from monarchical forms of organization while the construction of a corporate notion of the state has been an essential element in the struggle to obtain freedom from authoritarian rule. The person of the king or queen had to be dissociated from ownership of assets of the state. Otherwise the state and its possessions would be simply the personal property of the reigning monarch. This was long the case, preserved today in the notion of the 'patrimonial state', and it is said that Friedrich II of Prussia was the first to distinguish between monarch and state in the eighteenth century. Louis XIV in the seventeenth century would have famously rejected the distinction. King Leopold of Belgium was still able to rule what was then the Congo Free State as an element of his personal patrimony, committing widespread atrocities in the process, as late as the nineteenth century. Yet who was there to divest the property of an 'absolute' monarch and how could the emerging state somehow bestow identity upon itself, a manoeuvre which today could be seen as an exploit worthy of Baron Munchhausen, who bragged of pulling himself from the swamp by his own hair? The answer to this question

involves the slow construction, of what is today firm dogma, from a combination of historical circumstance and ancient authority.

The historical circumstance is found in the necessity of ensuring the continuation of royal authority on the death of a sovereign. There had to be time for laws of succession to be implemented, without an immediate descent into anarchy. So the immediately practical question came to be resolved by a small but important idea of immediate succession by an as yet uncrowned, even unnamed king. The idea is said to have been derived from customs of private law and the notion that 'la mort saisit le vif', the immediate succession to both debts and assets of a deceased person which notably prevented the emergence of a gap in the enjoyment of seisin[35]. A notion of private law would thus have been taken over by public law, though the distinction between the two was probably not rigorously drawn. Thus it could be said that 'le roi ne meurt jamais' or even shouted that 'le roi est mort, vive le roi', both implicitly recognizing the depersonalization of power[36].

Yet the working of the notion only deepened the intellectual mystery. How could a person or entity exist without physical embodiment? In the common law world it was said that the king effectively had 'two bodies', one of which was immortal, and the immortal one lives on in 'the Crown', that notional and lifeless indicator of executive authority[37]. Roman law came inevitably to be

[35] PH. SUEUR, *Histoire du droit public français*, 4th ed., vol. I, *La constitution monarchique*, Paris 2007, 105–6.

[36] J. PICQ, *Histoire et droit des États*, Paris 2005, 116.

[37] E. H. KANTOROWICZ, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton 1957, notably 409 (for descent from the canonical 'dignitas non moritur', though acknowledging at 273 that notion of two bodies 'camouflaged a problem of continuity').

invoked with its notion in the law of succession of a *universitas*, or totality of goods, though this has been described as a «piece of grammar, not a social entity»[38]. Roman law also allowed actions on behalf of certain groups or partners and so there was a notion that something approaching a person could be created by act of law for specific purposes, and the notion of a legally created fiction of corporate identity probably finds its source here[39]. Yet Roman law was not the source which was required since if a Senate could confer the fiction of corporate identity, in today's language, who was there to confer such identity on the Senate? Today the notion of a corporation as fiction is widely accepted and states have initiated various forms of creation or registration of corporations. There remains doubt as to what they are actually doing but these fictions have assumed great practical importance in the world[40]. The only other explanation for group identity appears to be that of von Gierke, who long argued that groups could constitute organic identities, that there could be a *Gesamtpersönlichkeit* which was not simply fictional in character and which did not result from some formal act of creation of a hierarchical superior[41]. It is generally thought today that this is a dangerous idea, filled with Hegelian overtones of a state seen as the

[38] T. GILBY, *Between Community and Society: A Philosophy and Theology of the State*, London 1953, 246; and see F.W. Maitland's Introduction to his translation of von Gierke's, *Political Theories of the Middle Age*, Cambridge1900, xviii ('there is no text which directly call the *universitas* a *persona*, and still less any that calls it a *persona ficta*').

[39] D. 3.4.

[40] See the seminar on the subject at *Washington & Lee L. Rev.* 63/2006, 1273-1598.

[41] See Maitland's translation into English of von Gierke's, *Die publischistischen Lehren des Mittelalters*, as *Political Theories of the Middle Age*, cit., (a part of the larger work *Das deutsche Genossenschaftsrecht*).

fulfilment of some kind of spirit of the people, pre-existing formal types of organization[42]. If it is not dangerous it is at least detrimental to the revenue-generating capacities of states to monopolize the creation of corporate fictions. Yet Gierke's notion of an organic corporate identity appears to be the only one which is capable of at least a partial explanation of the corporate identity of the contemporary state. No one has created these fictions, yet they are accepted as having been 'bodified'. It may not be necessary to subscribe to the 'organic' and real character of the body of the state, however, if it is possible to situate the notion of the state in a larger body of information which is that of the tradition of state identity. This may not involve the state being conceived as an entity. This is the possibility which remains to be examined in the second Part of these remarks. Before doing so, however, it is necessary to turn to the type of logic which has been supportive of the notion of the state as an entity.

A. *The logic of the state as entity*

The state conceived as an entity, with its concurrent notions of sovereignty and crisp identity, rests on a type of logic which is today described as 'classical' though much of its origin would be of recent date[43]. Plato would have been a primary contributor to this form of

[42] See Z. A. PELCZYNSKI, *The Heglian conception of the state*, in Z. A. PELCZYNSKI, *Hegel's Poliical Philosophy: Problems and Perspectives*, Cambridge 1971, 1-7.

[43] For 'classical' logic as the 'Frege-Peirce' logic developed in the nineteenth and twentieth centuries S. HAACK, *On Logic in the Law:"Something, but not All"*, in *Ratio Juris*, 20/2007 1-11, though as the following discussion indicates it has

logic, with his early insistence on *divisio* or in Greek *diairesis*, the division of all concepts, things or abstractions, into two, the better to narrow down the object of examination and discussion. He is probably the origin of western thinking being cast largely into dichotomous form since he stated that we should 'divide all cases of knowledge in this way'[44]. Aristotle would have followed these counsels in dividing animals into the blooded and bloodless, the blooded into quadrupeds and non-quadrupeds, the quadrupeds into mammals and reptiles, and so on[45]. In law the technique of *divisio* has become an essential element in legal education, instruction particularly in the continental manner depending frequently on various forms of a *summa divisio* between law which is public or private, or rights which are patrimonial or extra-patrimonial, or obligations which are contractual or extra-contractual. Beyond legal education western legal thinking is structured largely by a series of dichotomies such as those between law and morality, law and ethics, law and religion, law and culture and law and custom. They are

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roots extending to both Plato and Aristotle. On the contribution of Frege as 'the greatest single achievement in the history of the subject' (for its 'formal rigour'), W. KNEALE, M. KNEALE, *The Development of Logic*, Oxford 1984, 435 (first published 1962).

[44] PLATO, *The Statesman,* 261b; and for the 'taxonomic effectiveness' of the principle over centuries, A. ERRERA, *The Role of Logic in the Legal Science of the Glossators and Commentators. Distinction, Dialectical Syllogism, and Apodictic Syllogism: An Investigation into the Epistemological Roots of Legal Science in the Late Middle Ages*, in A. PADOVANI, P. STEIN (eds.), *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, vol. 7 of E. PATTARO (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht 2007, 91.

[45] See L. SCHIEBINGER, *Nature's Body*, Piscataway, NJ 2004, 43; though for later Aristotle concluding that *divisio* 'splits natural groups', M. ERESHEFSKY, *The Poverty of the Linnaean Hierarchy*, Cambridge 2001, 20.

reinforced by a larger series of dualisms such as those between mind and body, nature and nurture, or reason and emotion.

Plato's initial principle of *divisio* might have been harmless enough, and a useful means of concentrating attention, but it rests on an implicit and fundamental notion that radical separation, of people, things, or concepts, is possible and even to be recommended. When anything is divided into two, according to the principle of *divisio,* the result is two distinct remnants. *Divisio* can bring about separation and the distinction between the two remaining remnants would be radical or crisp. Plato and his immediate successors do not seem to have felt it to be necessary to defend this principle of separation or the crispness of the results of *divisio* and it no doubt corresponded with the simpler appreciations of reality which largely prevailed until the advent of contemporary science[46].

In the nineteenth century, however, logic went through a process of 'mathematization' and it became necessary to formalize the relations between notions or concepts conceived as crisply as numbers. This today is seen as an overly simple representation of most concepts or things, but a 'law of identity' assumed major importance as a fundamental principle following the 'laws of thought' announced by George Boole[47]. It could thus be stated, in apparently tautological form, that 'A is A' or in the language of Bishop Butler in the nineteenth century, «Everything is what it is and not another

[46] For simple assertion by Aristotle, see his *Metaphysics*, VIII.17 ('a thing is itself … each thing is inseparable from itself'.

[47] G. BOOLE, *An Investigation of the Laws of Thought on Which are Founded the Mathematical Theories of Logic and Probabilities*, London 1854.

thing»[48]. There would be a universal and undeniable principle of conceptual and physical autonomy.

Using the techniques of mathematized logic, two further 'laws of thought' inevitably emerged, though again they would have had less formal antecedents. The first was the 'law' of non-contradiction, that a thing or concept and its opposite were mutually incompatible or, in notational form, not (A and [not-A]). The law of non-contradiction is entirely dependent on the law of identity, since any less crisp definition of A would admit infiltration by its opposite non-A and their possible co-existence. From the law of identity and the law of non-contradiction we arrive inevitably at the third 'law' of thought, which is the law of the excluded middle. In notational form A or [not-A]. There is no possibility of a middle ground (it is excluded) because of the principle of radical separation. That which is [not-A] begins its crisp existence at precisely the point where A ceases to exist. It is galactic in character and by its expansiveness devours any possible middle ground between itself and A. This would be bad news for lawyers and already by mid-twentieth century Stephen Toulmin was decrying the crude and arbitrary character of formal logic when applied to real life, citing the law and work of lawyers as the major example of how 'classical' logic fails to capture what actually happens in the world[49].

Boole's 'laws of thought' were, however, announced in mid-nineteenth century and coincided in large measure with the process of state construction and the conceptualization of national legal

[48] J. BUTLER, *Fifteen Sermons Preached at the Rolls Chapel*, London 1964, Preface, at §39.

[49] S. TOULMIN, *The Uses of Argument*, Cambridge 1958, asking at 39 ('how far is a *general* logic possible?') and at 147 (criticizing 'field invariant' notions of validity, soundness).

'systems'. Boole was co-opted by national legislators and by national legal professions themselves convinced of the necessity of law expressed in national form. Each of the 'laws of thought' then found expression in legal principles seen as fundamental.

The law of identity found its most precise and eloquent expression in the French Constitution of the Year I (1793): «The French Republic is one and indivisible»[50]. The abstract and theoretical statement was accompanied by intense work on the ground as the process of drawing formal, national boundaries was vigorously pursued. Prior to the modern state there was no idea of a fixed geo-political demarcation of competing authorities[51], only a Roman god, Terminus, of the boundary of fields. The limits of authority, or empire, were marked only by 'marches', zones of ambiguous authority controlled in some measure by a marquis, or by the recognition of 'barbarism' of adjacent people. The process of tracing the French boundary on the ground had become systematic by the eighteenth century; there was some measure of geographic precision in the constitutional statement of the identity of the French

[50] As to which see R. VAN CAENEGEM, *An Historical Introduction Western Constitutional Law*, Cambridge 1995, 187. Article I of the Constitution of the present Fifth Republic uses similar and still more ambitious language: 'France shall be an indivisible, secular, democratic and social republic'. See also J. CHEVALLIER, *L'État*, Paris 1999, 20 (State 'prenant appui sur la nation', even conceived as 'une entité indivisible').

[51] P. GUICHONNET, C. RAFFESTIN, *Géographie des frontiers*, Paris 1974, 83, 84; and see M. VAN CREVELD, *op. cit.,* 143, 144 (on problems of territorial demarcation in Europe; Napoleon's retreat from Moscow 'in *terra* that was largely *incognita* ... blank patches were still large and numerous').

Republic[52]. Elsewhere the delimitation of national territory became widespread, though it is not complete even today, since it is marred by large numbers of ongoing boundary disputes[53]. This occasional ambiguity on the ground has not prevented widespread acceptance of the dichotomy inside/outside or domestic/international. States today have become widely accepted as having identities, regardless of their intensity or Kelsenian efficiency; they have been made to conform, at least ostensibly, with the 'law' of identity.

States having assumed crisp identities, the remaining elements of the 'laws' of thought fall easily into place. The state itself, as a legal system, must conform to the law of non-contradiction since no state can be permitted to command both a result and its opposite. This conclusion is quite specific in state-centric legal philosophy. Kelsen explicitly invoked the law of non-contradiction in his construction of a national legal system, necessarily marked by internal consistency. He stated explicitly that in the case of contradictory norms, 'only one of the two can be regarded as objectively valid'[54]. The notion of consistency and non-contradiction

[52] D. NORDMAN, *Problématique historique: des frontières de L'Europe aux frontières du Maghreb (19e siècle)*, in *Frontières: Problèmes de frontières dans le tiers-monde*, Paris 1982, 17-18.

[53] For ongoing problems of delineation, see the work of the International Boundaries Research Unit at Durham University, https://www.dur.ac.uk/ibru, and the listing of some 175 boundary disputes of the Florida State University as http://www.law.fsu.edu/library/collection/LimitsinSeas/numericalibs-template.html.

[54] H. KELSEN, *Pure Theory of Law*, trans. M. Knight, Gloucester, MA 1989, 206 (also for 'the Principle of the Exclusion of Contradictions … To say that *a* ought to be and at the same time ought not to be is just as meaningless as to say that *a* is and at the same time that it is not'). Kelsen later acknowledged, however, that conflicting norms could both be valid, a situation requiring an act of will of legal authority or 'customary non-observance'; H. KELSEN, *Essays in Legal and Moral*

has been emphasized by others and the objective of consistency would have played a major role in the codification process[55]. The application of the 'law' of non-contradiction also has had a major role in the development of the contemporary discipline of private international law, even the interpretive jurisdictions of the United States which have abandoned choice-of-law rules adhering nevertheless to the basic principle that in a private dispute between citizens or domiciliaries of different states the law of *both* states cannot be applied. In some jurisdictions, following the German model of application *d'office* or *von Amts wegen* of private international law rules, the domestic laws are presumed irrebuttably to be in conflict or contradiction, such that the governing law must be determined even where there is no allegation of substantive difference between the two. This presumption of conflict or contradiction is highly unfortunate in a common market or union of states and can only be seen as a relic of nineteenth century objectives of the exclusivity of state law. The principle of the territoriality of state laws had been announced by Huber in the seventeenth century and we see by the twentieth century the 'classical' logic-driven conclusion of such state-centric thinking.

The application of both a crisp notion of identity and the law of non-contradiction led inevitably to the 'law' of the excluded middle (A or [not-A]). In domestic, internal law this reinforced the

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Philosophy, selected by O. WEINBERGER, trans. P. Heath, Dordrecht 1973, 235 ('that two mutually conflicting norms should both be valid, is possible').

[55] See, for example, R. CARACCIOLO, *La noción de sistema en la teoría del derecho*, 2nd ed., Mexico 1999, 9; and for the principle of non-contradiction as fundamental in the process of codification in France, D. DE BÉCHILLON, *L'imaginaire d'un Code*, in *Droits* 27/1998, 173-182.

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dominant role of existing dichotomies such that notions of any type of continuum of solutions between the poles of the dichotomy became excluded. Judges and lawyers were faced in vast numbers of cases with binary options and the necessity of univalent choice. This may be justifiable in many types of case but we will see that strain inevitably developed as complex cases suggest various forms of 'continuization' (or working within a continuum of solutions). There is now serious discussion of such possible 'continuization' in domestic private law, given the often arbitrary character of the initial dichotomy which has been chosen[56]. As with the 'law' of non-contradiction, the 'law' of the excluded middle has received important application both in domestic law and in private international law. It has been universally accepted that the judge (though not, we will see, the arbitrator) is faced with a choice of either the law of the forum or the law of the foreign state which would be designated by a choice-of-law rule. The dichotomy between the law of the forum or the law of the relevant foreign state is also followed in interpretive jurisdictions of the United States who have abandoned choice-of-law rules. They appear less 'revolutionary' in the result. The case of decision by a judge of a non-interested jurisdiction between the law of two other jurisdictions has been described as «Almost-Never Land»[57]. The excluded middle between states has made recognition of any form of transnational law delicate. States have therefore been remarkably successful, or at least some of

[56] See below, section II.B. For the 'arbitrary' character of initial dichotomies of both Plato and Aristotle as even the 'results of creativity and invention', limited only by the 'willingness of co-speakers to accept them', T. VIEHWEG, *Topics and Law*, trans. W. Cole Durham, Jr., Frankfurt 1994, 57.

[57] B. CURRIE, *The Disinterested Third State*, in *Law & Contemporary Problems*, 28/1963, 754, 765-6.

them have been, in i) domestically excluding any form of normativity which would exist within the normativity they themselves have created, and in ii) internationally extending the application of their domestic law to transnational cases. 'Classical' logic has been an great ally in this process. It is, however, only one way of thinking amongst many. This becomes evident when the state is considered, not as an entity with a spatial field of normativity but as a tradition.

II. *The State as Tradition*

We have seen how much of western legal philosophy in the last centuries has had the effect of reifying the state, as a nation-state, a subject and object of public international law, an institution, a legal system, an embodiment of national culture, and a body *tout court*. It is difficult to escape the weight of this theory of what the state is, though this is possible through simple recognition of what it is, i.e., theory, or more basically information of a normative kind. Each of the theories presents itself amongst the others, in most cases attempting to be as descriptive as appropriate but in all cases purporting to set out the essence of a state. What unites these silos of normative information, however, is that they are all information which has been handed down over centuries, at least within certain zones of human communication. This is an important conclusion because it allows us to reconceptualise all of the reifying theories in their totality as a tradition – that of the state – with many different instantiations and justifications. It therefore becomes necessary to consider the state as a tradition, as well as the type of logic which would underlie it.

A. *The nature of tradition*

There is understandably debate as to the nature of tradition. The word itself derives from the Latin *traditio* or transmission and there is an important current of thought, particularly in the Catholic Church, which defends a concept of tradition consisting of the *process* of transmission. Yves Congar was very explicit in this sense, in stating that: «By tradition we mean the successive communication of one and the same object to others, a single possessor being the first term in the series and again. Tradition means, in itself, a transmission from person to person»[58].Vatican II appears to confirm this position in proclaiming that «...sacred tradition takes the word of God entrusted...to the Apostles, and hands it on...that they may explain it, this under the heading Handing on Divine Revelation»[59]. This particular Catholic position may be derived simply from the etymology of the word, or also from an unwillingness to equate initial revelation with subsequent interpretation under the same rubric of tradition. There would be an underlying idea of *sola scriptura*, eventually dear to Luther. Yet Catholic teaching is not entirely consistent in this respect, and it has also been affirmed that «Tradition is the handing down of the Bible, and, more specifically, *its interpretation throughout the Christian centuries*»[60]. A distinction is also sometimes made between the contents of tradition

[58] Y. CONGAR, *Tradition and Traditions: An historical and a theological essay*, London 1966, 240, 296.

[59] *Dei Verbum*, at para. 9, accessible at http://www.vatican.va/archive/hist_councils/ii_vatican_council/ documents/vat-ii_const_1.

[60] J. THIEL, *Senses of Tradition: Continuity and Development in Catholic Faith*, Oxford 2000, 13 (emphasis added).

and traditioning (or handing down)[61] or between passive tradition (content again) and active tradition (the handing down)[62]. Congar himself admitted that the notion of tradition has several aspects, one of which could designate the content transmitted, though this appears to have been an ancillary understanding of tradition primarily understood as transmission[63]. The more expansive Catholic teaching on tradition, extending to content, is more compatible with the contemporary sense of the word, summarized by the English legal historian A. W. B. Simpson as «*something which* has come down to us from the past»[64]. The two views come together, of course, in the general idea that a living tradition, as opposed to a dead or suspended one, requires both content and an ongoing process of transmission.

It is therefore possible to conceptualize the state as living tradition, a mass of normative information which is today widely transmitted in the world and which enjoys great, though far from complete, acceptance. The tradition of the state would be the DNA of the physical embodiments which many theories accept as the state itself. Yet concentrating on the underlying normative information allows us to escape the reification process and its underlying logic.

This notion of the state as tradition is, moreover, entirely compatible with the working of the various laws of the world. They all accept primary sources or beliefs and the interpretation which is

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[61] O. ESPIN, *Culture, Daily Life and Popular Religion, and Their Impact on Christian Tradition*, in O. ESPÍN AND G. MACY (eds.), *Futuring our Past: Explorations in the Theology of Tradition*, Maryknoll, NY 2006, 1-3.

[62] J. THIEL, *op. cit.*, 27.

[63] Y. CONGAR, *op. cit.*, 287 (distinguishing, however, things as such and their interpretation).

[64] A. W. B. SIMPSON, *Invitation to Law*, Oxford 1988, 23 (emphasis added).

necessary to give effect to these sources or beliefs. There is thus an accumulation of initial information, a capturing of it, a need for subsequent interpretation in giving effect to the primary source in new and different situations, and a subsequent capturing of these later applications themselves, which thus become part of the ongoing tradition. All of the great legal traditions function in this generally recursive though ongoing manner. They thus constitute vast repositories of normative information, whether the sources dealt with are seen as religious or secular, jurisprudential or legislative, customary or formal. The state is thus constructed in various ways, depending on the particular sources which are seen as primary in a given context and there is a phenomenon which has been described as the 'utter particularity' of each state[65]. The tradition of a state is therefore an open one, which has been described as an 'envelope', such that local circumstance, common laws, and neighbouring influence all play major though often different roles in the make-up of individual states[66].

This conception of the state as tradition, or normative information handed down through time, demonstrates that the reification or bodification of the state is the result of generally accepted information to this effect. It is a second-order conception of the state but it is the controlling one, since where the information leading to bodification is not accepted, as in the Islamic world, for example, the reification of the state is very weak or non-existent[67]. The various theories of reification or bodification cannot therefore

[65] P. ALLOTT, *The Health of Nations: Society and Law beyond the State*, Cambridge 2002, 117-118 ('of the nature of a nation to be uniquely itself').

[66] See generally, H. P. GLENN, *The Cosmopolitan State*, Oxford 2013.

[67] For the general opposition if Islamic law to the corporate person, H. P. GLENN, *Legal Traditions of the world*, 5th edition, Oxford 2014, Ch. 6, note 78.

function as regress-stoppers since there are so obviously counter-examples to them in the world. They exist as normative argument. So when it is said that the state exists beyond particular governments, as is generally accepted in western jurisdictions, this is evidently a contingent circumstance and very much the result of a long process of refinement of information to that effect.

This conception of the state as tradition, or normative information, has a number of real-life consequences in the world. Three in particular may be cited, where the concept of the state as tradition allows a clearer understanding of the nature and role of the state:

i) *The failing or quasi-state.* It has been written that «legal philosophers cling dogmatically to classificatory ideas», rejecting analysis of legal systems as matters of degree[68]. States conceived as entities, moreover, would either exist or not exist, existence being arguably the primary characteristic of any entity. Yet given the great variety of states in the world and the obvious degrees of their efficiency in control of territory and population, it becomes difficult, or at least unrealistic, to consider all states as existing to the same extent. The idea of a failing, quasi, or even failed state has inevitably emerged as an attempt to capture the notion of degrees of existence of states. The argument can be made, and has been made, that failing or failed states are really examples of simple failure of governments while the

[68] K. FÜSSER, *Farewell to "Legal Positivism": The Separation Thesis Unravelling* in R. GEORGE, *The Autonomy of Law: Essays on Legal Positivism*, Oxford 1996, 119 -124,155, with references (Dworkin opposing Fuller's non-classificatory proposals).

> abstraction of the state in each case would continue on, unperturbed by momentary governmental failures. Yet a functioning government is part of the most widely-accepted definition of the state in public international law and the ongoing inability of government to perform governmental tasks inevitably comes to reflect on the existence of the state. The underlying reality in such cases is that it is the state itself which is failing, or has even failed to achieve that level of support in the population to have come into full existence in the first place. As has been noted above, a jurisdiction in which there is no developed doctrine favouring corporate personality and the bodification of the state is lacking an essential element in the construction of the state[69]. It is at least a weak state if not a failing one.

The state conceived as tradition, however, presents no difficulty in the conceptualization of the state in terms of degrees. Since it is a matter of the reception of normative information there is no necessity to approach the question in binary terms, of existence or non-existence. It is a matter not of existence but of influence, and there is little conceptual difficulty in accepting the idea that there can be degrees of influence. There may thus be many factors affecting the influence or reception of the state tradition. These include, but are not limited to, hostility to the notion of bodification, hostility to western forms of social organization and their influence, corruption, inadequacy of resources and social division. Quantification of the existence of a state has not occurred, since this would run contrary to dominant philosophical and legal considerations and contrary to

[69] H. P. GLENN, *Legal Traditions of the world*, cit.

diplomatic niceties, but it would be every bit as possible as the quantification of degrees of corruption or the quality of universities. The notion of the state as tradition thus provides a realistic appreciation of the extent to which the state tradition is operative in the world.

ii) *The diversity of state populations*. One of the great myths of the modern world is that of the nation-state. As has been pointed out, however, there never has been, and there never will be, a nation-state. States are rather characterized by their manifest diversity[70]. How is it that successful states have maintained their cohesion, given potential internal conflict? The answer is partly due to efforts to create a nation which overlaps with the legal and political structures of a state. More important, however, would be the recognition that peoples are capable of ongoing co-existence in the absence of efforts to reify and conflictualize their relations[71]. The state as an open tradition, or envelope, is thus an inclusive idea which is capable of infinite adjustment to accommodate the needs and desires of different peoples. This is not well-recognized in the rhetoric of the nation-state and current language of 'integration' but every successful state has developed its own, often subtle, process of adjustment to allow co-existence of state and other social structures. Without recognizing a 'personal law', recognition can be given to non-state law in precise fields, where state law is difficult to implement, as is the case for Canadian recognition of informal, Inuit forms of adoption in the harsh circumstances of the Canadian far

[70] H. P. GLENN, *The Cosmopolitan State,* cit.

[71] See, for example, N. DOUMANIS, *Before the Nation: Muslim-Christian Coexistence and its Destruction in late Ottoman Anatolia*, Oxford 2013, notably at pp. xiii (for the necessity of coexistence) and 3 (for 'intercommunality').

north[72]. Without striking at the general efficiency of state law, exemptions can be made for specific groups and in the name of religious liberty guaranteed by a constitution[73]. Without abandoning a state principle of secularity or *laicité*, there can be judgments of state judges giving recognition to the «fait religieux» and in some measure to the religious norms underlying this «fact»[74].

The state conceived as tradition is therefore an inclusive state, and one which corresponds more precisely with the actual and continuing diversity of state populations. We will see below, moreover, that the logic of the state seen as a tradition is one which accommodates such population diversity. There is no presumed conflict between majority or minority populations since the logic involved is not one of reification and incompatibility. There is no entity which must suppress diversity in the name of uniformity or integration. There is therefore no need for the commission of the population transfers, to say nothing of the atrocities, which have been committed on many continents in the name of the nation-state. People can left where they are to undertake the inevitable task of

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[72] See C. BALDASSI, *The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences* in *U.B.C.L. Rev.* 39/2006, 63 (convergence of statutory and customary adoption towards non-secretive procedure).

[73] For legislation of some 25 U. S. states thus 'restoring' religious freedom from by reinstating a requirement of a 'compelling' state interest before general laws prevail over religious exercise, J. MARTINEZ-TORRON, C. DURHAM *Religion and the Secular State*, in J. MARTINEZ-TORR'ON, C. DURHAM (eds.), *Religion and the Secular State*, Provo, UT 2010, 1-27; and see L. SIROTA, *Storn and Havoc: Religious Exemptions and the Rule of Law* in *Rev. jur. Thémis*, 47/2013, 247.

[74] See generally M. PENDU, *Le fait religieux en droit privé*, Paris 2008, notably at 27-29 (on religion as sufficient 'interest' for change to Muslim name as required by Islam).

living with one another. To repeat a phrase used by the Canadian Supreme Court in dealing with the aboriginal populations of Canada, «Let us face it, we are all here to stay»[75].

iii) *The engagement of normative orders*. The state conceived as entity does not give rise to the substantive engagement of legal orders. In private law the emergence in the nineteenth century of choice-of-law rules led to the nationalization of transnational legal problems and the idea that all problems could be allocated to one or the other of the relevant national legal orders. In some jurisdictions choice-of-law rules were applicable *d'office* or *von Amts wegen* by the judge and even research into the content of foreign law was assigned to specialized institutions, such that the practice of law was largely untainted by foreign contact. In public law the concept of the state as entity led to an international law concerned exclusively with the relations between such entities and to constitutional law divided into national silos. Otto Kahn Freund wrote a famous article to the effect that comparison of public laws constituted an abuse of comparative law[76].

Today there is a widespread phenomenon of substantive engagement of normative orders. Diverse laws are examined for their relevance and applicability to diverse problems. In private law choice-of-law rules are in steady decline (the problem of localization of invisible concepts) and there is a growing phenomenon of examining the underlying policies of both domestic and foreign law

[75] *Delgamuuk* v. *British Columbia* [1997] 3 S.C.R. 1010 at para. 186, per Lamer, C. J. C.

[76] O. KAHN-FREUND, *Uses and Misuses of Comparative Law*, in *Modern L. Rev.*, 37/1974, 1, notably at 12, 13 ('the question is . . . how closely [the foreign rule] is linked with the foreign power structure').

to determine which of them should be applied[77]. The process is widespread in the United States of America where most states have abandoned choice-of-law rules entirely[78], and has been accepted in most jurisdictions in Europe through notions of 'special connections' (Sonderanknüpfungen) or laws of «immediate application»[79]. Application of both laws is contemplated and the respective merits of their application is the object of judgment. The same process of engagement has become evident in public international law, with the traditional exclusive role of the state being challenged by a process of 'humanization' of the discipline, as a result of which both the individual human being and non-state collectivities are becoming recognized as subjects of international law. The normative order of an exclusively state-centered public international law has been successfully challenged by other normative orders which offer more satisfactory solutions. The same process of engagement is recognized

[77] H. P. GLENN, *La conciliation des lois: Cours général de droit international privé,2011*, Recueil des cours (2014, forthcoming).

[78] See notably the process of 'comparative impairment' of laws practised in California (which law will suffer the most from its non-application in the circumstances of the case), as defended by Baxter; W. W. BAXTER, *Choice of Law and the Federal System*, in *Stan. L. Rev*., 16/1963, 1; and applied most recently by the Supreme Court of California in *McCann* v. *Foster Wheeler LLC,* 225 P. 3d 516 (Cal. 2010) (in action for product liability limitation period of state of Oklahoma applied and not the law of California since Oklahoma's policy of prohibiting such suits would be severely damaged if suit could be brought by a plaintiff moving outside the state of Oklahoma after having sustained injury in Oklahoma).

[79] G. KEGEL, K. SCHURIG, *Internationales Privatrecht*, 9th ed., Munich, 2004, 324 ('als unilateralistisches Teilsystem') ; PH. FRANCESCAKIS, *Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles des conflits de lois*, Rev. Crit. DIP 1966.1.

in domestic constitutional law, which must adjust to both transnational, international and foreign norms[80].

The traditions of peoples thus interact with one another, and the process is becoming increasingly recognized as the notion of the state as entity declines. There is today a 'burgeoning group' of legal positivists, those who recognize the growing necessity of defending the state on normative grounds. This engaged legal philosophy is a reflection of the wider phenomenon of the growing engagement of legal orders. It is part of the recognition of the state as a tradition, and it is a tradition with its own, particular form of logic.

B. *The logic of the state as tradition*

Classical logic was very appropriate in the process of state-building. It was even essential to the extent that a single, uniform and non-contradictory law was seen as essential to national identity. This notion of a single, national law was probably more important in the eighteenth and nineteenth centuries than it is today, when national, written constitutions have become much more widespread and would

[80]For 'humanization generally, T. MERON, *The Humanization of International Law*, Leiden 2006; and for recognition of aboriginal peoples, S. ALLEN, A. XANTHAKI (eds.), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples and International* Law, Oxford 2010. On the entire process of challenge to a western, state-centric concept of public international law, with states conceived as entities, beginning with the extension of the international order from beyond its initial Christian or 'civilized' states, H. P. GLENN, *The Ethic of International Law*, in D. CHILDRESS III (ed.), *Ethics in International Law*, Cambridge 2012, 246.

play a more essential function of unification[81]. Yet there is much to be said for notions of coherence and non-contradiction in any legal order purporting to be national and this was certainly the case in the state-building era of the eighteenth through twentieth century.

Today, however, the notion of a modern state structure is well known, as are its many variations. The question has become not whether states should exist, since they cover the entire inhabited surface of the globe (though in different degrees), but how and whether they can fulfill the functions which would be rightfully theirs. Population movement has become difficult to control; money and even entire enterprises move across borders; information has become much less a domain of state control and much more a matter of individual initiative. There are global communication networks which threaten not only national languages and cultures but also national law and legal authority. Law enforcement is rendered more difficult in this proliferation of freely available information and so is the generation of practices of adherence to state law[82]. These phenomena are well-known and are designated by the ambitious

[81] For the writing of some 800 constitutions since that of the United States in1789, T. GINSBURG, Z. ELKINS AND J. BLOUNT, *Does the Process of Constitution-Making Matter?*, in *Ann. Rev. Law and Social Science* 5/2007, 201 at 206, though the number of these constitutions, given only some 200 states, suggests they do not always play the unification function motivating their drafters.

[82] For the inability of political authorities to control international communication, P. BOBBITT, *op. cit.*, 221 (near-instant circulation of financial and other information), 224 (foreign broadcasts primary news source for 60 per cent of 'educated Chinese'), 227 (state inability to impose blackout rules on coverage of criminal trials in Canada, or prohibit receipt of pornography in Singapore); M. VAN CREVELD, *op. cit.*, 392, 3 (electronic information services 'another step in the retreat of the state', previous print circulation limited across international borders, information distributed on country-by-country basis, now states can only 'swim with the trend').

expression of 'globalization', which would be under no-one's control. For present purposes, the importance of 'globalization', and the challenge it represents to national boundaries, is to put into question the crispness of the contemporary state. Boundaries have become permeable in many ways, though it is perhaps the case that they have never had the impermeability that the notion of a nation-state, or state as entity, suggests[83]. The state as autonomous entity has become, however, an unsustainable proposition in a time when no state can itself provide the necessities required by its population[84].

Given the unquestionable permeability of national boundaries, the state as identity becomes subject to infiltration. In terms of classical logic, it is the 'law' of identity which is put into question by the transborder traffic which we know today. France is not the France

[83] For 'globalization' as a historic phenomenon, international trade today not having achieved the degree which obtained in the period prior to 1913, J. OSTERHAMMEL, N. PETERSSON , *Globalization: a short history*, trans. D. Geyer, Princeton 2005, at 146; and for levels of international trade from 1870 to 1913 as comparable to those of today, K. SINGH, *Questioning Globalization*, London 2005, 166; A. CRANSTON, *The Sovereignty Revolution*, Stanford 2004, 37–8 ('first globalization' from mid-nineteenth century brought to end by 'protectionist backlash'). The telegraph in the nineteenth century compressed the time for communication between London and New York by a factor of 4,000, from fourteen days to five minutes; R. JOFFE, *Schneller, besser, reicher…*, Die Zeit, 31 May, 2007, 3 (also on shipping costs falling by 40 per cent with steamships).

[84] For the notion of the 'trading state', necessarily dependent on others for products it is incapable of producing itself, R. ROSECRANCE, *The Rise of Trading State*, New York 1986, 15 (states no longer self-reliant, dependent on others for necessities), 140 (fragmentation of states after second World War increasing interdependence as size of states decreased); Q. MUNTERS, *Some Remarks on the Opening Up of Rural Social Systems*, in *Sociologica Ruralis* 15/1975, 34, 41 (agriculture forced to participate in world-wide economy; 'complete isolation . . . unimaginable'). By way of consequence, the 'import substitution' economy or many Latin American jurisdictions is no more.

it was in the minds of the revolutionaries, one and indivisible. The transposition of 'A is A' to the situation of the modern state is not compatible with the endless ways in which the non-national enters into national life and normativity. There would be an 'emergent intertwinement' of legal orders[85]. With the decline of the 'law' of identity there is inevitable decline of both the 'law' of non-contradiction and the 'law' of the excluded middle and this is now reflected in both the current development of 'new' logics and in legal thinking and practice.

The principal characteristics of the 'new' logics, which have been successful in their challenge to 'classical' logic[86], are that they are both 'paraconsistent' and 'many-valued'. They are paraconsistent in allowing contradictions to be sustained and not eliminated; they are many-valued in allowing the maintenance of multiple truth-values[87]. This flows from the permeable character of 'A' (which cannot be treated as mathematically crisp when applied to real life and its vague concepts and language) and the permeable character of the so-called 'nation-state'. Since A (or the nation-state) have become less crisp and may be permeated by elements from outside A, from [not-A], it becomes increasingly difficult to sustain the law of non-

[85] H. LINDAHL, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Oxford 2013, 267.

[86] See K. BIMBÓ, *Relevance Logics*, in D. JACQUETTE, *Philosophy of Logic*, Amsterdam 2007, 723 at 723 ['once the overpowering dominance of classical logic has been successfully challenged (and it has been) . . .'].

[87] See notably D. GABBAY, J. WOODS (eds.), *The Many Valued and Nonmonotonic Turn in Logic* Amsterdam 2007; and for the application of paraconsistent logic to law, G. PRIEST, *In Contradiction: A Study of the Transconsistent*, Oxford 2006, Ch. 13 ('Norms and the Philosophy of Law'); and the further references and discussion in H. P. GLENN, *The Cosmopolitan State*, cit., ch. 14 ('Cosmopolitan Thought').

contradiction. Since A cannot be separated crisply from [not-A], one must permit both to be maintained at the same time without imposing a univalent choice between them. A and [not-A] has become a reality of everyday life, which all must live with.

At the same time, a middle ground between A and [not-A] cannot be excluded. The 'law' of the excluded middle fails for the same reason the law of non-contradiction fails – the absence of a crisp boundary between A and [not-A]. Since both A and [not-A] are open to infiltration from without they cannot pretend to exclusively occupy their respective fields. There is open space within each of them. Where this open space is situate at the confluence of A and [not-A] there is an open middle ground between them.

The new logics also imply what the logicians refer to as «nonmonotonicity». Since there is open space within A or the so-called nation-state, the application of existing norms cannot be of monotonic or regular application. Of course, the norms apply when they should be applied but there is always the possibility of finding oneself in an open space, such that there is room for application of non-state law. There are therefore large and underlying reasons for the 'many valued and nonmonotonic turn' in logic and these reasons have become more explicitly recognized in both legal practice and legal thought.

The most obvious instances of how legal practice has adopted new forms of logic are found in the field of arbitration. Arbitration has now become widespread in the world and arbitrators may decide cases either through application of state rules of choice-of-law and substantive law, or through a 'voie directe' which proceeds directly to the appropriate material solution for the case and any rules of law

(not a legal system) necessary for the decision[88]. They therefore may make free use of what has come to be known as the 'new' lex mercatoria, which occupies an included middle between the state laws which would otherwise find application. The 'law' of the excluded middle is clearly rejected in such cases. The existence of an included middle is also implicitly conceded by state courts in all instances where there is application by private parties of transnational private regulation (TPR)[89]. Arbitrators will also decide according to the arbitration agreement between the parties and it has been accepted that parties may choose for the resolution of their difference the law of two states, which thus both serve as intellectual

[88] See J.P. BARAUDO, *Faut-il avoir peur du contrat sans loi?*, in *Le droit international privé: Esprit et methods; Mélanges en l'honneur de Paul Lagarde*, Paris 2005, 93-111 (this with the authorization or tolerance of the French Court of Cassation). For this "voie directe" to a directly applicable law, without passage through any formal choice of law rules, see M. BLESSING, *Choice of Substantive Law in International Arbitration*, in *J. Int'l. Arb.* 14(2)/1997, 39 at 48 (not only in case where arbitrator authorized to act as 'amiable compositeur'), 55 ("The Most Modern Solution"); E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Leiden 2008, 64 (arbitres libérés 'des contraintes des règles de conflit du for') at 152 ('un vaste mouvement de libération'); J. H. DALHUISEN, *International arbitrators as equity judges*, in P. BEKKER, R. DOLZER, M. WAIBEL (eds.), *Making Transitional Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, Cambridge, 2010, 510 -523 (arbitrators able to proceed to 'direct acceptance of multiple sources of law')

[89] See F. CAFAGGI, *Private Regulation in European Private Law*, in A. HARTKAMP, M. HESSELINK, E. HONDIUA, C. MAK, C. E. DU PERRON, *Towards a European Civil Code,* 4th ed., The Hague, 2011, 91-95; S. HOBE, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, Berlin 1998, 27 (for 'emancipation' of such social actors from the state).

resources for purposes of the arbitration. The law of non-contradiction (not (A and [not-A]) is here rejected[90].

Beyond the field of arbitration, increasing dissatisfaction with binary reasoning is being expressed in legal thought by a wide variety of actors. The prelude to these expressions of discontent may be seen in the writing of Stephen Toulmin, himself a non-lawyer but who relied on implicit forms of legal reasoning to argue in mid-twentieth century against the 'mathematization' of logic[91]. Toulmin argued that the allegedly 'topic-neutral' character of classical logic was an oversimplified view of the reasoning of lawyers. He argued that logic should therefore be 'field-dependent' and that a more complete form of logic should require the employment of «a pattern of argument no less sophisticated than is required in the law»[92]. Logic should therefore reflect the complex legal world of claims, data, warrants, their backing, rebuttal and qualifiers. Toulmin was concerned with the law of the state at a time of state construction so at a high point of classical logic. He did so in large measure in the absence of the circumstances of globalization and in the absence of the development of the 'new' logics. Today the case made by Toulmin appears more persuasive than it did a half-century ago and similar sentiments are

[90] See the choice-of-law clause for arbitrations in the construction of the Chunnel between France and England, which provided that '[t]he construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English law and French law'; C. C. SCHÜTZ, *The Effects of General Principles of Law*, in D. CAMPBELL (ed.), *International Dispute Resolution*, Alphen aan den Rijn 2010, 43-45.

[91] S. TOULMIN, *op. cit.*, 7 [«logic (we may say) is generalized jurisprudence') and asking at 39 ('how far is a *general* logic possible?»].

[92] S. TOULMIN, *op. cit.*, 89.

being more widely expressed today in both civil and common law jurisdictions.

In France, for example, Mireille Delmas-Marty has called for use of the full 'palette' of modern logic in «ordering the multiplicity» of world laws[93], and Johanna Guillaumé has found that internationality now is found in degrees[94]. In Belgium François Rigaux has written of the 'illusion' of categorization by dichotomy and of the 'perversity' of binary taxonomies[95], while in Switzerland Andrea Büchler would have the debate on Islamic family law in Europe move «from dichotomies to discourse»[96]. In the common law world Martin Krygier has criticized 'pernicious' dichotomies, which «might just be aspects of complex phenomena which can manage to include them both»[97]. Michael Taggart has decided that contemporary administrative law in New Zealand is no longer well served by dichotomies that have prevailed in the past—appeal/review, merits/legality, process/substance, discretion/law, law/policy, fact/law - and that they should be replaced with a 'sliding scale or rainbow' of possibilities of review, from correctness review at

[93] M. DELMAS-MARTY, *Le relatif et l'universel; Les forces imaginantes du droit*, Paris 2004, 412 (on using classic binary logic for 'hard concepts' such as indefeasible rights or *ius cogens* norms, fuzzy logic where less determinacy).

[94] J. GUILLAUMÉ, *op. cit.*, 276.

[95] F. RIGAUX, *La loi des juges*, Paris 1997, 69, 250–1.

[96] A. BÜCHLER, *Islamic family law in Europe: from Dichotomies to Discourse*, in *Int. J. Law in Context* 8/2012, 197.

[97] M. KRYGIER, *False Dichotomies, True Perplexitie, and the Rule of Law*, in A SAJÓ (ed.), *Human Rights with Modesty: The Problem of Universalism*, Leiden 2004, 251, and see also at 253 ('they postulate contradictions between which one *must* choose', making choice the first task and excluding other and perhaps more appropriate options, 'like refusing to choose').

one end of the rainbow to non-justiciability at the other[98]. Moreover, as in a rainbow, colours or internal categories 'imperceptibly blur or merge into one another'; there are no 'jolts'[99]. In construction of a law of peace or *lex pacificatoria* Christine Bell has written of the need to straddle binary distinctions and to develop 'constructive ambiguity'[100]. Binary distinctions in the law of citizenship have been particularly criticized and Neil Walker has expressed dissatisfaction with the «dichotomizing language of membership», arguing for denizenship as an «in-between concept, one that challenges the series of binary oppositions...that reflect the political imaginary of the Westphalian system of states»[101]. Linda Bosniak deliberately uses a notion of 'alien citizenship' to accommodate an 'ascending scale' of the rights of aliens who gradually augment their identification with a

[98] M. TAGGART, *Administrative Law*, in *New Zealand L. Reports* 2006, 75-83.

[99] M. TAGGART, *op. cit.*, 82, a phenomenon recently described in logical terms as 'fuzzy plurivaluationism': N. SMITH, *Vagueness and Degrees of Truth*, Oxford, 2008, 277ff., and notably at 292 (for resolution of the 'jolt' problem). This is an example of new logics tracking the vagueness of ordinary-language categories, as in 'Greece is less broke this week than last week'. This may be seen as 'higher-order vagueness', in the language of the new logics, since there is imprecision not just at the extreme ends of the rainbow (the dichotomy has become less crisp) but also everywhere else within it.

[100] C. BELL, *On the Law of Peace*, Oxford 2008, 166, and see 291 (law as 'holding device'), 302 (embracing what would be otherwise an excluded middle).

[101] N. WALKER, *Denizenship and Deterritorialization in the EU*, in H. LINDAHL (ed.), *A Right to Inclusion and Exclusion*?, Oxford 2009, 262, 266 (binary oppositions of insider/outsider, national/international, territorial/extraterritorial, domestic/foreign, franchised/disenfranchised); and see Ch. 10, 'Accommodating citizenships'.

local society[102]. Perhaps most visibly and fully, Neil MacCormick decided that legal reasoning was essentially defeasible[103], and that its forms of argumentation «cannot be properly conceived of in simply bivalent true-or-false terms»[104]. The conclusion is based in part on the impossibility of avoiding contradiction in legal systems, such that simple deduction from axiomatic, given premises is impossible in such cases[105]. The application of legal rules is therefore, in the language of the new logics, non-monotonic in character. Given a presumptively applicable rule, there is always the possibility of «invalidating intervention»[106].

The case against classical, binary logic, however, has not been made only by legal academics. It has also been made by courts in deciding cases. Thus in *In re Vivendi Universal, S.A. Securities Litigation*[107], a large U.S. class action case involving foreign class members, the court decided that risk of non-recognition abroad of the possible preclusive effect of the judgment should be «evaluated along a continuum» and not in terms of a bivalent choice between

[102] L. BOSNIAK, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton 2006, 38, 81, 89.

[103] N. MACCORMICK, *Rhetoric and the Rule of Law*, cit., 28 ('rule statements . . . are always defeasible'), 33 (certainty in law is 'at best, qualified and defeasible certainty'), 240 (validity of legal arrangements 'presumptively sufficient').

[104] N. MACCORMICK, *Rhetoric and the Rule of Law*, cit., 77, and see also 54 ('strictly deductive inferences from axiomatic premises is indeed an idea at some remove from anything to be found in legal argumentation', legal deduction 'embedded in a web of other practical arguments').

[105] N. MACCORMICK, *Rhetoric and the Rule of Law*, cit., 53–4 ('judicial decision-making includes the task of seeking to resolve contradictions as they emerge').

[106] N. MACCORMICK, *Rhetoric and the Rule of Law*, cit., 240 (resulting in 'defeasance').

[107] 242 FRD 76, (SDNY 2007).

recognition or non-recognition[108]. In one of the leading cases on determining jurisdiction in internet cases in the USA, *Zippo Manufacturing Company* v. *Zippo DotCom, Inc.*, the court decided that the likelihood of constitutionally permissible jurisdiction is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet, and that « [t]his sliding scale is consistent with well-developed personal jurisdiction principles»[109]. The Supreme Court of Canada in 2012 decided that the determination of persons having the interest or standing necessary to sue for their own protection allowed «no binary, yes or no analysis»[110]. At the international level the criticism of bivalent logic has reached the International Court of Justice. In the *Kosovo* decision the Court decided that Kosovo's declaration of independence was in accordance with international law, reasoning that in the absence of an explicit prohibition of such declarations there is no need to demonstrate a permissive rule.[111] In his declaration concurring in the result, however, Judge Simma criticized the reasoning of the Court as representing «an old, tired view of international law» and even as «obsolete».[112] Judge Simma would

[108] 242 FRD at 95.

[109] 952 F Supp. 1119 at 1123–4 (WD Pa 1997), the court also noting a 'middle ground' between actively selling products in a jurisdiction through the internet and simply posting information on an available website, the middle ground being an interactive website on which information could be exchanged.

[110] *Canada* v. *Downtown Eastside Sex Workers*, 2012 SCC 45, para. 50.

[111] 'Accordance with international law of the unilateral declaration of independence in respect of Kosovo', (22 July 2010), accessible at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

[112] Declaration of Judge Simma, paras 2 and 3, accessible at <http://www.icj-cij.org/docket/files/141/15993.pdf>, at paras 2 and 3. I am grateful to Morag Goodwin of the University of Tilburg for this reference.

have preferred «a more comprehensive answer, assessing both permissive and prohibitive rules of international law» that would have allowed assessment of «the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable"»[113]. This would have allowed for 'something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options'[114]. These judicial statements in favour of non-binary logic demonstrate the possibility of its choice in judicial proceedings.

Choice of logic is thus inherent in the deciding of cases, though the choice should not be presented as a definitive and bivalent one[115]. It is an essential element in multivalent and paraconsistent logic that there is no imposition of bivalent options and a univalent eventual choice. There is therefore always a bivalent option available in multivalent forms of logic. It is represented by the opposing ends of the continuum of choices which are presented in a multivalent view of the world. So it is possible to retain dichotomous reasoning there where it appears most appropriate to do so. Where this will occur is becoming the object of debate. There will be many defences of bivalence and the necessity of crisp legal concepts[116], yet the existence of 'logical pluralism' now appears well established[117]. It appears most

[113] Declaration of Judge Simma, note 112 above, at para. 8.

[114] Declaration of Judge Simma, note 112 above, at para. 9

[115] See the discussion of logical pluralism earlier in this section.

[116] For such a defence of 'juridical bivalence', at least in instances of validity/invalidity, guilt/innocence, T. ENDICOTT, *Vagueness in Law,* Oxford 2000, 73 ('graded standards *might* be undesirable. Juridical bivalence radically simplifies some of the law's most difficult tasks')(emphasis added).

[117] J.C. BEALL, G. RESTALL, *Logical Pluralism*, Oxford 2006, 30 ('Logical pluralism' even providing more 'charitable interpretation' of many important but difficult philosophical debates; would do 'more justice' to them).

appropriate in the present circumstances of 'globalization' where multiple legal traditions are in constant contact with one another even within states, such that simple notions of territoriality or localization are unable to provide effective means of allocation. Multivalence permits recognition of multiple legal traditions (recall the lex mercatoria, religious laws in all their variety, transnational private regulation, the unwritten law of chthonic or aboriginal peoples) while still permitting a detailed range of choice in the included middle. It is also argued for within states in a range of situations which would lend themselves to a more detailed range of options than existing dichotomies would permit. Such 'continuization' or working within a broad continuum has already prevailed, for example, in recognition of degrees of homicide, or comparative negligence (as opposed to a binary choice between the plaintiff's fault or the defendant's fault). There has also been recent work suggesting that a continuum of confidence (0 to 100%) in the identification of a perpetrator in a police lineup provides more accurate results than traditional requirements of identifying or not. It is also possible that binary thought cannot be eliminated at a second-order level of vagueness, where it must be decided at which precise point of a continuum a decision must fall. This too speaks to a form of logical pluralism and is entirely consistent with the establishing of a wider range of options than the present, often arbitrary, dichotomies will allow.

Conclusion

The state seen as an entity was reinforced by the 'classical' logic which was used in its construction. We still understand the state

largely in these terms but present circumstances in the world are bringing about a re-thinking of this manner of legal thinking. The state is now more permeable and its authority is being reduced by various other forms of normativity. It appears increasingly appropriate to consider the state as one normative option amongst others. As such it is best seen as an inclusive tradition, supported by the 'new' forms of logic.