The Precision of Vagueness,[1] interview with H. Patrick Glenn

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In 2000 the Canadian legal comparativist H. Patrick Glenn published his *Legal Traditions of the World*, which had already been awarded the Grand Prize of the International Academy of Comparative Law in 1998. His book raised eyebrows and hopes for a fresh start for comparative law, and it was celebrated by many as bold, original and all encompassing or assessed as over ambitious, mistaken on details and lacking viable theoretical underpinnings. After the second edition appeared in 2004,[2] the *Journal of Comparative Law* invited a team of colleagues to review the book from a variety of perspectives, providing more elaborate criticism and praise for his daring enterprise.[3] Though not a legal philosopher by training, Glenn manages to challenge and irritate not only 'classical' scholars in comparative law but also legal philosophers, if not by his position on what counts as 'legal' and his unusual use of the concept of tradition, then by his elusive and laconic style of reasoning. He avoids both postmodern irony and analytic rigidity, sometimes leaving the reader groping for a clear understanding in the midst of sustained series of paradoxes. The objective of this interview is not to repeat the detailed criticism and praise already available in the *Journal of Comparative Law*, but to assess the potential contribution of his

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1 The interview may remind one of an observation of Clifford Geertz: 'as Wittgenstein (...) remarked, a veridical picture of an indistinct object is not after all a clear one but an indistinct one. Better to paint the sea like Turner than attempt to make of it a Constable cow'. C. Geertz, Local Knowledge. Further Essays in Interpretive Anthropology, (Basic Books, New York, 1983).

2 H. Patrick Glenn, Legal Traditions of the World. Sustainable Diversity in Law (second edition), (Oxford University Press, Oxford 2004), from hereon referred to as Legal Traditions.

3 William Twining e.a., 'A Fresh Start for Comparative Legal Studies?', Journal of Comparative Law (1) 2006-1, p. 100-199, available at <www.wildy.co.uk/jcl>.

position to some of the tenets of legal philosophy. Reference will be made to the contribution of Andrew Halpin in the review, who discusses 'Some Broader Philosophical Issues',[4] as this is of specific interest for legal philosophy. The interview will focus on the issue of comparability, the general (or generic) concept of tradition, the question what counts as a *legal* tradition, and some of the arguments for a multivalent logic to achieve better understanding of complex intermingling legal traditions.

Hildebrandt
To give the reader a taste of the unconventional way in which you practice comparative law, we will start with a reference to the way you destabilize our concept of time. In the NYT of 11th May 2006 we read:

> 'recently (...) a group of nearly 80 [Nukak-Makú, who lived a Stone Age life in the Amazon jungle, MH] wandered out of the wilderness, (...) and declared themselves ready to join the modern world. (...) When asked if the Nukak were concerned about the future, Belisario, the only one in the group who had been to the outside world before and spoke Spanish, seemed perplexed, less by the word than by the concept: "The future", he said, "what's that?".'

This little narrative seems a salient demonstration of the sense of time specific to what you call the chthonic tradition, i.e. the oral tradition of societies mainly without a state. It seems to confirm the relevance of your preoccupation with the concept of time (pastness, change) as a notion that can be used to discriminate between different (legal) traditions. However, this raises some pertinent questions. Do you think that it is possible for us – trained in the Western legal tradition – to comprehend the scope of Belisario's tacit understanding of time? Or, should we not rather acknowledge that Belisario has a wrong understanding of time, and that this understanding fits the more 'traditional' dichotomies of legal comparison such as rational/irrational?

Glenn
Let me respond to your narrative with a little narrative of my own. Reading the Times Literary Supplement on the plane on my way to your conference, I came across a review of *The Labyrinth of Time*, with the title: 'The future isn't what it used to be'.[5] The book is about the latest develop-

4 Andrew Halpin, 'Glenn's Legal Traditions of the World: Some Broader Philosophical Issues', in: Twining et al 2006, p. 116-123.

5 Michael Lockwood, The Labyrinth of Time. Introducing the Universe, (Oxford University Press, Oxford, 2005), discussed by Barry Dainton in Times Literary Supplement May 19th, 2006. Note of the interviewer: Cp. e.g. George F.R. Ellis, 'Physics in the Real Universe: Time and Spacetime', available at <http://arxiv.org/abs/gr-qc/0605049>, for a critical discussion of Lockwood's position.

ments in physics and cosmology, discussing some of their philosophical implications. It deals with mind games and knowledge paradoxes like time travel: what would it mean to travel into the past in terms of your ability in the past to do things which would effect what you would then call the future, but which is now to you the present. The question is whether you could do things in the past that would affect your own existence in the present, and if you could do that how could you then have been in the present such that you could have travelled to the past? The book is the logical exercise of a philosopher to think through what time travel would mean and how one could contemplate the relationships of what we call the past, present and future. The reviewer talks about the general phenomenon of time and notably what Einstein said about time and what cosmologists now say about time.

The leading view (there are other views)[6] of contemporary science holds that the kind of time the west takes for granted, the linear concept of time, is probably wrong. We are used to thinking in terms of 'time running, time going by', which is linear time or the so-called arrow of time. We are conditioned to think this way, and this conditioning is originally religious in character: we are going through time to salvation. This reveals an unreflected tradition, going against contemporary scientific teaching of what time is. Cosmologists (or most of them) now claim that time exists in space, that it is situated within a broader cosmos; it is not going anywhere, it just sits there. This is ultimately what chthonic people call a circular notion of time. The idea that there is an arrow of time, or that time is somehow linear, would therefore be a mistaken concept. What we thought of as the future isn't what it used to be, and Belisario's understanding of time has much to commend it, which we are perfectly capable of understanding. It is probably much more capable of understanding than current, popular, western views of time. If, as they say, time goes by, what, actually, does it go by and where are we in the process? Most people simply do not think about what their concept of time could possibly mean.

Hildebrandt
How does the concept of time relate to our understanding of legal traditions?

6 Note of the interviewer: Cp. Ilya Prigogine & Isabelle Stengers, Entre le temps et l'éternité, (Paris, Fayard, 1988), Dutch translation: Tussen tijd en eeuwigheid, (Bert Bakker, Amsterdam, 1989), no English translation available. Prigogine won the Nobelprize in 1977 in chemistry for his claim that time is irreversible despite claims to the contrary in both classical dynamics, quantum physics and cosmology.

Glenn
I think it has very important consequences for our view of law and our ability to understand different concepts of law. Given a linear concept of time, western lawyers count time, from hourly billing to extinctive prescription. Most other legal traditions don't, and are more concerned with the process of recycling which is implicit in a circular notion of time. The contrast is most evident with chthonic or aboriginal people, whose cyclical concept of time translates into an ecological worldview. There is no dominant concept of change in such traditions, since there is no contrast between the 'past' and now, or now and the 'future.' Western people find a statement that something has no future to be a pessimistic or depressing statement, but for many it is encouraging, since the need for preservation of the natural world should forestall anything radically different in the time yet to be lived. Across the range of legal traditions in the world, the concept of time is a powerful explanatory concept.

Hildebrandt
Would you say that you use the concept of time as a tertium comparationis in *Legal Traditions*, as it is one of the four points of reference by which you compare the seven traditions that you describe in *Legal Traditions*?

Glenn
I generally attempt to make comparisons without using explicitly a tertium comparationis. In *Legal Traditions* I go so far as to state that there is no tertium comparationis and I think this is a sustainable view. My argument generally is that we don't need a tertium comparationis in order to effect comparisons. In particular we don't need *imposed* external criteria for comparison. We can do all of the useful and comprehensible comparison we need with the characteristics of the objects that we are actually comparing. And I think – though it bares further reflection – that this is consistent with the notion of time that we are discussing here. Time would not exist as a kind of eternal universal beyond us all, time would simply exist, part of all of our lives, and conceptualised according to the traditions by means of which we were taught to understand it. Therefore time is an element of each of these legal traditions that we have, and we can understand the concept of time that exists in all of those different traditions, in spite of the differences. There is nothing incommensurable about the different concepts of time; we just have to think differently in order to get a truer understanding of different concepts of time that are out there.

Hildebrandt
In many of your writings you hold a plea against postmodern incommensurability, and – like you just said – you also reject the necessity of a tertium comparationis. However, some readers of *Legal Traditions* claim that all you do is to provide an alternative taxonomy, again using a set of criteria to identify a tradition: (1) the nature of the tradition, (2) its underlying justification, (3) its concept of change and (4) the way it relates to other traditions. One could say that each of these criteria actually functions like a tertium comparationis. How should we understand your denial of both incommensurability and the need for a tertium comparationis? If these points of reference are not tertium comparationis, how can they be used as points of reference to compare one thing with another?

Glenn
Yes. Well, we have to think of using some instruments. I just read a book on Jewish philosophy of law, *Two models of Jewish Philosophy*, by Daniel Rynhold.[7] The author distinguishes priority of practice (PoP) as opposed to priority of theory (PoT). His basic argument in his treatment of Jewish law is that Jewish law does not exemplify PoT but rather exemplifies PoP. Given PoP it is implicit that you can have law functioning without major theoretical justification, without clearly defined a priori concepts and categories. You can essentially just do it, which provides a great echo obviously of unwritten traditions such as chthonic traditions. Some of my colleagues would also say this is not just Jewish, this is also the case for the common law; this is muddling through, the way the common law lawyers have always done it without ever any consistent preoccupation with theory. So the effort to explain legal traditions was necessarily dictated by a methodology, which took as little as possible as an a priori point of departure and had to be open to the statements of legal traditions as to their own points of departure and their own claims of normativity.

When I speak of the nature of the tradition, in the section which begins each chapter, this is simply the formula that I use to indicate my attempt to allow the tradition to speak for itself in defining what it is. I have said elsewhere that I try to argue each tradition from inside (Hart might call this an internal perspective, but it is here applied in the effort to justify the entire tradition, as opposed to simply working from within) and I don't subject chthonic traditions and chthonic notions of time to some a priori notion of time. I rather let people living within the tradition speak of a circular notion of time and the need to recycle the earth according to this cyclical notion of time. And

7 Daniel Rynhold, Two Models of Jewish Philosophy, (Oxford University Press, Oxford, 2005).

what I found, in terms of methodology, was that it was possible to do it, that it was possible to root oneself in the primary sources of each tradition and to try and articulate those primary sources rather than using any explicit tertium comparationis. My defence would be that the idea of the nature of the tradition is not superimposed; it's after-imposed – a description which did not control the attempt to articulate how the tradition defines itself.

Hildebrandt
It is inductively generated?

Glenn
I suppose inductive is the right word, though I hesitate about the empirical implications of the word. It is not analogical, because it was not working from something to something else. It was certainly not a priori, not deductive in character. It did have presuppositions; we all have presuppositions in whatever we do. But I think I can say, with great truthfulness, that my own presuppositions were inarticulate; they were not the object of being worked out and that is consistent with the way I approach these legal traditions. It is an effort of suspended belief. I approach the traditions initially by being told about them; there is no plan of my own in the actual study of them. In terms of my own learning process this was simply the result of teaching a graduate seminar in Legal Traditions, where I initially had guests come and tell us about the traditions. So my own development was a slow process of accumulation of information with respect to each tradition. It was only after that process had gone on for some years that I had any confidence whatsoever in saying anything myself, still very tentatively, about what the nature of a tradition is.

Hildebrandt
When you were speaking about methodology you said that, thinking of the priority of practice, you went and did it (the comparison) and that it was indeed possible; that it worked. Now my question is: who is to be the judge of that? There is a lot of criticism at this point, also regarding your interpretation of some of the traditions. So, if you say it is possible to allow the tradition to speak for itself, what is the criterion to say that you succeeded?

Glenn
Well, the most obvious criterion is that I finished writing the book. Because it would have been very possible to simply stop with exhaustion or frustration in the process.

Hildebrandt
What about critics who say: the description of the tradition is not correct, things are overemphasised. Critics may even argue that you have a totally wrong idea about the central tenets of a particular tradition. So if the claim is that it is possible to take an internal position, how does one judge success?

Glenn
Well, one indication of success is that critics engage with the statements of tradition which are made, which indicates inclusion in the (often contradictory) bran-tub of information of every tradition. The logic of major traditions is polyvalent, such that there can be no conclusive statement that *Legal Traditions* is somehow wrong on the major questions it deals with. The notion of success here is also relative. It is not a question of whether a single, true, or essential nature of a tradition has been captured, but whether an honest, relatively unbiased effort has been made to capture the dynamic of a tradition and the central themes of its internal debate. I think I have been (relatively) successful in doing that.

But the first statement that I made about success being implicit in just the writing of the book is not meant entirely in jest. If there is such a thing as incommensurability, of values and the legal traditions which incorporate them, then this simply could not be done. Then I would have had to recognize the raw fact of incommensurability or incomparability. I would have had to stop. Joseph Raz says quite correctly that in debating incommensurability we are not interested in the simple difference of opinion of people but in the reality of incomparability, in the failure of comparability. This is why we have the word 'incommensurability', since early Greek mathematicians believed it was simply impossible to find any unit of measure which could relate certain geometric forms to one another. So if there is such a thing as incommensurability then it would be impossible to write the book that I wrote. Assuming a minimum of intellectual honesty on my part, I would have had to admit failure. But my essential position on incommensurability is that it does not exist, in spite of all that has been said about it. I cannot envisage any situation in which one can say there is a failure of comparability, in one way or the other. I would even maintain that the assertion of incommensurability between two things or objects or concepts itself implies some elementary form of comparison to reach the conclusion that there is incommensurability. An assertion of incommensurability implies a means of evaluating relations between two things or concepts, at some minimal level at least. So I maintain that it is possible for each of us to think about these traditions and it is simply not the case as the old Soviet lawyers said that it is impossible to think about Soviet law if you are a bourgeois lawyer.

How far the book is successful, however, is obviously something I am not in a position to measure. There will be differences of opinion. I saw a description of *Legal Traditions* on a used book advertisement on the web, and the description of this used version of the book was as follows: 'Almost new – very few pages read.' I can't believe this was a very successful advertisement!

Hildebrandt
Now let's move on to the concept of tradition, which is very pervasive in your work. The concept seems to overrule other categorisations like (legal) families, systems and cultures, which aim to disclose formal characteristics, functional or institutional aspects, or dominant values (like in the case of culture).

Glenn
I don't talk about culture.

Hildebrandt
No you don't, one could not have missed that. In your idiom 'tradition' cannot be equated with culture. You claim that a tradition is a bran tub of information, not a practice. In other words, a tradition is not an 'interpretive community' in the sense of Stanley Fish, (like Halpin presumes), nor an 'epistemic community' (*Legal Traditions*, p. 42), because – if I understand you well enough – tradition in your view is a bran tub of information which precisely leaves open a variety of ways to 'decide on the constraints which tradition eventually lays upon us' (*Legal Traditions*, p. 20). However, I would say, we cannot decide this arbitrarily, because a particular tradition itself favours some and discourages other ways of dealing with what you call the information. In teaching the book and in discussing some of its central tenets in other contexts, I had difficulty with the idea that a tradition is a bran tub of information which can be separated from the practice that remembers and uses it. I think that this is a core criticism in some of the reviews, especially Halpin's: you seem to assume that one can isolate the information as a given, which is stored somewhere (in our memory, in writing or on computer discs) from the practice that creates it and results from it.

Glenn
I have not listed that as a separation problem in my paper on the separation thesis,[8] and I don't think it is a problem. The separation thesis paper describes the problems that result from isolating human groups from one another and enforcing arbitrary binary decisions upon people in a decision-

8 This issue at 222-241.

making process. But none of those unintended consequences of conflict, separation and so on, attach to the separation of the concept of tradition from the use which is made of it, the actual practice of particular people. I think this separation is quite possible and is done all the time, notably by lawyers, but the process is a reflexive and ongoing one. Given a point of origination of a tradition, people act upon it, and their practice is captured by the means which the tradition authorizes (e.g., case reporting of current decisions). Actual practice is thus converted, through capture, into the base of information of the tradition. The tradition is the information which precedes the decision (in what we call the 'present'), yet the decision itself will become part of the ongoing tradition if the tradition authorizes its capture.

One of the main criticisms of the use of tradition is that is a vague concept. There is of course a vagueness to it, because it simply points to the mass of normative information, which exists in the world. That is why the use of the bran tub is an accurate metaphor – everything goes into the bran tub, and there is no formal process of filtering or excluding what is in the bran tub. The particularisation of what's in the bran tub is not the function of tradition in general but of particular traditions, which define what is in the bran tub. So the common law tradition says it is the cases that are important, the civil tradition will say no it's not the cases that are important, it's rather legislative articulation. So there is imprecision at the general level of tradition, because it does not tell you what particular normative information is most important. But that is the great advantage of tradition as a general organizing concept, that it does not impose any definition or priority of sources. It can therefore be used in a relatively neutral way to examine all these different traditions that attach different levels of importance to different sources of law, or to there being no sources of law.

There is, however, some precision in the concept of tradition (as opposed to the concept of culture) because it does separate the normative information that precedes us from what we actually do in life and the decisions we actually make, faced with the normative information of the tradition. Tradition is therefore, as a concept, infinitely more useful than the concept of culture, because one of the characteristics of culture is that it conflates existing masses of information with what people do faced with such information. It is simply impossible to distinguish diachronically what is happening when one speaks of culture. One does not know whether people are being rebellious or whether they are being subservient and meek with respect to tradition, because it simply examines the totality of the informational environment within which they live and what they are actually doing and says in a descriptive way: this is the culture of this particular people. Everything is

culture and this is one of the main criticisms that are made of it. Whereas the concept of tradition allows you to engage and judge conduct against the normative information which actually precedes it.

Hildebrandt
Can I make a proposition about the way you use the term tradition, in order to clarify the difference between a generic concept of tradition and the particular traditions that fall within the scope of this concept? You define tradition in a generic sense as a bran tub of loose information. The content but also the structure of this information depends on the particular tradition: for instance, the question what counts as legal will depend on what is considered a source within a tradition, on whether a tradition has formal or informal sources, and whether the sources are considered to form a hierarchy. If we understand the relationship between the concept of tradition and particular traditions as a relationship of a genus to a species, this would imply that you use the general concept as a tertium comparationis, as something that allows you to compare different things, which have a common denominator. Studying the way you describe the seven traditions, however, the relationship between the generic term and the particular phenomena seems a matter of family resemblance rather than genus-species. If there is a family resemblance between these phenomena one particular tradition may not share any characteristic with all other traditions, but would still count as a tradition. This would explain both the diversity of what counts as a legal tradition and the absence of the need for a tertium comparationis.

Glenn
Yes, the notion of tradition is not intended to be used as a controlling genus or tertium comparationis. In my own personal experience I did not come to the concept of tradition until well in the process of thinking about the relations of different legal traditions, so in that sense it springs inductively or spontaneously from the examination at the same time of multiple traditions, as opposed to being in my own case any kind of a priori classification that was applied to all of them. That is why hesitation is expressed in the book about the development of a 'theory' of tradition, as opposed to simply learning from the tradition.

Much of this is inherent in Wittgenstein's notion of the practice of language games. Wittgenstein is most frequently criticised by lawyers for speaking in terms of games, which would be inherently incapable of being transposed to the normativity of law. I don't know whether that is the case or not, but I am presently pursuing the use of Wittgenstein's ideas in a particular legal context and I think that there is a great deal to be said in favour of that perspec-

tive and the elimination of a tertium comparationis or any other large, controlling, intellectual construction. Rynhold's book on *Two models of Jewish Philosophy* has confirmed in my own view the intellectual respectability of what appears to be only practice, as well as deliberate modesty in the formulation of theoretical goals. In my own use of the notion of tradition, the general characteristics are found within each of the traditions that I am actually examining.

Hildebrandt
Halpin claims that information in your theory is linguistic. Is it?

Glenn
No, it isn't. Never is that said in my writing. In my forthcoming response [to the review in the *Journal of Comparative Law*, mh] I have attempted to indicate a number of places in the book where I have said exactly the contrary. These are not found in the introductory two chapters, however, so may be overlooked by those concentrating on the more abstract discussion. The most explicit argument against the idea that traditions are merely linguistic is found in chapter 5, relating to the civil law tradition. It is there because the idea of law as language is essentially a western idea. The argument is explicit in chapter 5, however, that thought precedes language and that there is therefore normativity which prevails, prior to its linguistic expression.

Hildebrandt
You say that tradition is not necessarily linguistic, but that it is normative. How can I distinguish a legal tradition from any other type of normative tradition (moral, religious, scientific, political)?

Glenn
Yes, this is also a criticism made in the collective review. The idea of tradition is criticized and then the idea of legal tradition is criticized. Both are said to be imprecise. The idea of tradition is not entirely imprecise however, as I have said; it is simply defined as normative information, as opposed to all else in the world, including practice. The idea of legal tradition is not one, however, which I have defined in any way whatsoever, and that's very deliberate, because the definition of a legal tradition is not for me to impose by virtue of some tertium comparationis. It is rather for each tradition to answer this question in a way appropriate to the tradition. I have made this argument in a number of fora, and the most consistent response that I get is that if you only speak of tradition you can't know what the law is, whereas a legal system tells you formally what the law is. Western-trained people, or at least a number of them, purport to have great difficulty in understanding that there

can be any clarity outside of what they conceive to be a legal system, whereas the reality is that people always know well enough what is the normativity they need to live their own life and to impose decisions on others, even in the absence of some formalised legal system. All of the legal traditions examined in *Legal Traditions* have existed for centuries if not millennia, most of them without a super-imposed or formal definition of law. They all answer the question, though they all answer it differently in terms of sources or non-sources of law. So the question of defining a legal tradition is answered. As I say in response to the collective review, the answer of what a legal tradition is out there. All you have to do is work with it.

Hildebrandt
If a tradition itself does not use a term for legal how do you decide what counts a legal?

Glenn
Most of them do use a term. If they do not they provide you with the information necessary to know that it is there. I suppose this is some form of functionalist means of identification. But you have explicit acknowledgement of the existence of legal tradition within talmudic law, within civil law, within islamic law, within common law and within hindu law. All of these use the word law in different forms and have highly developed legal traditions, known as such. It's really only in the chthonic world and the East Asian world, where there is reluctance to engage in formalized law, that you find a linguistic problem in terms of identifying law. But if pushed these traditions can produce their normativity with a designation of law, so chthonic peoples everywhere in the western world are now producing their law adequately enough to be recognized by tribunals in the pursuit of native claims.

Once you get outside the source jurisdiction of China for Confucianism, people speak of Confucian law. The Chinese diaspora community in Asia uses what is called Confucian law, the normativity by which the people actually live. I think in China the expression *fa* (formal legislation) was not historically used so much because it had a pejorative connotation, given historical experience, so the notion of *li* (rites, or ritual) was preferred. But it's very difficult to distinguish *fa* and *li* in the eventual process of confucianisation. So in the normativity that exists within the Asian tradition, there is no problem in identifying the totality of the tradition as a legal tradition, the written and unwritten norms by which people live.

Hildebrandt
In the last chapter of *Legal Traditions* you argue for the use of multivalent logic, which should allow coherence (sustainable diversity) without enforcing unification. This reminds me of Marc Amstuz who pleads 'interlegality in legal reasoning' to advance what he calls 'normative compatibility' of the legal norms of private law within the Member States of the EU.[9] Do you see a connection between his interlegality in legal reasoning and your plea for multivalence?

Glenn
Yes I think there is a connection. But his article is representative of the working of traditions, because it seems there are very different interpretations of what the European Court of Justice (ECJ) means when it says there must be interpretation of national law in conformity with European directives. Some people say that this is a command of uniformity in the interpretation of them; others see this as ongoing recognition of the inherent interpretive authority of national institutions, which now must simply choose amongst different national interpretations that which would be in conformity with the directives. So there is noise about what the position of the ECJ is. In private law there is therefore some parallel with the debate in public law relating to margins of appreciation and multivalent logic, as Prof. Delmas-Marty has attempted to explain it in France.[10] To the extent that interpretation of European legislation is undertaken by national authorities, there is something beyond federal and confederal states in which federal legislation is meant to be uniformly interpreted. In the United States there is a federal judiciary because it was said that federal U.S. legislation had to be uniformly interpreted. The approach is binary, and interpretations of federal legislation are either legal or not legal. The theory at least is binary, since in reality there is a great deal of difference in interpretation of federal legislation between Federal U.S. judicial circuits. Canada is more multivalent in its approach to federal legislation, since its interpretation is left to provincial courts. In Europe, even given a requirement of interpretation in conformity with directives, there remains a principle of national interpretation, which admits as a point of departure that European level norms are not required to receive the same notion of uniform interpretation in a given territory. It seems to me inherent in these structures that there is a notion of multivalent logic which is here at work. An interpretation is not clearly legal or illegal; there are gradations of legality, which can be tolerated in different national fora. Even individual decisions of the European Court can thus be

9 Marc Amstutz, 'In-Between Worlds. Marleasing and the Emergence of interlegality in legal reasoning', European Law Journal 2005-6, p. 766-784.
10 Mireille Delmas-Marty, Le flou du droit (Presses Universitaires de France, Paris, 1986).

situated within this range of legality. In that sense the EU is more polyvalent than some federations and confederations of the world are in their treatment of national legislation. That is very interesting because so much of European legal tradition has resisted the idea of disunity or polyvalence in interpretation. The entire weight of European legal authorities since the inception of law teaching in universities has been directed toward a necessary notion of unity of law – the idea of a ius unum – but at this point there are very articulate statements of diversity in law which is tolerable.

Hildebrandt
Do you agree with Halpin that multivalence means that p or not-p is replaced by possibly p and possibly q, implicating that p and not-p still do not co-exist – that only our choice of action is broader because we do not have to choose in advance?

Glenn
Bivalence requires that you choose between p and not-p. It locks you into that field of choice and tells you that sustaining them both would be contradictory and impermissible. Multivalence allows you to sustain them both, or at least not dismiss one of them, by opening up a range of choice between them. P and not-p thus come to define the field of choice, in which there is a wide middle ground. To do this we require more information than the binary presentation of p or not-p allows. Multivalence or vagueness actually requires more detailed information, more precision, than bivalence. It also corresponds more exactly with the complexity of the world. Bivalence can only exist because of an arbitrary process of ignoring the complexity of the world and engaging in an arbitrary process of separation of only two options from all of those potentially available.

The argument of Halpin comes down to saying that everything is finally binary in the end because you ultimately have to choose on one side or the other of binary options which are before you. He takes my example, which was a complicated example drawn from the European Convention on Obligations in Private International Law, to say you have to decide at the end whether it's state law or party autonomy that actually applies, so my example of multivalence does not hold true. His argument does not hold up for a number of reasons. One, he takes what I see as a multivalent convention, which allows a range of choices, and chooses to ignore that in favour of the decision of a judge in an individual case about what the decision is actually going to be. Second he treats the process as involving a binary choice between state law and non-state law, when what the convention does is maintain both state law and party-choice as options (p and not-p), while using a fuzzy

standard of 'mandatory' particular state rules as a possible means of overcoming an initial party choice. It is a multivalent convention because it does not itself choose between party choice or state law (p or not-p) but maintains both while allowing party choice to be overcome only if a particular state rule of contract is judged to be 'mandatory' (and there are degrees of being mandatory in private international law). It is never therefore a question of deciding simply to apply state law. It is always a question of assessing how mandatory is a particular piece of contract law, not state law in general, for application in a given case, given initial and valid party choice. You can have state laws that are mandatory for all contracts, state laws that are mandatory for particular types of contracts such as consumer contracts, and state laws that have to be interpreted to know to what extent they are actually mandatory for an international case. So the notion of a mandatory state law is a fuzzy standard in the practice of international law, which means that you have to assess a range of criteria in order to know where in the continuum of possible decisions you actually decide the case.

It is true that this needs more explanation in the third edition than it gets in the second edition, but the argument that everything is ultimately binary in character simply doesn't acknowledge the existence of the range of choices which presents itself to the decider.

Hildebrandt
Isn't he simply talking about incompatibility, which is something else? I mean, I generally can't sleep when I drink coffee, but that does not make coffee-drinking incomparable to sleeping. Multivalence acknowledges that the two can be compared in a number of ways (depending on the objective of the comparison), without denying that you can*not* do both at the same time.

Glenn
Incompatibility is something different from incommensurability. Incompatibilities we live with all the time; incommensurabilities we never live with.