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Cultural Diversity and the Law:
Challenge & Accommodation



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Contents

1. Introduction and Background.....	7
2. Some Cases	9
<i>Case 1: Martinez</i>	9
<i>Case 2: Shambo</i>	10
<i>Case 3: Amselem</i>	12
<i>Case 4: Ghai</i>	14
<i>Case 5: IC</i>	16
3. Challenges, and Response	18
4. Accommodation from Three Perspectives	20
5. The Debate about Shari'a	29
<i>The Archbishop and Shari'a</i>	29
<i>Shari'a Councils in the Muslim Diaspora</i>	31
6. Conclusion.....	38
Appendix 1 Article 9 of the European Convention on Human Rights.....	43
References.....	44

1. Introduction and Background

Contemporary European societies are all, to greater or lesser degrees, multi-ethnic and multi-cultural, both in terms of their indigenous (regional) diversity and in terms of the diversity which has stemmed from the mass immigration of workers and refugees, and their settlement. Currently, however, there is a widespread and often acrimonious debate about cultural difference and its limits, evidence for which may be observed in the media (newspapers and television), in election manifestos, in parliamentary debates and statements by ministers, in policy initiatives at local, national and international levels, and in the daily preoccupations of, among many others, social workers and teachers. Not least among those others are lawyers and the many different groups and individuals who are concerned with or touched by the law. This paper focuses specifically on the legal field, and the law in relation to ‘other’, possibly conflicting, values and practices, and discusses what is happening in regard to their legal ‘accommodation’.

There is a long-standing interest among lawyers in legal pluralism (for example, Chiba 1989; Griffiths 1986; Menski 2006a; Santos 2002; Twining 2000; the *Journal of Legal Pluralism and Unofficial Law*, among many others), and this intellectual tradition has considerable resonance for the issues addressed here. More recently, there has been a specific concern with the implications for the law and legal practice of cultural diversity stemming from immigration and settlement. Leaving aside immigration law (a major field at a tangent to that discussed here), there has been important work by legal and other scholars in numerous European countries, including Belgium, Denmark, France, Germany, Italy, the Netherlands, and not least the UK, as well as North America.¹ Taking cognisance of these developments, and their significance for the wider study of migration and integration, a group of scholars associated with the IMISCOE Network, brought together in July 2007 in London some 30 anthropologists, political scientists and legal specialists and practitioners to examine how contemporary cultural diversity in Europe challenges legal practice, how legal practice responds to that challenge, and how practice is changing

¹ See *inter alia* Bowen 2006; Ferrari et al 2005, 2006; Foblets, Gaudreault-Desbiens & Renteln (eds.) 2009; Foblets & Renteln (eds.) 2009; Foblets and Strijbosch (eds.) 1999; Gaudreault-DesBiens 2004; Hoekema (ed.) 2005; Knights 2007; Menski 2001; Mehdi, Petersen & Woodman (eds.) 2008; Pearl & Menski 1998; Poulter 1987, 1998; Renteln 2004; Shachar 2001; Shah 2005, Shah (ed.) 2007; Shah & Menski (eds.) 2006, and contributions to the edited volumes.

in the encounter with the cultural diversity occasioned by large-scale immigration.² Selected papers from that conference have been published in *Legal Practice and Cultural Diversity* (Grillo et al eds 2009).

There are, briefly, several ways in which cultural plurality stemming from immigration may bring individuals, families, sometimes whole communities, within the purview of the law. Transnationalism, living multi-sited (and hence often multi-cultural) lives is a common, indeed growing feature of both migrant and settled populations, and transnational living (for example, organising families across borders) may bring people into contact, and perhaps conflict, with multiple legal systems. At the same time, some migrants and settled minority groups of migrant origin³ may seek to maintain values and practices potentially at odds with those of the societies in which they have settled and therefore perhaps ‘problematic’ so far as the law is concerned. This is not to say that the ways of life all migrants, in every way, all the time, ‘differ’ from those of the society of settlement (in neither case are ways of life static or homogeneous), but to point to the fact that some people, at some time, and to varying degrees, may seek to maintain some values and practices which bring them into conflict with the law. Moreover, such conflicts may stem as much from what is happening *within* migrant and minority families (for example in the changing relationship between genders and generations, and the clashes which arise from that) as it does from what is happening *between* them and receiving society institutions and values.

I should declare that I am neither lawyer nor legal specialist, but an anthropologist with a long-standing interest in multiculturalism and diversity. Pursuing that interest

2 The conference was sponsored and largely funded by IMISCOE (the EU-funded Network of Excellence, for International Migration, Integration and Social Cohesion), but received substantial financial support from Queen Mary, University of London School of Law, and a generous grant from the British Academy. There is now an Internet-based mailing list (‘Pluri-Legal’) which those interested may join: <https://www.jiscmail.ac.uk/cgi-bin/webadmin?A0=PLURI-LEGAL> The London conference was followed by a workshop, in Brussels, July 2008, to prepare a framework for future discussion and research collaboration. A further conference, June 2010, will focus on ‘Legal Practice and Accommodation in Multicultural Europe’, with particular reference to private law, especially as this concerns family matters, and the typical legal issues found frequently in daily life (e.g. marriage, divorce, responsibilities for children, the ‘best interests of the child’, and the transmission of property).

3 There is much discussion over appropriate terminology. For example, the term ‘Black and Minority Ethnic’ (‘BME’), widely used in the UK, poses many difficulties, not least when applied comparatively across Europe or North America, and ‘migrants and settled minority groups of migrant origin’ seems more appropriate. If I use the word ‘migrants’ alone it should be understood as shorthand for the fuller, if rather clumsy phrase.

in research in France, Italy and the UK, I have found myself engaging with numerous law-related issues, concerning the daily lives of migrant and minority ethnic families (Grillo ed. 2008), and matters connected with religious hatred and censorship (Grillo 2007). There is, of course, a long history of fruitful collaboration between law and anthropology, especially in colonial and post-colonial contexts, and most recently there has been excellent work on questions of human rights. Cultural diversity stemming from immigration provides another field in which the interface between law, anthropology (and politics) can be fruitfully explored, and in that vein let me begin in time-honoured anthropological fashion (pioneered by the ‘Manchester’ school approach), by drawing attention to some legal cases which illustrate the interaction between diversity and the law.

2. Some Cases

Case 1 ‘The Man Who “Sold” his Daughter for Beer’ [Martinez]

‘US father sells daughter for beer’, said a BBC headline.⁴ It referred to a case in the city of Greenfield, Monterey County, California, involving Marcelino de Jesus Martinez, a Mexican migrant from Oaxaca, Southern Mexico. Apparently, in December 2008 Martinez had gone to the Greenfield police to report a missing daughter who was eventually located living with a young compatriot, Margarito de Jesus Galindo, in an apartment a few doors from the Martinez home. According to the police investigation, it then transpired that his real complaint was that said compatriot had reneged on a contract, and failed to pay him what he was owed. The police alleged that Martinez had in fact arranged a marriage between Galindo and his daughter, who was fourteen years old, in exchange for \$16,000, 100 cases of beer, several cases of meat and other items. In consequence Martinez found himself charged with providing his daughter for lewd acts, aiding and abetting statutory rape, and cruelty to a child; Galindo was charged with statutory rape.

Martinez and Galindo are both members of the minority Trique people of Southern Oaxaca, and the Greenfield police chief acknowledged that among the Trique ‘such arranged marriages are commonplace’, adding: ‘We’re aware of the cultural issues here, but state law trumps cultural sensitivity’ (*Monterey County Herald*,

4 <http://news.bbc.co.uk/1/hi/world/americas/7829382.stm> [Accessed 14 January 2009].

13 January 2009). The point about cultural practice was reinforced by statements issued by indigenous people's associations, the Indigenous Front of Binational Organizations (FIOB) and the Binational Center for Oaxacan Indigenous Development (CBDIO) who argued that this was an arranged marriage according to Trique customary practice which requires a negotiated marriage payment; the girl was not 'sold' as the media reported. They also noted that such marriages often involve girls as young as 13 or 14. Martinez, however, who spoke little English or indeed Spanish, believed, it was said, that he had acted properly, and as the Greenfield police chief put it, the Trique community had not been aware that to arrange a marriage for money with a minor was contrary to the law in California.⁵ He added: 'Everything they were doing would be legal in Mexico. When I'm in Mexico I respect Mexican laws ... But you respect the law here when you are here. This involved a juvenile' (*Monterey Herald* 14 January 2009).

Martinez strenuously denied the allegation. His attorney said that Martinez would 'plead not guilty, and that his defense will not be, "It's cultural and please forgive him for having these customs"' (*Monterey County Herald*, 15 January 2009). Instead he would claim that he himself was the victim of a cultural practice known as *Me lo robo*, a kind of marriage by capture, in accordance with which Galindo had kidnapped the young girl against her will. In the event, the prosecution offered Martinez the chance to plea to a lesser offence which he agreed to accept, receiving a sentence of one year in prison plus probation. After a few months he was released and deported as an illegal immigrant.⁶

***Case 2 Shambo the Tubercular Bullock [R (Swami Suryananda, representing the Community of the Many Names of God) v. Welsh Ministers, 2007]*⁷
[Shambo]**

In the UK there is a religious community (Community of the Many Names of God) based on Hindu beliefs and practices located at the Skanda Vale Temple in Wales.

5 In New Hampshire, however, a girl as young as 13 may be married subject to parental and court consent: http://en.wikipedia.org/wiki/Marriageable_age#North_America [Accessed 28 January 2009].

6 The case was much more complicated than the brief summary suggests, and I hope to write about it in due course.

7 See Ballard 2007 for details of this case; it is also discussed in Hill 2007; Nason 2008; Sandberg 2009; see also <http://www.skandavale.org/shambo.htm>: 'Latest update on Shambo, Bhakti's and Dakshini's story 23 January 2008' [Accessed 28 January 2009].

It keeps animals and among these was a bullock named ‘Shambo’. In 2007 Shambo tested positive for bovine tuberculosis, and the relevant ministry in the Welsh regional government ordered his slaughter. Members of the community challenged this order on the basis that it infringed the Community’s right to freedom of religion under Article 9 of the European Convention on Human Rights [ECHR].⁸ They argued that Shambo was ‘central to their belief that all life is sacred, and that if he were killed it would ruin the spiritual power built up at the community in Carmarthenshire over three decades’. Their lawyer told the court: ‘He is an animal whose slaughter would constitute a violation of deeply held religious views.’⁹

An expert anthropologist was asked to comment on this case by the legal authorities who among other things wished to know whether the beliefs expressed by members of the community were part of the Hindu faith. In a detailed examination of the background to the case and the community concerned, he concluded: ‘The short answer is yes – in the sense that they fall well within the *range* of beliefs and duties which followers of many strands of the Hindu tradition regard as being incumbent upon them’ (Ballard 2007: 10). Indeed, Judge Hickinbottom in the High Court went quite deeply into the relevant religious beliefs, commenting: ‘In the course of this judgment I will need to expand upon the role played in the Hindu religion by animals generally and bovines in particular’ (High Court of Justice 2007: 3). And he went on to state:

I accept that the sanctity of life is a fundamental tenet of the Sanathana Dharma Hindu tradition, based as it is upon the belief that there is a spark of divinity within any living form – and, within that tradition, bovines play a special role, the soul or spirit of a bullock being in essence the same as that of a human albeit at a different stage of development. The temple bullock is of particular symbolic significance in this tradition. I accept that, within the tradition, in spiritual terms the killing of a such a bullock is comparable with the killing of a human being: and that, in the words of [one of the applicants], “the slaughter of Shambo would be a particularly extreme affront to the beliefs that underpin [the everyday lives of the Community]” (p. 10).

Against the background of these beliefs, which the Judge agreed were deep and sincere (p. 11), he confirmed that Article 9 ECHR was relevant to the case and that ‘the proposed slaughter of this temple bull would be a patent and gross interference with the manifestation of their beliefs’ (p. 41). However, he also asked whether such interference with their beliefs might be justified, as prescribed by clause 9(2) of ECHR.

8 The text of Article 9 may be found in Appendix 1.

9 Quoted in Steven Morris, ‘Judge grants Shambo reprieve’, *Guardian* 16 July 2007.

The judge found that while the latter was indeed relevant, the Welsh Ministers who had imposed the slaughter order ‘had failed to approach the balancing exercise required under Article 9(2) since they had not identified a public interest to balance against the individual rights’ (Sandberg 2009: 276). He therefore quashed the order.

Although this challenge in the High Court was successful, the matter went to appeal where the case was described as involving a ‘clash between the duties of the agriculture and health authority and the rights of the members of the Community to practise and manifest their religious beliefs and practices’ (cited in Hill 2007: 12). The appeal court then upheld the slaughter on the grounds that this was necessary for the success of the surveillance and slaughter policy authorised by an EU directive as a crucial means of controlling the disease, and alternatives to this policy could not be justified.¹⁰ So, in front of the TV cameras, Shambo was taken away to be put down. One monk consoled himself with the thought that ‘They cannot kill Shambo. They will simply add to the drama of his life cycle and he will come back again.’¹¹

This case like the next was complicated by the need to determine what or whose religious belief was at stake.

Case 3 Mr. Amselem’s succah (Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551)¹² [*Amselem*]

The Canadian legal scholar, Jean-François Gaudreault-DesBiens, writes:

Orthodox Jews who had bought apartments in a luxurious Montréal building had been asked by the management of the building to remove a temporary succah that they had erected on the balconies of their respective apartments. A succah is a small enclosed temporary construction, a kind of hut, built by observant Jews for the festival of Souccoth ... This construction is used by Orthodox Jews as their primary residence during the festival. Despite an agreement signed by all apartment owners in the building prohibiting such constructions for aesthetic and safety reasons, the Jews concerned asked for permission to build their succahs. This was refused, though the management suggested a compromise: they might erect a communal succah in the apartment gardens. (2009: 155).

10 *Suryananda v Welsh Ministers* [2007] EWCA Civ 893, at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2007/893.html&query=%22Shambo%22&method=boolean> [Accessed 13 July 2009].

11 In Steve Boggan, ‘The Moment They Came for Shambo’, *Guardian*, 27 July 2007.

12 This account draws heavily on Gaudreault-DesBiens 2009; see also <http://csc.lexum.umontreal.ca/en/2004/2004scc47/2004scc47.html> [Accessed 27 January 2009].

Mr. Amselem rejected this and instead argued that his ‘subjective understanding of Jewish law obliged him to erect an individual succah on his own balcony’, and that the prohibition in the agreement ‘infringed his freedom of religion protected by Quebec’s Charter of Human Rights and Freedoms’ (*ibid.*) The first court found against him on the grounds that there was ‘contradictory evidence’ for his belief in this religious obligation, and that the compromise proposed by the management was reasonable. This was upheld on appeal, but when the case went to the Supreme Court of Canada the majority judgement

adopted a subjective understanding of religion and, on that basis, held that Mr. Amselem’s freedom of religion had to prevail over the declaration of co-ownership. Most importantly, the majority rejected the view that the subjective understanding of a believer, i.e. that an individual succah was an absolute necessity, could be second-guessed in light of evidence establishing that what the believer deems to be a religious obligation is objectively not compulsory in his or her particular religious tradition (Gaudreault-DesBiens 2009: 156).

Così è (se vi pare), as Pirandello might have put it.

To determine whether an individual belief is sincere, the Court noted US case law, citing the US Supreme Court’s decision in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) in which Chief Justice Burger argued (pp. 715-16):

the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion

Thus the court advocated a minimally intrusive evaluation of an individual’s beliefs. Courts must only determine that a belief is not feigned and that religious claims are made in good faith. The following British case illustrates a somewhat different approach.

Case 4 ‘A Theological Necessity?’ [Ghai]

*Ghai v Newcastle City Council*¹³ concerned an application by a Sikh and a Hindu to allow open air cremations. The anthropologist Roger Ballard, in written expert evidence (2008b), argued:

Pyres not a theological necessity? In my view little weight should be given to this argument. Open air cremation has long been the routine format for end-of-life rituals in virtually every Indic tradition. Even when major sectarian deviations split way from the Hinduism’s Brahminical core – as did the Sikh, Buddhist and Jain traditions – the practice of *anthyeshthi sanskara* remained virtually unchanged, despite even radical revision of its theological underpinnings. As long as this vision is broadly sustained – and I readily confirm it is widely evident amongst Indic faith communities in the UK – popular sentiment will continue to prefer funerary rituals modelled on the practices and premises of a family’s community background in South Asia. *Reformists* – such as several of Dr. Firth’s¹⁴ informants – frequently take an opposing view, urging that ancient practices are in need of modernisation. My own first hand observation of South Asian settlements in the UK is that popular domestic ritual practice remains deeply traditional in character, and strenuous efforts ensue to reproduce all aspects of what was done ‘back home’, despite the challenges of a largely alien environment. The claimant’s position is a logical and consistent extension of these wide underlying efforts.

The judge, Mr. Justice Cranston, in coming to a decision seems to have been influenced by the views presented by Dr. Firth. He comments:

Dr Firth opines that it is quite difficult to state what a Hindu view is because there are such a range of languages, traditions and regional and caste customs. Hindus may follow different gurus, or belong to a sect or none at all (p. 9) ... Crucially most of Dr Firth’s informants in both her recent research and earlier field work did not see the key to proper rites to be an outside pyre; they had other concerns. The majority of Hindus in the United Kingdom, to her knowledge, do not believe that salvation or rebirth depends on an open pyre ... Cremation, however, is absolutely essential to enable the preta to move on to its rightful destination (p. 11).

In fact, Mr. Justice Cranston, apparently spent some considerable time visiting the evidence presented by Firth, Ballard and other experts as well as the standard anthropological work on the Hindu cremations, Jonathan Parry’s monograph, *Death in Banaras* (1994), to which he had been referred by Dr. Firth. He pointed, for example,

13 *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin) (08 May 2009). Decision of Mr. Justice Cranston. Available via <http://www.bailii.org/ew/cases/EWHC/Admin/2009/978.html> [Accessed 19 May 2009].

14 Dr. Shirley Firth presented expert evidence on the part of the Secretary of State.

to a personal communication by Parry to Firth which noted Parry's 'puzzlement as to how Professor Sharma [another expert] can conclude from the sacred texts or the ethnography that open air funeral pyres are one of the essential criteria for cremation' (p. 26). He adds: 'Further, there is Dr Firth's evidence, derived from many years of close study of Hindu religious practices in this country: open air funeral pyres are not regarded as an essential component of a good death' (ibid.) He goes on:

Despite the ... submission, that the determination of the core content of the Hindu religion is not a matter for the court, the authorities compel me to decide whether *anthyesthi sanskara* is an essential belief of one strand of orthodox Hinduism (p. 26).

'That the great majority of Hindus in the United Kingdom do not share the claimant's belief', he concludes, 'is not a complete answer.' And the judge accepted that the Hindu applicant's belief in open air funeral pyres 'is cogent and also central to *his* strand of orthodox Hinduism' [my emphasis]. 'It is beside the point', he added, 'that typically Hindus in this country do not share that belief' (p. 38). On the other hand, while this might apply to Hindus, it did not, in his view, necessarily apply to Sikhs, for whom 'open air funeral pyres are not a matter of dogma and belief but simply a matter of tradition' (p. 26).

Mr. Justice Cranston, therefore, ventured into areas where the US Supreme Court apparently feared to tread. Nevertheless, this did not lead him to support the claims brought by the applicants. He ranges widely over Strasbourg and British court decisions concerning the application of Article 9(1) of the European Convention on Human Rights to this case, i.e. whether the law interferes with the applicants' freedom to express and follow their religious beliefs, and if so, whether interference with Article 9 is justified under Article 9(2) (see Appendix 1). While he concurs with the claim that the legislation (The Cremation Act 1902 and 2008 Regulations) which makes open air funeral pyres a criminal offence 'does interfere with one manifestation of the claimant's religious beliefs', the issue for him is whether the interference can be justified. Justice Cranston goes over the various grounds very fully and concludes (p. 38):

In my view the prohibition on open air funeral pyres in the 1902 Act and 2008 Regulations is justified. The Secretary of State advances various arguments, in particular that others in the community would be upset and offended by them and would find it abhorrent that human remains were being burned in this way. The claimant takes issue with this. This is a difficult and sensitive issue. Precisely for that reason a court must accord primacy to the conclusion of elected representatives. It is within their remit to conclude that a

significant number of people would find cremation on open air pyres a matter of offence. The balance they have struck in the 1902 Act and 2008 Regulations is entitled to respect.

Even if in the end it turned out to be irrelevant, or at any rate over-ridden by other considerations, the judge's sifting of the anthropological and theological evidence was impressive.¹⁵

Case 5 Transnational arranged marriage, by telephone (KC & Anor v City of Westminster Social & Community Services Department & Anor [2008] EWCA Civ 198)¹⁶ [IC]

In 2008 a UK court heard an appeal on the part of a person named only as IC against the London Borough of Westminster Council. The background was that IC, an adult male born in the UK, of parents born in Bangladesh, was very severely handicapped and had been supported by the local authority since the age of four, needing extensive care in the home and at a special centre. As he grew older the local authority became concerned about the question of marriage and applied to the High Court for a declaration on his capacity to marry. It then emerged that IC had been married, under Muslim law, in September 2006 by a ceremony conducted over the telephone with a woman in Bangladesh. The High Court found that, among other things, IC

15 Information about the judge may be found at http://en.wikipedia.org/wiki/Ross_Cranston [Accessed 19 May 2009]. Born and brought up in Australia, he served as a Labour member of the UK Parliament, 1997-2005, being Solicitor General 1998-2001. In a personal communication, Roger Ballard comments:

'The most striking aspect of the Cranston judgement is his (no doubt constitutionally correct) argument that while all UK institutions of a lesser rank are bound to respect the legislative prescriptions laid down by Parliament (in this case the Equalities Act and the Race Relations Act), Parliament (or in this case the Secretary of State placing a Statutory Instrument, 2008 No. 2841, a new edition of the Cremation Regulations which included the clause "*No cremation may take place except in a crematorium the opening of which has been notified to the Secretary of State*") is fully entitled to over-ride such restrictions (as well as those set out in the ECHR) on democratic grounds no less than those of and health and safety if it so chooses. If this approach holds good, the way will now be open for sovereign legislatures to de-legitimate almost any 'alien' practice which the majority of the population regards as unwelcome or disturbing by introducing appropriate regulatory initiatives't.

Ballard also draws attention to the contrast between Cranston's approach and that of Mr. Justice Silber's judgement in *Sarika* [2008] EWHC 1865 (Admin), in which the principal respondents were the Governing Body of a School rather than the Ministry of Justice (see Knights 2009, Sandberg 2009).

16 Report available at <http://www.familylawweek.co.uk/site.aspx?i=ed1103> [Accessed 8 June 2009].

lacked the capacity to marry and that the marriage, while valid in Muslim law and in the law as applied in Bangladesh, was not valid under English law. The court also ordered that IC should not be removed to Bangladesh. Background evidence indicated that at the root of the matter appeared to be the elderly parents' deep concern about the future care of their son, and they hoped that the arranged marriage to be contracted with a woman resident in Bangladesh would provide for his care when they were gone.

The appeal court commented:

The role of marriage in the life of one so handicapped is inconceivable in our society. Furthermore as a matter of law marriage is precluded. IC lacks the fundamental capacity to marry. However the marriage is not precluded in Bangladesh (para. 3)

and went on to list the various issues at stake on which it had to make a decision (para. 6):

- Does IC have the mental capacity to consent to a) marriage b) sexual relations c) circumcision?
- Is IC lawfully married a) in Sharia Law b) in Bangladesh c) in English civil law?
- If IC is lawfully married either in Sharia Law or in Bangladesh, is that marriage recognised in English Law?
- Does the Court have jurisdiction to prevent the family changing IC's domicile or taking him to live in Bangladesh?
- What is the correct test/approach for establishing IC's best interests?

In Lord Justice Wall's judgement:

The appeal throws up a profound difference in culture and thinking between domestic English notions of welfare and those embraced by Islam. This is a clash which, in my judgment, this court cannot side-step or ignore. To the Bangladeshi mind, as admirably and clearly explained in the written evidence of the jointly instructed expert witness [Prof Werner Menski of SOAS] the marriage of IC is perceived as a means of protecting him, and of ensuring that he is properly cared for within the family when his parents are no longer in a position to do so. (Para 44).

To the mind of the English lawyer, by contrast, such a marriage is perceived as exploitative and indeed abusive. Under English law, a person in the position of IC is precluded from marriage for the simple reason that he lacks the capacity to marry. No English Registrar of marriages could or would have contemplated celebrating a marriage between IC and NK [i.e. the bride], for the simple reason (amongst others) that no such Registrar could have issued a certificate of satisfaction that there was no lawful impediment to the

marriage. Furthermore, as IC is incapable of giving his consent to any form of sexual activity, NK would commit a criminal offence in English law by attempting to have sexual intercourse, or indeed having any form of sexual contact with him. (Para 45).

To the mind of the English lawyer, the marriage is also exploitative of NK, although the evidence is that she entered into it with a full knowledge of IC's disability. The English lawyer inevitably poses the rhetorical question: what young woman of marriageable age, given a free choice, would ally herself for life in marriage to a man who, on the evidence, may be disturbed by her introduction into his life; for whom she will have to care as if for a child; with whom, on the evidence, she will be unable to hold a rational conversation, let alone any form of normal social intercourse; by whom she cannot have children, and indeed with whom any form of sexual contact will, under English law, as already stated, constitute a criminal offence? (Para. 46).

Again, these issues are very complex, and besides the tragic nature of the case I only note the court's decision to refuse the appellant's application; they ruled that the marriage should be held not valid, and under the Mental Capacity Act 2005 prevented IC from going to reside in Bangladesh.¹⁷

3. Challenges, and Response

What these cases show is that cultural diversity in Europe and elsewhere tests dominant cultural conceptions, and this may become apparent in interaction with the law. Such cases pose problems of a legal, ethical, ethnographic, theological and philosophical kind, for example the nature of belief, and present challenges to legal practice, which are not just a matter of texts and lawyers but involve a wide range of social actors and stake-holders, inside and outside strictly legal processes. As Ballard et al 2009 argue, these challenges include:

- New issues are entering the legal arena requiring re-interpretation of existing law (e.g. re. marriage or divorce, or the custody of children);
- New arguments and justifications are proposed, such as 'cultural defence' ;
- New demands by individuals or collectivities for special rights or treatment test the legitimacy of long-established principles such as 'equality before the law', which may no longer be seen as self-evident;

¹⁷ See also *Re SA (Vulnerable Adult with Capacity): Marriage* [2006] 1 FLR, cited in Clarke and Richards 2008

- New types of inequality of power with respect to the law have emerged;
- New values, e.g. stemming from movements on behalf of human rights, or the rights of women and children, are being institutionalised, and endowed with legislative authority, nationally and/or internationally, with implications for the daily lives of migrants and their descendants;
- National legal systems are increasingly affected by international legislation and decisions, as with the growing influence on judicial decisions of the European Court of Human Rights (ECtHR), and the interpretation of Article 9. This tests the adequacy of approaches to law grounded in ‘methodological nationalism’ (Shah 2009, see also Koenig 2009).

This forces us to think about what kind of response to such challenges is adequate. More specifically, how far should societies and especially legal systems and legal actors go to accommodate the plurality which is an inescapable characteristic of contemporary societies? One response is simply to say ‘No!’ We should insist on conformity with existing norms and values. Migrants should be obliged to assimilate into the legal order of the receiving societies. This is the old adage: ‘When in Rome’ (or Greenfield, CA.) As Kymlicka put it (1995: 96): ‘The expectation of integration is not unjust ... In deciding to uproot themselves, immigrants voluntarily relinquish some of the rights that go along with their original national membership’. Many others argue that social cohesion and equality can only be maintained when the law is the same for all without cultural or religious distinction; the principal of ‘equality before the law’ demands this. Nonetheless, as the then Lord Chief Justice pointed out in a speech in 2008 (Nicholas Phillips 2008), equality before the law does not necessarily mean differences may not be recognised. Indeed in many societies differences are indeed recognised, for example in legislation which penalises discrimination and equal treatment sometimes requires that people be treated differently because their situations are different (Parekh 2000). In reality legal practitioners already take notice of claims based on ‘other’ legal, religious, or customary norms.

Isaiah Berlin’s discussion of freedom may be relevant here. Legislating against racial and religious discrimination, for example, provides what Isaiah Berlin called ‘freedom from’ (Berlin 2002: 178). But in Berlin’s view there is another kind of freedom, ‘freedom to’, which he glosses as ‘the freedom which consists in not being prevented from choosing as I do by other men’ (ibid.) An alternative viewpoint or strategy, therefore, would be to argue that we should adopt a perspective within which social actors operating in, or in the shadow of, the law, are encouraged to be sensitive

to, and make room for, ‘other’ values, meanings and practice. This is what may be meant by ‘legal accommodation’.

4. Accommodation from Three Perspectives

Leaving aside the ‘When in Rome’ argument, I will assume that some accommodation is justifiable, necessary and possible. On the basis of the above working definition, especially that part referring to the process of ‘making room for “other” values and meanings’, we can identify three perspectives from which accommodation, or accommodative processes, might be viewed.

- From that of the receiving society and its institutions: What kind of adjustments are being made by the law and legal – and associated – practitioners?
- From that of migrants and minorities: What are they (who?) doing about the law as regards their own cultural practices? What kind of adjustments are they making?
- From an international or transnational point of view (see Koenig 2009: 314 ff.). What kind of adjustments are being promoted or hindered by national governments (e.g. the governments of sending countries) or by international institutions (for example, the United Nations or the European Court of Human Rights, ECtHR, at Strasbourg)?

This later international/transnational dimension is an important one, as may be clearly seen in the case studies: Marcelino de Jesus Martinez was operating within two legal systems, and assumed their similarity – his case was also taken up by NGOs operating in both the USA and Mexico; IC was married by one country’s laws, but not another; Mr. Amselem’s case was determined in part by reference to international case law regarding human rights, which also played a part in the destiny of Shambo. However, I will not deal with it here, and instead concentrate on the first two perspectives.

(a) Accommodation on the Part of Legal Systems

The process of accommodation is not restricted to changes in legislation or confined to a narrow range of legal actors or legislators. Social workers or teachers concerned with young people, for instance, may find themselves drawn into the process of legal accommodation, e.g. in the use of their discretion to act or not (sometimes controversially). And it is important to remember that accommodation or its opposite may

be found on many different levels, from a small town police chief to justices in an international court. Nonetheless, it is important to observe how legal actors (judges, advocates, expert witnesses etc) engaged directly in cases in the courtroom address alterity and the contradictions between indigenous and 'alien' understandings of the behavioural implications of kinship, marriage, paternity, and this is the focus of this section of the paper.

From that perspective, official accommodation in the UK, for example, has generally involved two complementary strands. On the one hand there are court and related decisions and recommendations (often in conjunction with legislative debates and subsequent Acts of Parliament) which make allowance for exceptions (Menski 2006b; see also Koenig 2009). A much-cited example is the case of the exemption from health and safety and other regulations concerning the wearing of helmets granted to Sikhs. Many practicing male Sikhs would argue that they are obliged by their religion to grow their hair and cover it with a turban, and an important test case in the 1980s¹⁸ secured the decision that the banning of turbans constituted unlawful discrimination under the UK's Race Relations Act 1976. Inter alia the case involved arguing that Sikhs constituted an ethnic or racial group for the purposes of the Act, and this meant that the judges had to take a view on the sociological question of what such a group entailed. This exemption was not, however, made available to them in France when in defence of the principle of *laïcité* the wearing of turbans was included in the legislation banning ostentatiously religious head covering in schools which was, of course, principally concerned with Muslims and the *hijab*. When British Sikhs lobbied the French Ambassador in London about this issue they argued that the turban was a cultural not a religious requirement.¹⁹ The Ambassador rejected this on the grounds that culture was optional, reportedly saying that 'Religion prescribes. Culture doesn't'²⁰, and in a subsequent petition to the ECtHR, (and later the UN Human Rights Commission), Sikhs changed their ground and indeed emphasised the *religious* character of the turban.²¹ As an aside, it is interesting to observe how

18 *Mandla and another v Dowell Lee and another*, House of Lords, [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, [1983] IC R 385, [1983] IRLR 209, (46 MLR 759, 100 LQR 120, [1984] CLJ 219); see http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm [Accessed 11 June 2009]. There was a similar issue in Canada regarding Canadian Mounted Police headgear (Gaudreault-DesBiens 2009).

19 http://www.sikhnet.com/news_011204a.html [Accessed 18 July 2006].

20 <http://www.sikhnet.com/s/USDiplomat> [Accessed 18 July 2006].

21 See http://www.unitedsikhs.org/rtt/pdf/UNITED_SIKHS_Right_To_Turban_Campaign_Timeline.pdf, and <http://www.nerve.in/news:253500192935> [Accessed 9 July 2009]

interaction with the law often demands answers to such fundamental sociological or anthropological questions as the definition of ‘race’, ‘ethnicity’, ‘culture’ or ‘religion’, or more specifically requires that the court determine what actually constitute the norms, practices and beliefs of a particular group or religious community, as was apparent in the cases cited earlier, before deciding whether to accommodate them.

While in some cases accommodating norms and practices means exempting a group from the requirement to abide by a piece of legislation, as with Sikh helmets, in others it involves creating legal conditions which enable members of a particular group to participate, along with everyone else, on terms which meet their cultural requirements. One important field in which this has happened in the UK concerns the creation of shari’*a* compliant financial instruments, in particular with regard to loans (mortgages) for home purchase.²² Home ownership in the UK is very widespread and most people purchase their home with the help of a bank or building society loan which is repaid with interest over a long period. Islam, however, forbids the payment of interest. Various schemes have been devised and authorised in the UK to overcome this objection, including *Murabaha*-based contracts. One financial institution explains:

In a modern context, *Murabaha* involves the purchase of an asset/commodity by a financial institution at the request of a customer. This customer then purchases the asset/commodity from the financial institution under a deferred payment arrangement designed to cover the costs of purchasing the asset/commodity with a pre-agreed upon profit mark-up. The mark-up constitutes the bank’s profit and has been widely used as a substitute for the charging of interest by institutions that wish to adapt interest-based banking to Islamic requirements. The calculation of the mark-up may be in the form of a fixed lump sum or it may be calculated as a percentage of the financed amount.²³

Such instruments (including the *Ijara*, lease to own²⁴), accompanied by measures introduced by the government to prevent these arrangements from being penalised financially (e.g. by removing the possibility of having to pay stamp duty twice), mean that Muslims have, for better or worse, been enabled to enjoy the fruits of a modern

22 The Runnymede Trust’s otherwise excellent discussion (Khan 2008) of *Financial Inclusion and Ethnicity* makes no mention of this form of inclusion.

23 Available at <http://www.yasaar.org/pubs/20255%20Shariah%20Compliant%20Mortgages%20brochure1.pdf> [Accessed 27 January 2009].

24 With ‘lease to own’ the lender buys (and owns) a property on behalf of a client who then leases it from the lender, paying a monthly rent and contribution to the eventual purchase of the property: <http://www.islamicmortgage.org/2007/03/23/islamic-mortgages-what-is-islamic-mortgage/> [Accessed 27 January 2009].

capitalist society. Mortgages are not all, however. A press statement from the UK Treasury in December 2007²⁵ reported a meeting of the Islamic Finance Experts Group which discussed ways of expanding the global wholesale Islamic finance market in the UK, including the Islamic insurance market (*takaful*) and the access of Muslims to *sukuk*, a shari'a compliant form of corporate bond, provision for which had been introduced in the 2007 Budget.

Such measures are not always welcomed²⁶. Some Muslims, for example, doubt whether such schemes are truly shari'a compliant.²⁷ On the other hand, an anti-shari'a movement, the *USA – Stop Shariah* organisation, which is backed by the neo-conservative 'Center for Security Policy'²⁸ issued a statement in November 2008 which argued:

We are determined to resist efforts now underway to create "parallel" Muslim societies and otherwise to insinuate Shariah into this country via its mosques, prisons, campuses, media, government and financial institutions. Of particular concern is the progress being made to establish Shariah-Compliant Finance (SCF) within Western, and most recently, U.S. banks and other institutions that trade securities ... The Treasury Department is

25 'City Minister works with industry to improve access to retail Islamic finance products', http://www.hm-treasury.gov.uk/press_136_07.htm [Accessed 27 January 2009].

26 Roger Ballard (personal communication) comments: 'Whilst the Banks have been eager to develop shari'ah-compliant products in order to attract Muslim customers, the most widely used shari'ah compliant product is the *Hawala* system, through which funds in excess of USD 100 Billion are transferred across jurisdictional boundaries on an annual basis. However since these 'informal' networks were identified as operating outwith the money laundering regulations by the US authorities in the aftermath of 9/11, and were consequently rendered vulnerable to criminal prosecution. Whilst a number of prosecutions for non-compliance have taken place in both the UK and the USA, the Exchange Houses in Dubai who still provide the hub of the operation vigorously contest that their operations have anything to do with *Hawala*'.

27 See <http://www.newhorizon-islamicbanking.com/index.cfm?section=features&action=view&id=10741> [Accessed 27 January 2009], citing Sheikh Haitham Al Haddad. Al Haddad prefers another model, the *qard hasan* system, promoted by the Ansar Finance Group, based in Manchester, on whose advisory board he sits: <http://www.ansarfinance.com/> [Accessed 11 June 2009].

28 <http://www.centerforsecuritypolicy.org/index.xml> [Accessed 27 January 2009]. Other supporters include: Concerned Women for America, ACT for America, Institute for the Study of Islam and Christianity, the Zionist Organization of America, Traditional Values Coalition, Center for Security Policy, Endowment for Middle East Truth, Unity Coalition for Israel, Let Freedom Ring, Christian Solidarity International, Tradition Family & Property Inc., Women United, Jewish Action Alliance, Florida Security Council, Society of Americans for National Existence and the Center for Security Policy, <http://usastop-shariah.wordpress.com/coalition> [Accessed 27 January 2009].

hosting in its headquarters ... a “seminar for the policy community” entitled “Islamic Finance 101” ... The Coalition to Stop Shariah calls on the Treasury Department to cancel this indoctrination session, to cease its efforts to promote Shariah-Compliant Finance and to recognize Shariah for what it is – sedition – and treat it accordingly by banning its use in U.S. financial institutions and products.²⁹

The Equal Treatment Benchbook

English courts have often been surprisingly accommodating of religious and other difference, as the late Sebastian Poulter showed (1987, 1998). The scope for traditional customary practices to be upheld in British courts appears to be substantial, as Gordon Woodman (2009) has argued in respect of sub-Saharan African communities in the UK. There is, however, another tack which has been followed by British legal actors, that is increasing sensitivity to diversity issues. An example is the work of the Judicial Studies Board, which supervises the training of judges in the UK.

The Board has for a number of years published *The Equal Treatment Benchbook*. This is compiled by the Board’s Equal Treatment Advisory Committee, drawing on the advice of experts and covers topics such as gender, sexuality, disability, and poverty and social exclusion as they relate to experience of the judicial system. It is a guide to the judiciary on best practice in the context of cases coming before the courts and on coping with diversity in the courtroom. It is about ‘judgecraft’ (Hall 2006). Among other things it provides information on various ethnic groups, and their (mainly) religious beliefs and practices, and advises judges to be aware of, and where possible sensitive to, those relevant to the conduct of a case. It emphasises ‘understanding the range of diversity within families [and] the many factors that lead to differences; being sensitive about not making assumptions’ (Section 1.2.3). As one judge, Lady Justice Arden, put it in a ruling concerning an agreement made in a ‘family meeting’ (see further below), in a plural society the courts ‘must pay appropriate regard’ to different values and practices, and the Benchbook seeks to sensitise judges to this³⁰.

29 <http://usastopshariah.wordpress.com/> [Accessed 27 January 2009].

30 In *Khan v Khan* [2007] EWCA Civ 399. Roger Ballard, however, comments that in his experience as an expert witness he has seen ‘no indication that the Benchbook has had a significant impact on processes of litigation as and when cases in which issues of plurality are at stake come before the courts’ (personal communication).

Wibo van Rossum, writing about such programmes in the Netherlands, proposes the concept of ‘neo-modern’ sensitivity or thinking which such training might cultivate:

A modest belief in law’s values, optimistic about its instrumental power to change society and to contain state powers, but realistic as regards law’s ultimate capacities, effectiveness, and side-effects, and with awareness for and sufficient knowledge of other rule systems that from the point of view of its proponents are just as worthy as modern law is from ours (van Rossum 2008b).

(b) Accommodation by Minorities

As discussion of shari’a compliant financial instruments has perhaps already indicated, accommodation is often a two way process³¹, and the second perspective discussed is from the viewpoint of migrants and minorities. One set of issues, not discussed here, concerns who, among migrants and their descendants, is using state law, for what purpose, and how. Another focuses on the extent to which migrants and minorities (and/or their representatives) orient their own values and practices (perhaps adjusting them) to take into account existing law, and/or lobbying for changes which might accommodate them. An illustration of this in the UK is provided by the ‘Muslim Marriage Contract’.

In August 2008, a British-based organisation called the Muslim Institute published what is called a ‘Muslim Marriage Contract’ with the support of a wide range of Muslim and other organisations.³² The background to this includes the recent debate in the UK and elsewhere in Europe on arranged and forced marriages which have given rise to much concern in the media, in Parliament, and among Muslim and other activists (see Grillo forthcoming). The introduction to the publication setting out the contract notes:

The document has been drafted after prolonged consultation with religious scholars, community leaders, national and regional Muslim organisations, including organisations of Muslim women [and] reflects a consensus effort of Islamic scholars and experts in family matters to lay down and protect the rights of both parties to a *nikah* (non-registry marri-

31 The Islamic Finance Experts Group brings together a wide range of Muslims and non-Muslims representing different interests; (http://www.hm-treasury.gov.uk/press_136_07.htm [Accessed 27 January 2009]).

32 Including the Imams & Mosques Council (UK), The Muslim Law (Shariah) Council UK, Utrujj Foundation, Muslim Council of Britain, The Muslim Parliament of Great Britain, The City Circle, Muslim Women’s Network-UK, Fatima Network, Muslim Community Helpline.

age) guaranteed under the Shari'ah. The document consists of a Certificate of Marriage explaining the rights and responsibilities of the parties to the marriage and recording the terms upon which the parties have agreed to enter into the relationship, with guidelines to facilitate its implementation. The guidelines ... emphasise mutual consultation, the financial independence of the husband and wife and their shared obligation to support the family. Setting down these matters in writing will allow an intending couple to agree upon many important matters related to their future lives, together with the future of any children, and thus the new document should contribute to a harmonious and happy marriage and family' (Muslim Marriage Contract 2008: 1).

It added that by following the guidelines and obtaining the certificate 'Muslims married in Britain will be able to access the British courts regarding marital issues whilst at the same time enabling British courts to enforce the rights of parties to a Muslim marriage in accordance with the Shari'ah'.³³

An article in *Asian News* for 8 August 2008³⁴ underlined some of the reforms which the contract introduced including

removing the requirement for a "marriage guardian" (*wali*) for the bride, who, as an adult, can make up her own mind about whom to marry; enabling the wife to initiate divorce and retain all her financial rights agreed in the marriage contract; forbidding polygamy whether formally or informally in the UK or abroad; encouraging mosques to register to perform marriages

The contract was endorsed by a British MP, Ann Cryer, who has been active in matters concerning Muslim women, notably around the issue of forced marriages, but *Asian News* also cited criticism from an anti-shari'a point of view by a lawyer who argued that

with government members approving it, [the contract] gives pseudo-legitimacy to Islamic marriage and to shariah by the back door, without giving any real reason why this contract is necessary and what's wrong with civil marriage

33 Prakash Shah (personal communication) suggests that they may be overstating their point since British courts have only reluctantly used pre-nuptial agreements to interpret partners' obligations on break up. However, he also draws attention to the recent judgement in *Radmacher v Granatino*, [2009] EWCA Civ 649 (see <http://news.bbc.co.uk/1/hi/business/8133631.stm> [Accessed 9 July 2009]) which appears to give greater support to the recognition of such agreements.

34 http://www.theasiannews.co.uk/news/s/1061862_muslim_marriage_contract_revolutionary_for_uk_women [Accessed 11 June 2009].

This position was also taken by some other Muslims opposed to giving any legitimacy to shari'a. On the other side, the contract was rejected by the Salafist-oriented Islamic Shari'ah Council in a statement (2008) which recorded that:

After a thorough study of the document, the Council finds that the proposed contract contains numerous flaws which contradict the Quran, Sunnah and Ijma' of our previous scholars including the four great Imams, despite the fact the documents claims to refer to those sources. Moreover, this contract has introduced into the Sharia many elements that are alien to both the text and the spirit of the Sharia.

The case against from an Islamist point of view was elaborated by Shaykh Haitham Al Haddad, who sits on the board of the Islamic Shari'ah Council, at one of his regular public addresses, on 15 August 2008.³⁵

Before talking about the technical issues about this Muslim Marriage Contract I'd like to clarify a few points. Allah revealed this sharia and revealed this Islam to be the best of religions and to be the best of systems. And it is well confirmed by all the scholars that if anyone believes that this sharia or this system is not the best of systems then he is committing an act of *kufir* [unbelief]. [Quotes from the Qu'ran] "Today I have perfected, completed your religion. And I have completed and perfected my [bounty] on you. And I have accepted Islam for you as a religion". OK? And there are so many ... hadith are talking about this issue. So, because of this, Muslims unanimously agreed that the Muslim should believe that their religion is complete, and no one should add or subtract from this religion. OK? This is one thing. Part of this, OK, or another principle which is based on this principle is to believe that this religion is suitable for any place at any time. And if someone believes that this religion is not suitable for certain places, like for example, the West, or is not suitable for certain times like the 20th century, then this person is committing an act of *kufir*.

Later he condemned Muslims who claimed: 'We need to change our Islam in order for our Islam to fit into the Western life style'.

The Shaykh's perspective reflects what Modood and Ahmad (2007: 192) call 'non-moderate Islam', which they describe as 'ahistorical and making no concessions to interpretation and context'. The theological (and political) arguments obviously demand attention, but here I simply make the point that the Marriage Contract is a compromise, a negotiated accommodation on the part of some actors which moves towards compliance with the demands of British law (and courts) while remaining

35 See <http://maqasid.wordpress.com/2008/08/15/shaykh-haytham-al-haddad-the-infamous-marriage-contract/>, and <http://uk.youtube.com/watch?v=FGRA252Y9BU/>; also <http://www.mrdf.co.uk/content/view/23/73/> [all Accessed 27 January 2009].

(its authors would argue) consistent with Islamic law.³⁶ It is not supported by those who take a position on shari'a like that proposed by Shaykh Haitham Al Haddad, nor does it satisfy those who wish to have no truck with shari'a in the legal system (see further below).

At the same time as migrant and minority groups or their representatives negotiate (or oppose) accommodation with the official legal system of the receiving society, they may also be making use of a swathe of informal legal institutions of which official practitioners may have little knowledge, though when they do they may well castigate them as creating 'parallel' institutions. These informal institutions are many and varied, and mostly unstudied or under-documented. One example is the existence of bodies (some which are Internet-based) such as the Union des Organisations Islamiques de France (UOIF) which issue *fatwas* guiding the faithful on a wide range of matters (Caeiro 2007, Sisler 2007), either on their own account or in response to an request for guidance. Others more court-like include the 'family meeting' (the English phrase is used) or 'Panchayat' (where a South Asian term is used), discussed *inter alia* by Roger Ballard (2008a), and the *Cem*, the principal religious ceremony of Turkish (Kurdish) Alevi Muslims held in designated assembly houses, which among other things may provide a forum within which disputants may be given the opportunity to resolve grievances. 'Alevi law comes to life at the *cem*', says Wibo van Rossum (2008a: 8):

Usually one or two people walk forward to settle a debt or a quarrel, or some other 'petty' conflict. Sometimes a third party walks up to the *dede* to tell him about a quarrel he knows of, and then the *dede* asks these people to come forward. In front of the *dede* and before all the people attending, parties then have to 'make up' and 'reconcile'. This reconciliation takes the form of shaking hands and exchanging three kisses on the cheek. The whole procedure usually does not last longer than a few minutes. When parties are not prepared to reconcile, they need to leave the *cem*. This happens very seldom, because it brings shame, distrust by the community ('he's not an honourable person'), and religious disgrace (because one strays from the Path). (*ibid.*)

Another example is the *gar*, 'an unofficial Somali court' in London, as was reported in an edition of the BBC programme 'Law in Action' in 2006.³⁷ The programme

36 In similar vein note the Muslim Arbitration Tribunal's proposals for dealing with forced marriages (2008).

37 E.g. Innes Bowen, 'The end of one law for all?', <http://news.bbc.co.uk/1/hi/magazine/6190080.stm> [Accessed 11 June 2009]. See also 'Sharia court frees London knife youths', Evening Standard, 8 February 2008, <http://www.thisislondon.co.uk/standard/article-23436339-details/Sharia+court+frees+London+knife+youths/article.do> [Accessed 11 June 2009].

claimed that ‘Ethnic and religious courts are gaining ground in the UK’, and asked: ‘Will this lead to different justice for different people?’ The report quoted a Somali youth worker, Aydarus Yusuf, the court’s ‘convenor’, who was described as someone who had ‘lived in the UK for the past 15 years, but feels more bound by the traditional law of his country of birth – Somalia – than he does by the law of England and Wales’: ‘Us Somalis, wherever we are in the world, we have our own law. It’s not Islamic, it’s not religious – it’s just a cultural thing’.³⁸ Other examples, include the Jewish Beth Din, and Shari’a Councils, discussed below.

Information on these institutions is patchy, and the extent to which use is made of such fora (alongside state law) needs investigation (see, however, Bano 2007, Bowen 2009, Zaman 2008). How widespread are these informal (‘parallel’) community-based dispute settling institutions, which also exist among groups such as Roma? What models influence them? How do they operate, when and where and with whom? What sort of disputes and disputants? What is the relation between these and other fora, from the viewpoint of participants? How are they perceived by legal and other actors in the receiving societies? How is British experience (where these institutions are widespread) seen and evaluated by migrants in other European countries? Will the institutions spread? There are also some interesting comparisons to be made with a wide range of similar mechanisms in non-immigrant contexts, for example between shari’a councils in Britain and in Pakistan. This, however, brings us to the wider debate about shari’a in Europe.

5. The Debate about Shari’a³⁹

The Archbishop and Shari’a

Although the challenges posed to the legal system by cultural diversity should never be construed as principally to do with Islam, it is nevertheless the case that Islam figures prominently in this field. This was illustrated when in February 2008 there was, in the UK, a ferocious row over a speech on ‘Civil and Religious Law in England:

38 Whether in fact the *gar* is rightly described as a kind of shari’a council or a form of customary dispute settling or is not clear and needs documenting. Are there other instances of this kind institution in other parts of Europe, e.g. among Somalis in Denmark?

39 This account of the British debate about shari’a and the intervention by, among others, the Archbishop of Canterbury, is largely taken from Ballard et al. 2009; see also Shah 2009. On shari’a in Europe see Rohe 2009.

a Religious Perspective' given by the Archbishop of Canterbury, Dr. Rowan Williams (2008). The speech at the Royal Courts of Justice was the opening lecture for a series entitled 'Islam in English Law', part of the 400th anniversary celebrations of the foundation of the Temple, one of the most important institutions in the British legal establishment. It was a high-powered address to a professional legal audience, but the popular and media reaction to what he said, or was imagined to have said, led to calls for his resignation, if not impeachment for treason. Headlines such as 'Archbishop backs sharia law for British Muslims' (*Guardian*, 7 February), 'Archbishop of Canterbury warns sharia law in Britain is inevitable' (*Independent*, 8 February), were typical. 'What a burqha', proclaimed the popular newspaper, the *Sun* (8 February).⁴⁰

It is salutary to note what the Archbishop said and did not say. One issue concerned the complex question of what shari'a actually is. This exchange between the Archbishop and a BBC interviewer, Christopher Landau, on the afternoon preceding his lecture, illustrates the confusion⁴¹:

[Christopher Landau] But I suppose Sharia does have this very clear image in peoples' minds whether it's stoning or what might happen to a woman who's been raped; these are big hurdles to overcome if you're trying to rehabilitate Sharia.

[Archbishop] What a lot of Muslim scholars would say, I think, and I'm no expert on this, is that Sharia is a method rather than a code of law and that where it's codified in some of the ways that you've mentioned in very brutal and inhuman and unjust ways, that's one particular expression of it which is historically conditioned, not at all what people would want to see as part of the method of trying to make actual the will of God in certain circumstances. So there's a lot of internal debate within the Islamic community generally about the nature of Sharia and its extent; nobody in their right mind I think would want to see in this country a kind of inhumanity that sometimes appears to be associated with the practice of the law in some Islamic states the extreme punishments, the attitudes to women as well.

While the Archbishop was trying to grapple with complex arguments about the nature of shari'a, the interviewer homed in on 'extreme punishments': 'I suppose more often than not, that is what Sharia is equated with, is it not?', and this interpretation was taken up by the press, notably the *Guardian* writer, Andrew Brown (9 February): 'It is all very well for the archbishop to explain that he does not want the term "shari'a" to

40 The *Sun* headline involved a play on words. In English slang a 'berk' is an idiot.

41 From the transcript of an interview with Christopher Landau of the BBC World at One programme, 7 February 2008, available at <http://www.archbishopofcanterbury.org/1573> [Accessed 13 August 2008].

refer to criminal punishments, but for most people that's what the word means', the implication being that is what it actually is.

The Archbishop's speech was long, sophisticated, and not easy to summarise, but what he was advocating was the necessity of taking cognisance of the current condition of cultural, social and conceptual plurality, and its implications for the law. This became apparent in his reference to Ayelet Shachar's concept of 'transformative accommodation' (2001), which the Archbishop glossed as 'a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters'. Later in 2008, the then Lord Chief Justice, Lord Nicholas Phillips of Worth Matravers, sought to clarify the Archbishop's intention during a speech on 'Equality before the Law':

It was, I believe, not clearly understood by all, and certainly not by sections of the media which represented the Archbishop as suggesting the possibility that Muslims in this country might be governed by their own system of Sharia law. That is certainly not what he was suggesting. On the contrary he made it plain that there could not be some subsidiary Sharia jurisdiction which, I quote, "could have the power to deny access to rights granted to other citizens or to punish its members for claiming those rights" (Phillips 2008).

He emphasised that the Archbishop was arguing that it was 'possible for individuals voluntarily to conduct their lives in accordance with Sharia principles without this being in conflict with the rights guaranteed by our law', and he stressed that the Archbishop specified a limited number of domains (e.g. marital law) where this might occur. He concluded: 'It was not very radical to advocate embracing Sharia Law in the context of family disputes', adding 'our system already goes a long way towards accommodating the Archbishop's suggestion'. In fact, the Archbishop was not pleading for group rights as a compulsory scheme for all Muslims, for example. He was calling for discussion of the need for the availability of voluntary tribunals covering a restricted range of issues under the same legal authority as other arbitration and mediation tribunals. This may be what he meant by what he called 'supplementary jurisdictions', otherwise undefined.

Shari'a Councils in the Muslim Diaspora

There have been calls for the availability of Muslim family law in Britain since the 1970s (Poulter 1998: 201 ff.), though many Muslims oppose such measures. When, in 2006, delegates met a government minister to discuss tackling extremism, it was

widely reported that they advocated adopting the shari'a, though such a proposal had been made by one member only (from the Union of Muslim Organisations), and was opposed by representatives of the Muslim Council of Britain. Osama Saeed (2006) commented that the report was, a 'godsend for those who love bashing Muslims', adding:

This call for shariah needs to be framed in terms of what exactly Muslims are asking for ... civil matters like divorce, inheritance and custody. No one is calling for beheadings or stonings.

'Of course lots of Muslims would like to live their lives by the Sharia', said a representative of Hizb-ut-Tahrir, but this means living 'in a more Islamic way', with Islamic bank accounts and halal meat (in Meehan 2006).

Indeed there already exists (among other such bodies) the Islamic Shariah Council, established in 1982, through which UK Muslims can obtain advice on the application of shari'a principles, and have disputes settled (Ansari 2004: 386-7, Bano 2007, Bowen 2009, Césari, Caeiro, and Hussain 2004: 38-42, Keshavjee 2007, Poulter 1998: 234-5). Its objectives are:

To advance the Islamic Religion by fostering and encouraging the practice of the Muslim faith according to the Quran and the Sunnah; providing advice and assistance in the operation of Muslim family; establishing a bench to operate as court of Islamic Shari'a and to make decisions on matters of Muslim Family law referred to it; doing all such other lawful things as may be in the interest of promoting the proper practice of the Muslim faith in the United Kingdom.⁴²

It deals mostly with family matters (guidance on appropriate practices around marriage, divorce, the custody of children, inheritance), and the religious propriety of issues ranging from intravenous fertilisation to trading in shares.⁴³

The movement towards the institution of shari'a councils in the Muslim (migrant) diaspora (i.e. in countries outside the Muslim world) needs documenting. There are a number in the UK and it is an interesting question whether or not they are a particularly British South Asian, even British-Pakistani phenomenon, the enthusiasm for them on the part of British Pakistanis perhaps inspired by experience with shari'a councils and similar bodies in South Asia. However, while such councils have not been documented in other parts of Europe, they do exist elsewhere in the diaspora.

⁴² <http://www.islamic-sharia.co.uk/main.html> [Accessed 31 August 2007].

⁴³ In February 2008 a programme by British TV's Channel 4, *Divorce Sharia Style*, filmed the working of a shari'a council in London.

There is, for example, the Sharia Council of Western Canada⁴⁴, though it is not clear what the SCWA actually does. Also in Canada there was a move in Ontario to make such councils more formally consonant with Canadian law: the proposal in 2004 by the Islamic Institute of Civil Justice to establish a Darul-Qada (Muslim Arbitration Board). This led to a major public debate and a commission of inquiry (Boyd 2004) which recommended the availability of such arbitration fora in family and inheritance cases. This recommendation was, however, rejected outright by the Ontario Premier, Dalton McGuinty, who declared:

I've come to the conclusion that the debate has gone on long enough. There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians (cited in Bader 2009: 56).

In the USA, as in Canada, informal religious arbitration is clearly widespread if under-documented. 'Basement' councils, for example, are found in Washington DC (among Sierra Leonean refugees⁴⁵), organised by imams, trained in Saudi Arabia⁴⁶, meeting in their homes to deal among other things with marriage questions. In an article in the *New York Times* 'Weekly Review' for 17 February 2008⁴⁷, entitled 'When God and the Law Don't Square', which commented on the shari'a controversy in the UK, the author, Adam Liptak, noted that the archbishop's proposal

was groundbreaking only in extending to Islamic tribunals in Britain a role that Jewish and Christian ones have long played in the judicial systems of secular societies. Courts in the United States have endorsed all three kinds of tribunals. In 2003, for instance, a Texas appeals court referred a divorce case to a local tribunal called the Texas Islamic Court. In 2005, the federal appeals court in New Orleans affirmed an award in an employment arbitration by the Institute for Christian Conciliation, which uses Biblical teachings to settle disputes. And state courts routinely enforce the decisions made by a Jewish court, known as a bet din, in commercial and family law cases.

Some information about the 'Texas Islamic Court', is reported in a case before the Court of Appeals of Texas, Fort Worth⁴⁸, which ruled that an arbitration decision

44 <http://www.scowc.com/aboutus.html> [Accessed July 2008, now unavailable]

45 Personal communication from Prof. JoAnn D'Alisera.

46 Saudi Arabian support for the spread of sharia in the Muslim diaspora, including the UK, may be a significant factor in the development of councils.

47 <http://www.nytimes.com/2008/02/17/weekinreview/17liptak.html?ex=1360904400&en=c05d8d8b839956b1&ei=5088&partner=rssnyt&emc=rss> [Accessed 11 June 2009].

48 Court of Appeals of Texas, Fort Worth. Saadallah JABRI and Aida Jabri, Appellants, v. Jamal QADDURA, Appellee and Rola Qaddura, Appellant, v. Jamal Qaddura and

made by the Islamic court between the parties to a dispute, and signed by them, was ‘valid and enforceable’.⁴⁹ Saminaz Zaman (2008) in an article on *Amrikan Shari’a* – the title echoes the phrase *angrezi shariat* coined by Pearl and Menski (1998) to describe the evolving situation in the UK – records that an organisation called the Islamic Society of North America has instituted a *Fiqh* Council to advise on issues relating to Islamic law, but notes that

contrary to many press reports, there are actually many Sharia Councils, not just one. Attempts to create one Council as a formal representative of all Muslims in a particular state, given the internal diversity of Muslim migrant populations and of Islamic school traditions and sects, are thus deeply problematic in terms of power (2008: 200).

Reflecting on the differences between Britain, where Muslim immigration is long-established, and the USA, where it is relatively recent, she adds:

the very newness of the American experience and the vast size of the country compared with the more compact spatial scenario and the more family-focused British immigrant experience of chain migration, seem to have allowed many American Muslims more room for experimenting with the internal diversities of Islamic law and different adaptive processes (p. 188).

A propos the activities of the British shari’a councils, an article in the *Daily Telegraph* in September 2008 sparked yet another dispute when it reported:

Five sharia courts have been set up in London, Birmingham, Bradford and Manchester and Nuneaton, Warwickshire. The government has quietly sanctioned that their rulings are enforceable with the full power of the judicial system, through the county courts or High Court. Previously, the rulings were not binding and depended on voluntary compliance among Muslims. Lawyers have issued grave warnings about the dangers of a dual legal system and the disclosure drew criticism from Opposition leaders. (*Daily Telegraph*, 16 September 2008).⁵⁰

It went on to quote Sheikh Faiz-ul-Aqtab Siddiqi, founding member of an organisation called the ‘Muslim Arbitration Tribunal’ (MAT), which had been created in 2007, claiming that ‘sharia courts are classified as arbitration tribunals under a clause in the Arbitration Act 1996’. The subsequent media panic (the *Times*, 14 September 2008, led with ‘ISLAMIC law has been officially adopted in Britain, with sharia

Osama Qaddura, Appellees. Nos. 2-02-415-CV, 2-02-416-CV. May 8, 2003.

49 I thank Sarah Dooley for drawing attention to these cases on the Pluri-Legal mailing list.

50 <http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html> [Accessed 27 January 2009].

courts given powers to rule on Muslim civil cases⁵¹), led to questions in Parliament, and a clarification by the then Minister, Bridget Prentice MP (in *Hansard* 23 Oct 2008 : Column 562W Matrimonial Proceedings: Religion):

Mike Penning: To ask the Secretary of State for Justice what guidance is issued on the validity of (a) fatwas and (b) other rulings issued by religious authorities in the determination of matrimonial disputes. [228591]

Bridget Prentice: We do not issue any guidance on the validity of fatwas or other rulings by a religious authority because there is no need for such guidance. Shari'a law has no jurisdiction in England and Wales and there is no intention to change this position. Similarly, we do not accommodate any other religious legal system in this country's laws. Any order in a family case is made or approved by a family judge applying English family law. If, in a family dispute dealing with money or children, the parties to a judgment in a Shari'a council wish to have this recognised by English authorities, they are at liberty to draft a consent order embodying the terms of the agreement and submit it to an English court. This allows English judges to scrutinise it to ensure that it complies with English legal tenets. The use of religious courts to deal with personal disputes is well established. Any member of a religious community has the option to use religious courts and to agree to abide by their decisions but these decisions are subject to national law and cannot be enforced through the national courts save in certain limited circumstances when the religious court acts as arbitrator within the meaning of the Arbitration Act 1996. Arbitration does not apply to family law and the only decisions which can be enforced are those relating to civil disputes. Religious courts are always subservient to the established family courts of England and Wales.

As the Minister pointed out their ruling would be subject to the family courts, and how those courts might deal with shari'a related cases needs investigation.

The legal journalist, Joshua Rozenberg (2008), has observed that there is no evidence at all for some of the more sensational claims made in the media. He comments:

If individuals or companies are unable to settle their differences and do not wish to begin legal proceedings, they can agree to have their disputes resolved by an arbitrator, a sort of private judge. Unless there are procedural irregularities, the arbitrator's decision — known as an award — will be enforced in the same way as a court ruling. Section 1 of the Arbitration Act 1996 says “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”. It follows that a dispute may be resolved by a sharia court, provided that the parties agree and that

51 <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece> [Accessed 27 January 2008].

its procedures are fair. But this does not give sharia courts the power to resolve questions of personal status. All this is made perfectly clear by the Muslim Arbitration Tribunal.

Bowen (2009), who describes the MAT as ‘recently registered under the Arbitration Act’, observes that it in its deliberations it ‘places a solicitor side-by-side with the Islamic scholar. The solicitor can make contracts binding, enforceable in the civil courts’.⁵² In 2008 MAT launched an initiative intended to tackle the problem of forced marriages, especially where these involve British-based and overseas-based partners, proposing a number of measures to deal with what it describes as a ‘crisis’ which has ‘loomed within the Muslim community without being noticed or dealt with for the past two decades’ (2008: 9). They suggested a procedure which would involve the British partner making a ‘voluntary deposition’ to be scrutinised by MAT appointed judges who would satisfy themselves that the proposed marriage was ‘without any force or coercion’. Their declaration could then be used in support of applications for entry to the UK. In the event that the marriage was deemed forced or coerced, the MAT might seek a Protection Order under the Forced Marriage (Civil Protection) Act 2007.⁵³ This would perhaps be an illustration of what the Archbishop meant by a ‘supplementary jurisdiction’.⁵⁴

The idea that rulings by shari’a councils might be validated by the legal system, or indeed provide a supplementary jurisdiction, is clearly shocking to some, as the earlier reference to the *USA – Stop Shariah* movement’s objections to shari’a compliant financial instruments might indicate. In Britain, too, opposition has been mobilised by such organisations as the *One Law For All, No Sharia Campaign*, whose launch statement in December 2008 included the following indictment:

52 Legal experts on the Arbitration Act advise that it is principally concerned with arbitration in disputes involving commercial transactions (contracts etc) and is unlikely to have jurisdiction in the kind of cases typically dealt with by shari’a councils. The Minister’s statement quoted above implies that family law matters would not come under the Act. The situation may be different in the USA or Canada (see Milot 2009, and Boyd 2004).

53 A video of Shaykh Faiz Siddiqi’s presentation at the launch of the initiative is available at http://www.matribunal.com/initiative_qa_sfs.html [Accessed: 8 July 2009].

54 It is interesting to compare the stance taken by the Islamic Shariah Council over the Muslim Marriage Contract with the MAT proposals on forced marriage. Prakash Shah (personal communication) suggests that the MAT is ‘positioning itself as a tribunal that British law could recognise more easily – note the lack of the ref to “sharia” in its title. Anecdotal evidence suggests that like most other councils its business is also restricted mainly to marriage cases’.

Even in civil matters, Sharia law is discriminatory, unfair and unjust, particularly against women and children. Moreover, its voluntary nature is a sham; many women will be pressured into going to these courts and abiding by their decisions. These courts are a quick and cheap route to injustice and do nothing to promote minority rights and social cohesion. Public interest, particularly with regard to women and children, requires an end to Sharia and all other faith-based courts and tribunals.⁵⁵

However, whereas *Stop Shariah* reflects the views of neo-conservatives, *One Law For All's* opposition comes from the left⁵⁶, thus illustrating the spectrum of views (including many others not discussed here) from which the accommodation of shari'a has been criticised.⁵⁷

Returning, for a moment, to the intervention by the Archbishop of Canterbury and his support for 'supplementary jurisdictions'. What he appeared to be advocating, in so far as he was suggesting state sanction and control of voluntary tribunals, already finds expression in the way Jews, in their Beth Din, have managed to reconcile the desire to manage their own affairs while operating under a system of state control. For Muslims, the Beth Din provides an example of what can be achieved within the framework of the existing legal order (Shah 2007).

55 <http://www.onelawforall.org.uk/PDFs/December-01-08-Launch.pdf> [Accessed 27 January 2009].

56 A key figure in that organisation is Maryam Namazie, originally from Iran, whose Wikipedia entry describes her as: 'currently the secretary of the International Relations committee of the Worker-Communist Party of Iran and a current member of the politburo and coordinating council of the party. She is also a leader within the International Federation of Iranian Refugees, a current member of the central council of Organisation for Women's Liberation and one of the hosts on New Channel TV. She is hosting the "International TV" which is broadcast by NCTV and is the current editor of "WPI Briefing" (English organ of WPI) ... In 2005, Namazie won the UK's National Secular Society's "Secularist of the Year" award', http://en.wikipedia.org/wiki/Maryam_Namazie [Accessed 11 June 2009]. This is not to damn by association, but point to the variety of subject positions from which such organisations emerge.

57 In this connection one might note the ruling of the European Court of Human Rights in the Refah Party case, with the possible implication that the principles of shari'a are incompatible with those of a democracy: Refah Partisi (The Welfare Party) and others v. Turkey (application nos. 41340/98, 41342/98, 41343/98, and 41344/98), <http://www.echr.coe.int/Eng/Press/2003/feb/RefahPartisiGCjudgementeng.htm> [Accessed 11 June 2009].

6. Conclusion

Current research and writing in the field covered by this paper has indicated many empirical and theoretical issues that need to be addressed. I will comment briefly on three of these (What is happening? Why is it happening? What should happen?), before concluding with some remarks about the problematic status of culture in these developments.

First, we need to know a lot more about and what is actually happening, on the ground, whether in courtrooms or in informal ('parallel') community-based dispute-settling institutions, and about what kinds of accommodation are actually occurring, how and why. One issue is the over-emphasis on the religious basis of matters which come within the purview of the law. As Koenig notes: 'In times of increased awareness of, if not fixation on, religion, it is important to recognize that explicitly *religious* issues characterize only a small portion of the entire range of migrants' claims' (2009: 300). The volume on *Legal Practice and Cultural Diversity* (Grillo et al eds. 2009) makes a similar point: note especially the chapter by Woodman (2009) which is concerned with sub-Saharan migrants in Britain. Cultural practice (e.g. in respect to kinship, marriage and inheritance) loom far larger in their claims than does religion. Nevertheless religion is important, and indeed may be caught up with other issues which are not strictly or necessarily of a religious nature (e.g. arranged and forced marriages).⁵⁸

A more general question concerns what kind of legal order is (at least potentially) emerging in Europe? Are we moving towards legal pluralism, with separate (parallel), legal jurisdictions, at least in civil matters? Or can what is happening be better described through the concept of 'interlegality'? There would seem to be some elements of both, but I am very much drawn to the view that what is interesting and important about the current legal order is the process of 'interlegality' which may be observed. Interlegality, as described by Hoekema (2009)⁵⁹ refers to the process

58 Prakash Shah, personal communication, has suggested that this passage begs the question 'whether the category religion can be used universalistically e.g. with respect to Hindus in light of the fact that a growing literature now contests the universal application of the label religion and its application to non-Abrahamic traditions'. This is an interesting and difficult issue. In Europe and North America adherents of particular beliefs might be obliged to define what they do as 'religion' (and akin to Religions of the Book) in order to qualify (or not) under some existing law, just as Sikhs had to argue they were a ethnic/racial group to benefit from the UK's Race Relations Act 1976.

59 This section draws heavily on Hoekema ed. 2005, and Hoekema 2009.

through which new legal regimes emerge from the interaction between what are often thought of as discrete legal systems or social entities. Although generally applied to the impact of dominant legal orders on ‘local’ (subordinate) systems, the term may also be used for the reverse situation. Interlegality of that kind may be observed in Europe (and elsewhere) at many different levels, and on a daily basis in the courts, though whether it to the same extent and in the same way in all circumstances remains to be explored. The term is associated with the work of Santos (2002; see also Twinning 2000), and has now become quite widespread (e.g. Reyntjens 1999). Although relatively new, the idea behind it is quite old (e.g. Poirier 1969). Indeed, as a phenomenon it has been commonly accepted in legal anthropology for more than 30 years, since legal anthropologists forsook the quest for ‘pure’ indigenous law, and colonial and postcolonial administrators abandoned structural and evolutionary thinking (see Moore 2001, Merry 2003). Interlegality is both process and outcome. As process it refers to the adoption of elements of a dominant legal order, both national and international, and of the frames of meaning that constitute these orders, into the practices of a local legal order; and/or the other way round. The outcome is a new hybrid legal order. The concept brings a valuable dynamism to the matter of legal pluralism. Santos (2002) stresses the fact that different legal orders (local, national, and international law), cannot be said to have a separate existence as if they are elements in communities which are more or less sealed off from each other.

Secondly, why is cultural (and religious) diversity increasingly coming before the courts, and causing so much concern, legally, politically and socially, in Europe and North America?⁶⁰ In thinking about the factors which have influenced this, Matthias Koenig (2008, 2009) points, on the one hand, to those internal to these societies, and on the other to those external to them, or rather which are the outcome of developments taking place at a global level. These include the world-wide ‘judicialisation’ of politics, what Hirschl (2008: 94) describes as the ‘ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’. This has occurred alongside an increasing globalisation and internationalisation of the legal sphere, illustrated by ‘the [international] juridifi-

60 Roger Ballard (personal communication) comments: ‘That the courts systems should find themselves confronted by litigants insisting that cognisance should be taken of their distinctive ethno-religious should come as no surprise, given the increasingly plural character of the populations served by every contemporary Euro-American jurisdiction, as well the way in which ECHR provides (mostly heavily qualified) grounds on which a case can be made for the admissibility of such arguments’ He also observes that in only one of the five cases cited above (*Amselem*) was the cultural argument actually accepted.

cation of human rights in “post-Westphalian” international law’, which, Koenig contends has ‘structurally altered the relationship between states and individuals’ (2008: 100). This has led to the proliferation of cultural and religious claims by individuals and activist movements on the basis of international conventions, as in *Shambo*, *Amselem*, and *Ghai*, or in complex ways in the *hijab* affair in France (Galembert 2009).⁶¹ Hirschl (2008: 96) calls this ‘judicialization from below’. The ‘global institutionalization of universalistic human rights’, says Koenig (2008: 96), ‘has paradoxically led to the proliferation of particularistic rights of sub- and transnational collectivities, thus undermining the classical link between individual rights and national identity’ (Koenig 2008: 96). This does not, of course, oblige us to dispense with a wide range of factors (socio-demographic, religious, cultural, institutional, constitutional) internal to nation-states and sometimes specific to them (e.g. France, Bowen 2006, Cohen 2009, Galembert 2009). Rejection of ‘methodological nationalism’ should not lead to an over-riding commitment to ‘methodological transnationalism’.

There are two other factors which are important here. One is international Islam. Though it cannot be stated firmly enough that religious and cultural difference in Europe and North America takes many other forms, nonetheless, Muslim beliefs and practices, for reasons which may be both obvious, and not so obvious, now seem especially problematic, indeed increasingly so, in almost all European countries. There is a complex interaction between politics, the media, public opinion, events such as 9/11 or bombings in London or Madrid, legislation, and legal practice which needs to be explored. Thus, for example, concerns that Muslims in Europe seek to lead ‘parallel lives’ and eschew integration and inclusion – or more fantastically seek to bring about the ‘Islamisation’ of Europe – have rightly or wrongly influenced debates about practices such as veiling and arranged marriages with implications for what courts decide. At the same time, Islam itself, in the guise of Muslim countries such as Saudi Arabia, or through Muslim scholars operating internationally, has had a significant role in driving claims for the legal recognition of Islamic practice, for example, shari’a.

A further factor is that burgeoning claims on grounds of culture (or indeed gender) challenge mainstream legal thinking about the citizen (France) or subject (Britain) as ‘unaccommodated’, i.e. stripped of all social and cultural differentiation.⁶² This

61 Claims based on international conventions may benefit some migrants (but not others), and sometimes they can be to their disadvantage. Rights, says Ballard, can be a ‘double-edged sword’ (2009: 321)

62 ‘Unaccommodated’ refers to Shakespeare’s *King Lear*. At the height of the storm on the heath Lear cries out: ‘Is man no more than this? Thou art the thing itself; unaccommo-

is certainly a strong element in French thought and in other national legal theories too. However, as Ballard (2009) shows, what is assumed to be acultural and universal, applying to all and sundry at all times and in all places, is in fact deeply embedded in the values of a particular time, place and culture. Recall that in British law, the figure of the ‘reasonable man’, used as a standard by reference to which behaviour might be judged was, classically, ‘the man [*sic*] on the Clapham omnibus’. Similarly, a swathe of social practice (e.g. regarding marriage, family life, bringing up children etc.) is judged on the basis of what is believed to be right and proper – *sc.* culturally hegemonic – social practice, historically rooted in the Judeo-Christian tradition. So when someone comes before a court and says ‘We do things , or want to do things, differently’ , this may bring into the open the ethnocentric bias within the legal system, and challenge the assumptions on which the law is based; the debate about shari’a illustrates this clearly. Peter van der Veer, commenting on this paper, pointed out that the co-existence of different norms and values seemed to pose much less of a problem for legal systems in South Asia than it does in the West (see also Koenig 2009: 301). This is in accord with Menski (2009) and both he and van der Veer are right to emphasise the positive aspects of Indian experience and what Menski calls Indian ‘plurality consciousness’. However, there is a danger of romanticising India in this regard, and certainly the Indian experiment (which developed partly out of colonial institutions) represents a form of legal pluralism, like the Ottoman millet system, which is not directly translatable into European and North American societies.

Thirdly, the normative question: How far can or should European societies go to accommodate minorities? What are/should be the limits? Is it reasonable, for example, to permit women who wish to do so to wear a veil (niqab) when appearing in court as advocates, defendants or witnesses (see Bakht 2009 for a detailed discussion). As someone from a discipline whose approach is to a considerable degree relativistic I find that an extremely difficult question to answer in general. Clearly there are matters of fundamental value, but such values are not necessarily eternal or immutable or indeed unchanging. On the whole I agree with Isaiah Berlin, cited earlier: ‘freedom from’ is important, but so is ‘freedom to’. Nonetheless, ‘freedom to’ cannot always prevail, as British judges show by using ECHR Article 9(2) to impose limits on Article 9(1), as in *Shambo*.⁶³ The governance of multicultural societies must entail

dated man is no more but such a poor, bare, forked animal as though art’ (Act III, Scene 3, 100 ff.)

⁶³ See Knights 2009 and Sandberg 2009 on the influence of Article 9 on British judicial decisions, and Galembert 2009 for its influence in the French *hijab* debate.

cognisance of the diverse values attached to, or associated with, different cultures and ‘communities’, but it must also entail judgement about what kind of difference, and how much, to recognise, formally and informally, in private and public. The five cases cited earlier (and many others) illustrate this dilemma. In the UK, over the last forty years this has involved negotiating boundaries, often pragmatically: *hijabs* and turbans yes, *jilbabs*, *niqabs*, *burqas* perhaps not; freedom of expression, yes, incitement to religious or racial hatred no; arranged marriages perhaps, but not when the persons concerned are under-age (except perhaps when living in New Hampshire), or when they are in some way incapacitated; forced marriages, by no means, but perhaps not criminalised. Knowing where to draw the line, or accept the line being drawn, is often very difficult, though practices such as forced marriage, where coercion is involved, contravene the basic values of liberal democratic societies, with a strong belief in human rights. No ‘cultural defence’, as it is called, is possible.⁶⁴ The great majority among minority populations accept this, while feeling defensive about the practice, and fearing demonisation (Grillo forthcoming).

Finally, something about ‘culture’. The concept of interlegality is consistent with anti-essentialist accounts of culture predominant in anthropology in which culture is seen less as a body of lore (or law), than as an emergent body of contested principles and practices. But this leads to an anthropological question: When the law attempts to take into account difference, as for example in a ‘cultural defence’, what is the status of that which it is taking into account, and whose account of a culture is the court to accept? Good illustrations of the way different courts, and perhaps different legal cultures, approach such issues are found in the contrasting decisions in *Amselem* and *Shambo*, and further illustrated on *Martinez* and *Ghai*. In *Amselem*, the Canadian Supreme Court (though not the lower court) took the view that Mr. Amselem’s subjective account of his religious obligations should trump evidence that his religion did not always insist on its adherents doing what he thought they should do. In this they followed the US Supreme Court’s view that ‘Courts are not arbiters of scriptural interpretation’. In *Shambo*, however, the British court thought otherwise, and similar arguments (and conclusions) can be found in *Ghai*, both of which drew heavily on

64 Alison Renteln (2009: 199-200) notes: ‘In many instances, individuals commit acts which are considered acceptable in their countries of origin but apparently violate the law of the new country. These matters of criminal law involve the question of whether defendants should be entitled to raise a cultural defense. Sometimes, when these cultural conflicts can be anticipated, legislatures may decide to carve out exemptions from statutes to avoid unnecessary prosecution of individuals whose actions involve no threat of harm to others.’ See also Renteln 2004, Foblets & Renteln (eds.) 2009.

(conflicting) expert evidence. This does, however, pose a problem for contemporary anthropology. How might legal practice take into account culture while avoiding essentialising and stereotyping? This leads me to wonder whether perhaps contemporary anthropological and related theory demands a more fluid and problematic notion of culture than is 'realistic', i.e. consistent with lived experience. Perhaps the association of specific practices or principles (articulated or not) with particular (culturally grounded) ways of living may be less difficult than that theory implies.

In discussing these sorts of question, Roger Ballard (personal communication) has rightly observed:

We are trying to sink our teeth into a staggeringly wide range of intellectual and political issues [and] are still all (usefully and necessarily) at sixes and sevens as to the appropriate analytical and conceptual frameworks with which to address the issues by which we find ourselves confronted

To which it is appropriate to add 'normative' frameworks. There are no easy answers, and all this does is to underline, that what to do about 'otherness', the perceived differences between ethnic minorities and Europe's *indigènes*, is a central – and unresolved – problem of our era.

Appendix 1 Article 9 of the European Convention on Human Rights

9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

9(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

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