

Coping with Super-Diversity in Law: Thoughts on the British Scene

Prakash Shah

From: Rubya Mehdi, Gordon R. Woodman, Erik Reeberg Sand and Hanne Petersen (eds.): *Religion and law in multicultural societies*. Copenhagen: DJØF Publishing, 2008, pp. 63-81.

With a focus on Britain, this paper discusses some theories of legal pluralism in light of Western multicultural societies. It then explores the increasing salience of religion within Britain and how religion has become the subject of recent legislation and court decisions. It is argued that the quest for a space for Muslims within British multiculturalism explains this increasing focus on religion. The paper then goes on to provide a critique of the focus on religion which, it is argued, leads to only a partial recognition of the complexity of legal pluralism.

Coping with Super-Diversity in Law: Thoughts on the British Scene

Prakash Shah

Why ‘super-diversity’?

Having myself used the term ‘diversity in law’ as the subtitle of my recent book (Shah 2005), I later came across the term ‘super-diversity’ in a paper by Steven Vertovec (2006). Vertovec points out that multiculturalist frameworks in Britain have, for the better part of the post-war period, been dominated by policy responses to the large-scale immigration and settlement of African Caribbeans and South Asians. He argues that the social reality of Britain’s metropolises has, however, changed further in recent years with a much more diversified collection of countries of origin of recent migrants and the languages they speak; the highly differentiated socio-economic profile of diaspora populations; and the varied types of legal statuses allocated to them by official laws. I would suggest that this picture can, to some extent, be generalised across western Europe as migrant populations diversify and state responses try, and often fail, to cope with the legal challenges posed. So perhaps, at least in some cases, we need to talk of ‘super-diversity’ as a governing consideration when we think about cultural and legal pluralisation in European societies. It will be no surprise to say that in today’s Europe we have individuals who are attached more or less to a wide variety of cultural communities, and very often of course to more than one such community. Such people interact with dominant norm systems to different degrees producing very complex social and legal realities and, as their communities get bigger, ever more differentiated and ‘hybrid’, the task of the legal analyst gets much more difficult. When Menski (1993) discussed the phenomenon of South Asian laws in Britain back in the early 1990s he already pointed to the perplexing challenges facing the researcher in the field. Taking into account the developments of the sort described by Vertovec in the intervening period, it seems that the task gets no easier. And not only do we experience ‘super-diversity’ on the ground - the range of policy responses to such phenomena have become increasingly more confusing, while the risks of talking at cross-purposes or ‘speaking past each other’ (Edge and Harvey 2001: 9), misunderstandings, ill-feeling, and even terrorism (McRoy 2006), have also got magnified.

Legal pluralism

I write as a legal pluralist, although I am probably better described as someone trying to overcome my own positivist training. But what is legal pluralism? Is it a purely descriptive of a state of affairs or is it indeed a normative position taken by those who might wish to see more or less cultural diversity supported or even encouraged within and among legal systems? I prefer to see it primarily as the former, being indicative of a factual state of affairs whereby different norm systems are coming into interplay with each other with complex results. Methodologically, this requires attention to be focused not only upon how courts and other official agencies navigate and negotiate inter-culturally within this hybridity, but also upon the situation ‘on the ground’, where individuals, as members of their cultural communities, engage with plural norm systems which include their own consciences, their family and communal conventions (as well as those of their neighbours), the state, European and international laws, etc.

This first sense of pluralism involves the recognition, from an analytical viewpoint, that, legally, the situation on the ground is extremely complex.

This complex hybridity or super-diversity in turn raises the question of whether and, if so, how official actors are able to 'see' and cope with the fact that the individuals they are dealing with are not just stereotyped clones of this or that culture, but are active agents engaged daily in legal plurality, negotiating different norm systems psychologically. The focus on whether official actors are able to see the situations of legal pluralism around them is not meant to exclude the possibility that others too are obliged to take notice of them. The emphasis on 'the official' here is meant to underline the differential power relations between individuals and the state, especially when those individuals are drawn from any number of *minority* communities.

It is interesting, however, that as communities diversify locally, we are seeing a diversification of conflicts among communities living next to each other. For some observers, there are limits to the cohesiveness one can expect among such overlapping communities. For instance, Amin (2002) writes:

Mixed neighbourhoods need to be accepted as spatially open, culturally heterogeneous and socially variegated spaces that they are, not imagined as future cohesive or integrated communities. There are limits to how far community cohesion – rooted in common values, a shared sense of place, and local networks of trust – can become the basis of living with difference in such neighbourhoods.

In Southall, west London, South Asians and black people of Caribbean origin are seen to resent Somalis; Birmingham's Lozells area saw clashes between South Asians and blacks in October 2005; everywhere new sojourners and settlers from East Europe are regarded suspiciously and blamed for economic woes and stress on resources. South Asians, who have long been labelled 'Asians' in British public discourse, increasingly differentiate themselves as Hindu, Muslim or Sikh. We are also therefore quite far from the period where the only issue of concern in relation to pluralist co-existence, in the sense of respect for the 'other', appeared to be relations between white and non-white people, although in Britain the pressures resulting from Anglo-conformism, with its 'white' biases, are still the greatest obstacle to pluralist co-existence.

We ought also not to fall into the trap of mistaking legal pluralism as necessarily entailing a moral acceptance of all that social actors feel compelled to do. It doesn't follow that we should suspend moral judgment when we discuss legal pluralism. Rather legal pluralism represents an attempt to get into proper perspective the diversity (or super-diversity) existing among legal agents. As part of this it needs to be acknowledged that legal pluralism also entails conflict (Chiba 1998), while individual legal agency is often extinguished by other social actors. How else do we explain the fact some members of social groups or communities can be killed off, often by close relatives, in the name of protecting the latter's own felt moral imperatives? Such cases, which often occur in Europe, underline the fact that it is not only official actors, but all legal agents who must strive to respect the agency of others to decide what the good life means for them.

Let us take the example, not far removed from a case which ended up in an English criminal court in 2005.¹ A Bangladeshi teenage girl's Iranian boyfriend is killed. What line of inquiry should officials proceed with? Such a case is nowadays likely to be so influenced by the 'honour killing' hypothesis (or stereotype) that it would probably determine a specific line of investigation based on those premises, and might well exclude other, equally reasonable inquiries. But should we be presuming that this was an honour killing, with the male and possibly older female members of the teenage girl's family being the prime suspects? It would probably be much easier to convince a jury, the majority of which is not likely to be drawn from the same ethnic minority group as those accused, that the honour killing paradigm is the one that holds most water. Other questions also loom large. For example, should such homicides be punished to the same degree of severity as others or should a 'cultural defence' (Phillips 2003; Renteln 2004) be admitted? Needless to say, these kinds of questions now regularly face criminal justice agencies in Britain, Scandinavia and Germany, as elsewhere, and it is arguable that those agencies are trying to send a strong message that killings for the sake of honour will not be tolerated in Europe.²

Moving the focus away from the state and towards the social field, in the kind of case just described, we see that some individual(s) may have attempted to frustrate another's legal agency. In the example, it is possible that one or more of the girl's family could have acted so as to frustrate the amorous couple's unwanted liaison, effectively denying their own right to decide about the intimate question of *ishq* (romantic love). Contrary to dominant stereotypes of Asian or Muslim communities of Britain, the conflict between families and wider kinship groups on the one hand, and the pursuit of loving desire on the other is ever present in their folkloric cultures, as in those of other communities. This shows that social and psychological conflicts of this type already exist and are recognised socially, in another case of legal pluralism (Shah 2006: 15-16). How individuals manage such conflicts is, however, not always attractive and leads to all sorts of further conflicts in the social field and with official legal norms.

Conceiving of 'the presence in a social field of more than one legal order' (Griffiths 1986: 1), or of 'multiple normative engagements within contemporary society' (Davies 2005: 100), can also amount to a kind of normative position since it asks us to engage with plurality, which then has implications for policy and praxis. So legal pluralism involves an 'is' as well as an 'ought'. In other words, once we are prepared to concede that law making agency is shared with all sorts of different social actors, indeed with all other individuals, this has got to entail a decision as to how to respond to this situation. This links to legal pluralism in the second sense of a normative position which is more or less desirous of an embracement of plurality or respect for difference. Margaret Davies (2005: 103-104) captures this extremely eloquently:

As legal subjects we do not act merely on the basis of legal prescriptions as they are identified and interpreted in a formal system, but on the basis of intersecting demands of our own ethical beliefs, our location in a social field, prevailing discourses about right and wrong and any number of more practical

¹ *The Guardian*, 4 November 2005, http://www.guardian.co.uk/uk_news/story/0,3604,1634797,00.html and 5 November 2005, <http://www.guardian.co.uk/crime/article/0,2763,1635047,00.html>, last accessed 18 May 2007.

² For a comparative discussion of 'honour crimes', including some approaches taken in Europe, see Welchman and Hossain (2005).

considerations. Judges and lawyers do the same. Law's legitimacy cannot reside solely in a formal concept, but is equally (or more so) the consequence of the ongoing relationships, decisions and actions undertaken in a primarily social environment. This is a descriptive and conceptual argument concerning the inadequacy of the monist concept of law but it is possible to see how it also has normative consequences: if law's legitimacy has a social (ethical, discursive, cultural) and not merely a formal legal basis, then it is a mystification for judges to avoid responsibility for their decisions merely by referring to established doctrine.

Ideologies and practices of 'multiculturalism' have attempted to embrace plurality on the ground in many Western, mainly Anglophone, countries although they remain largely imprisoned within the presuppositions of modernity and its vision of law as the monopoly of political power. Davies (2005: 97-99) has also tuned into such practices, arguing that while liberalism supports value pluralism it does not challenge the singular concept of law which is putatively neutral. Not only does this deny the cultural embeddedness of official law, it also suppresses deeper cultural ideas about the nature of law. In their study on Sikhs in Britain, Singh and Tatla (2006: 144) have dubbed this rather imperfect form of multiculturalism as 'asymmetrical pluralism'. Many spokespersons are, however, now explicitly advocating conformism to what are regarded as non-negotiable dominant norm systems, signalling the end of multiculturalism, however minimalist a concessionary position that may have been on the part of states (Joppke 2004; Grillo 2005). Australia appears to have made a bold indication of this in January 2007 by renaming its Department of Immigration and Multicultural Affairs as the Department of Immigration and Citizenship, significantly dropping the term 'multicultural'.³

I believe that the second aspect of legal pluralism described above is also what is entailed when colleagues and students ask me to bear in mind the negative consequences of 'having' legal pluralism – 'surely you can't just have everyone following their own law'. In fact, while legal pluralism is a fact (Griffiths 1986: 4) and therefore I believe one has very little choice but to accept it analytically, I recognise that using the term can also mean that one has to actively make an effort to approach legal plurality, entailing consequences like acknowledgement of various legal fields, recognising them and conceding to the limits of state power to control other legal fields. As stated above, however, this does not imply an endorsement of *all* positions and the suspension of one's own moral judgment. So I don't see why we should not advocate the protection of a person who is about to be killed by one or more members of her family.⁴

Talking of multiple legal orders existing within the same social field implies that we are questioning the dominant, positivist received vision of law. Griffiths (1986: 4), Santos (2002: 89-90) and Davies (2005: 98) are spot-on in saying respectively that law, as defined by positivists, is essentially a myth, a political claim or a fiction that has taken on the aura of a fact. In other words, with legal pluralism, it is recognised that the state is not the only law making agent. However, Masaji Chiba

³ *The Age* (Melbourne), 21 May 2007, <http://www.theage.com.au/news/NATIONAL/Immigration-dept-denies-assimilating/2007/05/21/1179601291193.html>, accessed 25 May 2007.

⁴ The Indian courts are apparently dealing with cases of mixed marriages by demanding that the state offer them protection when the parties are victimised by their families and/or communally-based political organisations. For a recent case see *The Times of India*, 12 April 2007, accessed <http://timesofindia.indiatimes.com/articleshow/1895094.cms>.

(1998) has observed that European scholars still shy away from using the concept of legal pluralism (while 'legal culture' is still studied), despite the respectable scholarly backing which it has received among some Euro-American thinkers of law (Menski 2006: 82-128). I also detect that scholarly analysis of legal trends in relation to diaspora communities in Europe is actually being undertaken to a greater degree by political-scientists than it is by lawyers, which does not do much to mitigate the emphasis on law as an attribute solely of the official field. Meanwhile, despite a long Euro-American tradition of legal anthropology (Rouland 1994), anthropologists are not widely involved in studying the legal field, despite the strenuous efforts of stalwarts like Roger Ballard (2006).

From a legal pluralist perspective we can also ask whether allocating solely an official provenance to law marginalises the legal agency of social actors. In other words, do individual people and groups within society not also have law-making power? Davies (2005: 107-108) observes that

traditional legal theory has traditionally marginalised types of law, which do not have an institutional appearance comparable to Western law, labelling such laws as defective, primitive and merely cultural practices.

Some scholars of the field of ethnic minority or diaspora legal studies, including the leading British writer, Sebastian Poulter (1986, 1998) have, however, taken the position that it is possible to separate out law from 'customs' or 'traditions'. It is therefore always a great temptation to think that culture and religion are attributes of the social field but that law is an attribute of the official field. As Davies (2005: 101) points out, this is linked to another notable aspect of the dominant view of law which is its treatment as discrete and autonomous of other social fields. However, a truly intercultural position would have us admit that laws are also an attribute of the social, and not just the state field. This makes unsustainable the dichotomous position, whereby culture, customs or religion can be said to belong to the non-state sphere, while law properly belongs to the state.

If we take the presuppositions of Muslim jurisprudence, as an example of a non-Western legal tradition, then it can be seen that the insistence that law is a separable entity is not cross-culturally sustainable. In Muslim jurisprudence state law is recognised under a concept like *qanoon*. But there are additional, crucial concepts such as *sharia*, the 'religious' law, which are indispensable for an understanding of Muslim legal views. Local customs and conventions which may go under terms like *adat*, *urf* or *rivaj* are also critical aspects of the legally plural structure of Muslim societies. In addition, there are a considerable number of techniques and concepts which help to facilitate the dynamic interaction among all these aspects of law (Rosen 1989; Yilmaz 2005). Thus there is no need, from a Muslim legal viewpoint, to separate the realm of law from other aspects of social control. And while it must be conceded that Muslim law has a strong 'religious' foundation, there is plenty of room for 'secular' matters to be dealt with in Muslim law too.

In fact, a close examination of British legal practices shows that there is a constant feeding back and forth between the official and unofficial levels of law. In a recent case, *Khan v Khan*, involving enforcement of the terms of an agreement between two brothers of a Punjabi Muslim family, the unreported version of the judgment by Lady Justice Arden in the Court of Appeal reads (at para. 39) as follows:

As I have said, when interpreting an agreement, whether written or oral, the court must look at the matrix of fact This matrix of fact would no doubt include evidence as to the conduct that the parties regularly adopted. Where the parties are members of a particular community, then in my judgment the court must bear in mind that they may observe different traditions and practices from those of the majority of the population. That must be expected and respected in the jurisdiction that has received the European Convention on Human Rights. One of the fundamental values of the Convention is that of pluralism: see *Kokkinakis v Greece* [1994] 17 EHRR 397. Pluralism is inherent in the values in the Convention. Pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes, and from that value tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups. In turn, the court must pay appropriate regard to these differences.⁵

In this case, we see that the official law can be influenced by what Lady Justice Arden describes as ‘traditions, practices and attitudes’ of a particular community. While not referred to as ‘laws’, it is seen as necessary that these phenomena are nevertheless taken into account. Thus, even though they have not been originated or made by the state, they are sanctioned by it as being legally relevant. This type of case therefore illustrates an official acknowledgment of the capacity for ‘jurisgenesis’ (Davies 2005: 109) from outside the realm of state law. It is therefore too far-fetched to claim that law is a discrete field of official provenance, since there is plenty of evidence around to show that law always has quite fuzzy boundaries and is always interlinked with, and influenced by, related fields.

While there is plenty of evidence that official law remains relatively open to jurisgenesis in other fields, it is also the case that in Europe, and in the British case in particular, we all too frequently see overblown claims of the capacity of the state to override and fully control non-state fields of law, which makes the dicta indicating relative judicial ‘openness’ in a case like *Khan v Khan* seem like more than an exception. As ever, things are far too complex to be susceptible to easy categorisation. In my study of cases on marriage solemnisation (Shah 2007) we see different types of reactions among judges to the recognition of ethnic minority marriages where some or all parts of the officially mandated procedures have not been followed. The closer in form to the English or Scottish concepts of marriage, for example an Orthodox Christian marriage, the more likely it is to be brought within the official fold. In other cases, judges have employed the technique of ‘presumption of marriage’, borrowed from Scottish law, to seal over the fact that official registration procedures were not followed. In two other cases – one a Muslim *nikah* and one a Hindu *vivah* – we find that the judges regard the marriages as following the practices of ‘foreign religions’, and therefore as non-marriages. In this array of cases we therefore see a variation of responses showing tremendous confusion and some evidence of ‘asymmetrical pluralism’. In contrast to Lady Justice Arden’s dictum in the *Khan* case, we find that there are also some ‘jurispathic’ (Davies 2005: 109) tendencies, the attempted killing off of alternative law.

⁵ I am grateful to Lady Justice Arden for giving permission for this extract to be reproduced.

Religion

Now to address a core concern of the lecture series from which this book emerges - the question of religion - *and* law. It is important to note at the outset that the majority of responses to what I am here calling super-diversity and law have come in the form of studies (Bradney 1993; Hamilton 1995; Knights 2006) which discuss religion and its treatment by law, and specifically how the legal systems they deal with approach the question of religion as it arises in various contexts and as it affects those who might be regarded as members of religious groups or communities. The growing academic interest in this particular area shows that there is something more to discuss than there was in previous decades, and it is the large scale establishment of diasporic minorities from outside Europe - and to some extent migration within Europe - which has challenged widespread assumptions of a secularising social order.⁶ This has inevitably had repercussions in the legal field too where, for long, the attitude has been to anticipate a one-way progression to a secular future. A British judge, Munby J (in *Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, para. 62) has put the resulting contradictions thus:

There have been enormous changes in the social and religious life of our country. The fact is that we live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Our society includes men and women from every corner of the globe and of every creed and colour under the sun.

Thus while the self-definition (or judicial definition) of the overall framework of the social order is seen as secular and pluralistic, there is a consciousness that society becoming more secular *as well as* religious in more diverse forms.

Of course, it can be countered that Britain (or at least England) is not really secular in that there is the established Anglican Church with high constitutional functions. Not only that. There is an observable bias towards a certain type of ethno-religious identity considered to be the 'core' of British- and Englishness. As Knights (2006: 2) writes: 'Recent scholarship has challenged the concept of a homogenous identity, but the Anglo-Saxon Protestant myth is ever present.' Bradney (1993) too critiques British legal systems and rules on the basis that frequent rhetorical obeisance to the principle of freedom of religion actually masks the privileging of the historically established religion, in particular the Anglican tradition. He concludes (Bradney 1993: 160-161) by framing the following problematic:

Legal rules are often created and applied without thought of the difficulties they will cause for some faiths. This in turn happens because neither judges nor legislators are acquainted with much of the variety of religious experience. In some cases faith is devalued because its form runs counter to those religious traditions which have historically dominated Great Britain. People are treated as citizens and not as individuals. Patterns of legal thought, in any event, rest uneasily in religious pastures. Judgements in some cases involving conflict between religions and laws suggest mutual incomprehension on both sides.

⁶ Recent news reports indicate that attendance at Catholic Churches has increased as a result of the immigrant presence, notably immigrants from Eastern Europe, who have arrived in significant numbers upon the accession of new states to the EU in May 2004.

In so writing, Bradney curtly brings notice to the fact that legal thinking appears not to be able to find its way when mired in a religious terrain, a reference to the progressive secularisation of official law which appears to have been brought to an abrupt standstill, and even a reversal, by the presence of diasporic minorities. In turn it appears that official law is not well understood by ‘religions’ suggesting miscommunication and distance from state institutions. Bradney also underlines the unevenness in legal coverage for different religious communities in British legal systems, echoing the finding by Singh and Tatla (2006: 144) of ‘asymmetrical pluralism’. Such a phenomenon can be noticed in many European states where, as in Denmark and England, there is an established Church, or where one Christian Church, even though disestablished, has historically held a position of dominance in cultural and political life.

In the case of Britain, Tariq Modood (2005) has been fiercely arguing that the achievements of official multiculturalism have been laudable and ought not to be drawn back now that religion has come about as an important factor in the multicultural equation. As Modood recognises, the religion agenda has been campaigned for by Muslims more than any other ethnic or religious minority group. This has entailed struggles for recognition under the anti-discrimination law (the Race Relations Act 1976 having been interpreted as not protecting Muslims) and the racial hatred laws, more visible recognition within the Census figures, state recognition of Muslim denominational schools, and so on. On the other hand, campaigns for recognition of rules of *sharia* in family matters, having been consistently rejected by the state, have taken a rather lower profile although they have not disappeared from the agenda altogether. This has not excluded, but probably reinforced, the quietistic reconstruction of *angrezi shariat* as a socio-religious legal phenomenon (Pearl and Menski 1998).

Meanwhile the campaigns which Modood points to have resulted in the addition by legislation of religion to grounds for both civil and criminal action in various official legal contexts. Some examples of this development are:

1. The Crime and Disorder Act 1998 created new offences of ‘racially aggravated’ harassment and assault and ‘racially aggravated’ public order offences, allowing courts to add on a period of time to a prison sentence when an offence is found to be racially aggravated. This was extended by the Powers of Criminal Courts (Sentencing) Act 2000, section 153 to cover all offences, not just the listed ones. The Anti-Terrorism, Crime and Security Act 2001, section 39, then added religion to racially aggravated offences, making the offences ‘racially or religiously aggravated’. In this field, therefore, the law has fairly rapidly been extended to cover religious groups, especially in light of some attacks after 11 September 2001 against Muslims or those believed to be so.⁷
2. Council Directive 2000/78/EC was implemented in part by the Employment Equality (Religion or Belief) Regulations 2003 to cover discrimination, victimisation and harassment on grounds of ‘religion or belief’, as part of the anti-discrimination law. This somewhat extended the

⁷ The equivalent, though differently worded Scottish provision is to be found in Section 74 of the Criminal Justice (Scotland) Act 2003.

protection offered by the Race Relations Act 1976, whose reference to ethnic group membership had been interpreted to cover Jews and Sikhs. The Directive and the implementing Regulations were, however, restricted to the field of employment, perhaps indicating a lack of consensus at EU level about the range of areas where religion ought to be a protected category. However, the Equality Act 2006 extends more general legal protection to those discriminated against on the basis of their ‘religion or belief’, which includes a *lack of* religion or belief. Muslims are as covered as atheists would be. All these provisions of the anti-discrimination law allow individual civil actions to be brought.

3. In his chapter in this volume, Werner Menski refers to the Divorce (Religious Marriages) Act 2002, section 1(1) which inserted a new section 10A into the Matrimonial Causes Act 1973. The relevant part of interest here is the reference to ‘any other prescribed religious usages’ according to which a court may decide whether there is the requisite evidence to satisfy itself of a religious divorce before an official one is granted. The term ‘usages’, which can be approximated to customs or conventions, appears in statutory material since medieval times in English law, and in much case law concerning mainly commercial practices. While confined here to the very limited scope of a contested divorce within the statute, the appearance of ‘religious usages’ is nevertheless an interesting indication of its potential to act as a means of official recognition of minority laws in Britain. In fact, several Marriage Acts refer to the usages of the Jews and Quakers, reflecting the fact that marriages celebrated according to the rites of those groups are recognised officially.
4. With the coming into operation of the Human Rights Act 1998, from October 2000, the provisions of the European Convention on Human Rights acquire much more significance in UK domestic law than was previously the case. In particular, its Article 9 (freedom of thought, conscience and religion) in combination with Article 14 (non-discrimination) as well as Article 2 of Protocol 1 (respect for the ‘right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions’) are already generating and are bound to generate many more opportunities for litigation (see Knights 2007 in detail).
5. Since the Rushdie Affair of the late 1980s, it was clear that the blasphemy law of England excluded all but Anglican Christianity. Meanwhile, remedies against so-called hate speech in British law have been provided under the Public Order Acts which, like the Race Relations Act, did not cover religious groups explicitly. After six attempts at closing this lacuna, the government finally managed to obtain parliamentary approval for what is now the Racial and Religious Hatred Act 2006 (see Goodall 2007). This legislation, applicable primarily in England and Wales, adds a new part to the Public Order Act 1986, whereby all the offences centre on the concept of ‘religious hatred’, which is defined in new s. 29A of the 1986 Act as ‘hatred against a group of persons defined by reference to

religious belief or lack of religious belief". However, a number of qualifications introduced to the legislation in its passage through parliament mean that it will be extremely difficult to implement. The relevant words/material/behaviour must be 'threatening', so that language, images and behaviour that are merely abusive or insulting are not covered by these provisions. A person must have intended to stir up religious hatred so that a mere likelihood that this would be the result is not sufficient to convict. The legislation also avoids prosecution of sceptics and evangelists by providing that nothing in the legislation should be read or given effect 'in a way which prohibits or restricts discussion, criticism or other expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.' Lastly, criminal proceedings require the consent of the Attorney-General, which means that the operation of the legislation will be closely monitored by central state authorities. The legislation therefore survived but also became the casualty of the then current debates on freedom of expression versus religious beliefs, most notably encapsulated in the debates around the putting on and subsequent forced removal from a Birmingham theatre of the play *Behzti*, at which some Sikhs took offence and direct action (Grillo 2007).

We can see therefore that in some ways religion has now achieved a level of prominence that it did not have a few decades ago within British legal systems, indicating a sort of paradigm shift in legal concerns regarding ethnic or diasporic minority groups. This level of official recognition has however not been without opposition or criticism, while the climate in which it has been generated, or so far used, is permeated with hostility against Muslims. Indeed, many would argue that the official law has also simultaneously been used to target Muslims and others who are taken to be Muslim. The longer term consequences of this trend will obviously have to be tested over time.

Some scepticism about 'religion'

I now turn briefly to the relationship between how we think about religion and the implications it has for the concept of law for a plural society. I regard the problem as mainly a methodological one, but with deep cultural roots. It is not altogether unexpected that conceiving of the diversity of laws in Europe today we tend to think mainly in terms of religion and its supposed opposite, the secular, which lurks constantly in the background implicitly conditioning our responses. Often we are not conscious enough that there is no agreed concept of secularism (or religion) anyway and that in South Asia 'secular' can mean something quite different to what it means in Europe, explaining how Salman Rushdie can describe himself as a 'secular Muslim'. More often though, as Derrett (1968: 19-20) observed, South Asians are themselves confused about the significance of secularism.

Nevertheless, the supposed split between the secular and religious spheres is patently and widely accepted in Western countries. Within this frame, religion is bound to be allocated a subordinate position, deeply unsatisfactory to Islamic

epistemology (Ramadan 2002: 208-209), and arguably unhelpful for the study of other pluralisms. An illustration of the potential subordination of religion is provided by the case of *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* (No.1) ([2004] 1 WLR 1784) where, in a dispute over a loan, the Court of Appeal faced a choice of law clause stipulating *sharia* as the proper law that must be used to apply in case of dispute. However, the court declined to apply it, partly on the basis that Islamic rules were only religious principles and far too imprecise to be practically applied, while the international rules on the law applicable to contracts envisaged only the rules of a particular state legal system. It is interesting that the Court decided to take this route, even though there was expert evidence on both sides indicating that Islamic rules on banking could be discerned with some level of precision. Again, this case illustrates the potential for 'jurispathic' behaviour.

On the other hand, acceptance of the primacy of religion as an analytical category, as also argued for by many Muslims from an internal Islamic perspective, also carries the risk of what Chetan Bhatt (1997) has referred to as 'epistemic overreach', thus underlining its limited usefulness. Making the same point from a legal pluralist perspective, Menski (2006: 194) writes:

But religion, like law, is itself a cultural construct, a culture-specific interlinked element within context-specific scenarios and cannot simply be treated as superior to everything else. Religious centralism, like legal centralism, is also an unrealistic analytical tool. It is not possible, therefore, to view non-Western laws simply as religious systems, since religion is manifestly an element of legal ontology in the 'West' too, and non-Western 'religious' laws contain many elements that are not primarily religious. Even Muslims, most vociferous proponents today of the view that everything legal is religious, have had to accept a long time ago that this perspective is not unchallenged within their own tradition.

Thus religious centralism turns out to be the homology of the legal centralism of positivists. In this light, religion forms *at best* merely one component in the complex plural legal settings that we are navigating through constantly.

Besides the separation of the secular, state sphere and the religious spheres, another purported separation is that between religion and culture. Again, I really wonder whether it is possible to make such a separation although it ties in with recently developed Muslim rhetoric (but not only Muslim) which seeks to parry attacks and criticism made upon Muslims and Islam by taking the position that the laws and practices complained of by non-Muslims are not 'Islamic' but rather properly belong within the sphere of culture. While we have to recognise this as a culture-specific, defensive argumentation strategy, analytically it is quite weak. Those who have studied something about Muslim societies and laws know that it is impossible to say where 'religion' stops and where 'culture' begins. Further, the intellectual efforts currently being expended, particularly by European Muslims, in arguing that religion should more firmly be brought to bear on culture, so as to reform the latter in a more progressive direction, runs into the same difficulties that official law does when seeking to act on the social realm, with unpredictable results. A perspective that contains more realism is one that relies on the in-built distinction which Islamic law offers between *ibadat* (worship) and *mu'amalat* (social affairs), allowing Muslims to develop adaptive strategies of living as Muslims anywhere in the world while observing core ritual precepts (Ramadan 2002; Rohe 2006).

More fundamentally, however, the positioning of religion as a valid analytical category carries many pitfalls. Several Asianists (Tambiah 1990; Staal 1996; Ballard 1996; Fitzgerald 2000) now argue that religion, generally defined in a Protestant-centred way by privileging belief over ritual, mysticism, etc., is not a cross-culturally useful analytical category. The strong link between religion and belief can be seen in some of the legislation noted above, again betraying Protestant and/or Christian assumptions of religiosity. At most religion conceptualised with belief as a central element can be applied to Abrahamic traditions and, again, it has become a convenient way to talk about Muslims in Europe. However, applying the concept to other traditions, we immediately begin to run into difficulties. Although some members of those other traditions have obligingly responded to Western inquirers by *creating* a category that is equivalent to religion within their own traditions, in fact, such creations fail to match the social and legal reality that they apparently seek to encompass in another illustration of ‘epistemic overreach’. I pursue this problem in more detail elsewhere (Shah 2006).

The consequences of headlining ‘religion’ are therefore multi-edged. The dominance of secularist thinking undermines the claims of individuals and communities that prefer to see themselves as defined by religion. More importantly, using religion means under-privileging and artificially reconstructing non-Abrahamic cultural and legal systems. Why, for example, don’t we think of the Chinese or non-Muslim, non-Christian Africans as religious minorities, but we tend to do so for Muslims? Where do Hindus and small groups like the Jains fit into all of this? Are they really members of ‘religious’ minorities in Europe and, if so, what place does religion really have in their legal pluralistic reconstruction in diaspora? If they are not, then are they living in a state of *jahaliyya*, so they don’t really matter? Current patterns of reconstruction in Britain among Hindus and Sikhs, no doubt under multiple pressures of non-recognition, reveal continuing attempts to emulate those of the Abrahamic traditions by claiming fixity of belief, which in turn results in much further confusion.

Conclusion

In this chapter I have discussed the question of religion and law as an aspect of legal pluralism in a ‘super-diverse’ context. I believe that legal pluralism provides an important conceptual lens through which we can conceptualise contemporary legal trends and events connected with minorities in Britain and the wider Europe. It allows for the respect for individual legal agency of all actors, and has the potential to compel official systems to recognise the super-diverse nature of the socio-legal sphere, and to react to it constructively. In so doing, however, the official sphere must also recognise its own limits. The place of religion in all this is extremely interesting though not susceptible to easy analysis. We can see that the official legal sphere in Britain provides an increasing space for religion, and this is particularly connected to Muslim struggles for recognition within the context of official multiculturalism. It appears that the state has acknowledged that religion must be part of a multicultural equation. However, such struggles are the result of years of campaigning and yet other struggles, for example, for the recognition of rules of *sharia* remain much more muted and are developing ‘underground’. In the end, however, ‘religion’ promises to be only one element in a legally complex super-diverse environment, and will always have to contend for recognition in amongst other elements, whilst taking into account the presence of ‘other others’.

Bibliography

AMIN, A. 2002. Ethnicity and the Multicultural City: Living with Diversity. *Environment and Planning* 43: 959-980.

BALLARD, R. 1996. *Panth Kismet Dharm te Quam*: Continuity and Change in Four Dimensions of Punjabi Religion. In *Globalisation and the Region. Explorations in Punjabi Identity*, P. Singh and S. S. Thandi (eds.), 7-38. Association for Punjabi Studies: Coventry.

BALLARD, R. 2006. Ethnic Diversity and the Delivery of Justice: The Challenge of Plurality. In *Migration, Diasporas and Legal Systems in Europe*, P. Shah and W. F. Menski (eds.), 29-56. Routledge-Cavendish: London.

BHATT, C. 1997. *Liberation and Purity: Race, New Religious Movements and the Ethics of Postmodernity*. UCL Press: London and Bristol, Pennsylvania.

BRADNEY, A. 1993. *Religions, Rights and Laws*. Leicester University Press: Leicester et al.

CHIBA, M. 1998. Other phases of legal pluralism in the contemporary world. *Ratio Juris* 11(3): 228-245.

DAVIES, M. 2005. The Ethos of Pluralism. *Sydney Law Review* 27(1): 87-112.

DERRETT, J. D. M. 1968 [1999]. *Religion, Law and the State in India*. Oxford University Press; Dehli et al.

EDGE, P. and HARVEY, G. (eds.) 2000. *Law and Religion in Contemporary Society: Communities, Individualism and the State*. Ashgate: Aldershot.

FITZGERALD, T. 2000. *The Ideology of Religious Studies*. Oxford University Press: New York and Oxford.

GOODALL, K. 2007. Incitement to Religious Hatred: All Talk and no Substance? *Modern Law Review* 70(1): 89-113.

GRIFFITHS, J. 1986. What is Legal Pluralism? *Journal of Legal Pluralism and Unofficial Law* 24: 1-56.

GRILLO, R. 2005. Backlash against Diversity? Identity and Cultural Politics in European Cities. Centre on Migration, Policy and Society, Working Paper No. 14, University of Oxford: Oxford. <http://www.compas.ox.ac.uk/publications/>

GRILLO, R. 2007. Artistic Licence, Free Speech and Religious Sensibilities in a Multicultural Society. In *Law and Ethnic Plurality: Socio-Legal Perspectives*, P. Shah (ed.). Martinus Nijhoff: Leiden.

- HAMILTON, C. 1995. *Family, Law and Religion*. Sweet & Maxwell: London.
- JOPPKE, C. 2004. The Retreat of Multiculturalism in the Liberal State: Theory and Policy'. *British Journal of Sociology* 55(2): 237-257.
- KNIGHTS, S. 2007. *Freedom of Religion, Minorities and the Law*. Oxford University Press: Oxford.
- MENSKI, W. F. 1993. Asian Laws in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain? In *Ethnicity, Identity, Migration: The South Asian Context*, M. Israel and N. K. Wagle (eds.), 238-268. Centre for South Asian Studies, University of Toronto Toronto.
- MENSKI, W. F. 2006. *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. 2nd ed. Cambridge University Press: Cambridge.
- McROY, A. 2006. *From Rushdie to 7/7/: The Radicalisation of Islam in Britain*. The Social Affairs Unit: London.
- MODOOD, T. 2005. *Multicultural Politics: Racism, Ethnicity and Muslims in Britain*. Edinburgh University Press: Edinburgh.
- PEARL, D. and W. F. MENSKI 1998. *Muslim Family Law*. Sweet and Maxwell: London.
- PHILLIPS, A. 2003. When Culture Means Gender: Issues of Cultural Defence in the English Courts. *Modern Law Review* 66(4): 511-531.
- POULTER, S. 1986. *English Law and Ethnic Minority Customs*. Butterworths: London et al.
- POULTER, S. 1998. *Ethnicity, Law and Human Rights*. Clarendon: Oxford.
- RAMADAN, T. 2002. Europeanisation of Islam or Islamisation of Europe? In *Islam, Europe's Second Religion: The New Social, Cultural and Political Landscape*, S. T. Hunter (ed.), 207-218. Praeger: Westport, Connecticut and London.
- RENTELN, A. D. 2004. *The Cultural Defence*. Oxford University Press: New York.
- ROHE, M. 2006. The Migration and Settlement of Muslims: The Challenges for European Legal Systems. In *Migration, Diasporas and Legal Systems in Europe*, P. Shah and W. F. Menski (eds.), 57-72. Routledge-Cavendish: London.
- ROSEN, L. 1989. *The Anthropology of Justice: Law as Culture in Islamic Society*. Cambridge University Press: Cambridge.
- ROULAND, N. 1994. *Legal Anthropology*. Athlone Press: London.
- SANTOS, B. de S. 2002. *Toward a New Legal Common Sense*. Butterworths: London.

SHAH, P. 2005. *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*. Glass House: London.

SHAH, P. 2006. Thinking Beyond Religion: Legal Pluralism in Britain's South Asian Diaspora. *The Australian Journal of Asian Law* 8(3): 1-25.

SHAH, P. 2007. Rituals of Recognition: Ethnic Minority Marriages in British Legal Systems. In *Law and Ethnic Plurality: Socio-legal Perspectives*. P. Shah (ed.). Martinus Nijhoff: Leiden.

SINGH, G. and TATLA, D. 2006. *Sikhs in Britain: The Making of a Community*. Zed Books: London.

STAAL, F. 1996. *Ritual and Mantras: Rules Without Meaning*. Motilal Banarsidass Publishers: Delhi.

TAMBIAH, S. J. 1990. *Magic, Science, Religion and the Scope of Rationality*. Cambridge University Press: Cambridge.

VERTOVEC, S. 2006. *The Emergence of Super-Diversity in Britain*. Centre on Migration, Policy and Society, Working Paper No. 25, University of Oxford: Oxford. <http://www.compas.ox.ac.uk/publications/>

WELCHMAN, L and HOSSAIN, S. (eds.) 2005. *Crimes, Paradigms, and Violence Against Women*. Zed: London.

YILMAZ, I. 2005. *Muslim Laws, Politics and Society in Modern Nation-States*. Ashgate: Aldershot.