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The Challenges of Justice in Diverse Societies

Constitutionalism and Pluralism

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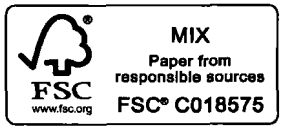

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For Arya, who grew along with this book

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Chapter 1
Introduction

Ali v Ali: The Subtlety of the Challenges of Justice

The unreported case of *Ali v Ali* is an example of the subtle nature of the challenges of justice in diverse societies, which form the focal point of this book.[1] Mr and Mrs Ali were Bangladeshis living in London, who both had good careers that afforded them the means to live a comfortable life. As part of the arrangements of their marriage, a dower, or *mahr*, was negotiated. Menski states that this bargaining process 'was not over some kind of sale of the woman, but reflects a contest over the relative status and financial standing in society of all participants to these negotiations' (2002: 48). Menski also explains the meaning and purpose of *mahr* (2002: 48):[2]

> The main point of the Muslim *mahr* clearly is to provide the wife some financial security after divorce or the husband's death. In the classical Muslim law, there is an understanding that *mahr* should be divided into 'prompt' and 'deferred' dower, the first to be paid in connection with the consummation of the marriage, the deferred part being normally due on divorce or death. ... In either case, this is an important financial security for the wife.

The final amount settled upon, and included in Mr and Mrs Ali's *kabhinama* (marriage contract) was £30,001. Menski notes that the couple had two weddings: a civil wedding recognised by English law and a Muslim marriage.[3]

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1 Menski (2002: 47–52) provides the factual background, and analysis of this case. His role as expert witness in this case means that he provides a report of this case that is readily amenable to socio-legal analysis. Although Menski notes that '[s]uch cases, albeit important for legal practice, remain systematically unreported' (2003: n 7), I wonder whether an official report of this case would reveal the dimensions that Menski's case comment and analysis makes visible. It follows that material facts may be excluded in those cases that do reach the official reports, which impacts on their availability for socio-legal scholarship.

2 For further details of *mahr*, Menski refers to Pearl and Menski (1998). See, in particular, Pearl and Menski (1998: 178–81, 190–201, 232–4).

3 This double marriage is a form that many other British South Asians also follow, and Menski has termed these evolving hybrid legal systems *angrezi shariat* (Pearl and Menski 1998). It should be noted that the legal hybridity that Menski has observed goes deeper than double marriages. The idea of hybrid legal systems is considered in greater detail in Chapters 2 and 5.

Mr and Mrs Ali's marriage broke down after a few months, and Mr Ali sought a divorce in the English courts. Mrs Ali cross-petitioned the court, asking them to refuse to allow the divorce unless Mr Ali paid her any financial entitlements she was owed, including the *mahr*. Menski (2002: 48–9) explains that Mrs Ali would have had no financial entitlements under English law, given that this was such a short marriage and that there were no children. Mr Ali sought to claim that Mrs Ali was not entitled to the *mahr*, arguing 'in essence that in England, only English law should be applied' and that *mahr* was a matter of culture, not law (2002: 49).

Called as an expert on Muslim law in this case, Menski clarified that there were two marriages and two divorces: the proceedings before the English court and a Muslim marriage and *talaq*. This hybrid scenario meant that there were also 'two sets of financial arrangements' that the judge needed to consider (2002: 49), namely those under English law and Muslim law. Menski went on to explain the complexities of diversity in contemporary Britain to the judge (2002: 50):

> Not surprisingly, the judge was a little confused. I insisted that if he did not consider the complete multicultural scenario, he would not only be doing injustice to the wife, but he would also damage the standing of English law, because he would drive Mrs. Ali straight into the office of one of Britain's many Shariat Councils, virtual Muslim courts, which have an unofficial internal hierarchy.

Troubled by this description of unofficial legal systems in Britain, the judge awarded Mrs Ali £30,000. Menski analyses this judgment as something more than a judge equitably resolving the dispute before him (2002: 51): '[b]y giving her £1 less, he applied not Muslim law, but asserted the application of English law', and therefore 'protected English law from the unrelenting pressure to accept personal laws, such as that of the Muslims, as part of the new British legal framework'.

I believe the challenges of justice in diverse communities lie in the significance of this missing one pound. It would be simple to dismiss such a small amount of money as meaningless; Mrs Ali got the money that was contractually owed to her, and would surely not complain about the missing one pound, so what does this insignificant sum of money matter? My arguments in this book aim to provide fresh perspectives on justice and law that are able to explain the significance of this missing one pound. I argue that fresh perspectives are necessary so that it is possible to understand the challenges of justice in diverse societies more clearly. In becoming clearer as to the significance of the missing pound, my belief is that this will lead to new, and more just, legal responses to diversity.

The Importance of Contexts

Habermas (1978) expanded the ambit of critical social theory in *Knowledge and Human Interests* by separating it from the Frankfurt School, with its distinctly Marxist framework. He took a broad view of critical theory as a reflexive process

that has the ultimate aim of emancipation from domination. It is this emancipatory interest that provides an ideal platform for this book. Moreover, this project follows Iris Marion Young's understanding of critical theory. Young (2000: 10) describes critical theory as a 'socially and historically situated normative analysis and argument' and writes that (1990: 5): 'normative reflection must begin from historically specific circumstances because there is nothing but what is'. This book pursues this method of inquiry by constructing a normative framework that creates spaces in which this reflection upon social and historical realities can take place. This socially and historically contextualised reflexive process has the goal of facilitating new legal responses to diversity. I do not aim to construct a universal and decontextualised theory of justice that proposes ideals, which, by their very nature as ideals, imagine a better society. Instead, I seek to contribute to an ongoing dialogue which endeavours better to understand, and thereby better respond to the challenges of justice in the context of diversity. By making space for reflection upon the social and historical realities of the experiences of diversity, I hope to achieve the emancipatory effect that Habermas identifies as crucial to critical theory. The first, and vital step, towards emancipation is to craft sound normative foundations that can ground these reflexive processes; I hope to take this first step in this book.

Crucial to Young's explanation (1990: 8) of the role of critical theory is that it is not an approach that 'must be accepted or rejected in its entirety. Each [theory] provides useful tools for the analyses and arguments I ... make'. There are three interdependent consequences to adopting this methodological stance here. First, by taking up the premises of a particular theoretical approach, it does not follow that I accept the tenets of all theorists that adopt this approach. Indeed, some of the ideas expressed in this project may well conflict with those of other critical theorists. Secondly, in adopting this methodological approach, it does not follow that there is an obligation to confine myself to literature which also adopts this particular theoretical approach. Indeed, it is wholly legitimate to use a variety of literature which touches upon the same themes as this study, regardless of the theoretical and methodological approach that is adopted. For example, whilst Kymlicka's *Theory of Multicultural Citizenship* (1995) may not use the method of critical theorists, it nevertheless provides useful insights and norms which inform this project.

Finally, it also follows that adopting the premises of critical theory does not necessarily mean I align myself on either side of purportedly mutually exclusive discourses. This study does not reject theories which critique critical theory, such as Dworkin's; at the same time, it does reject academic divisions, such as the barrier between sociology and anthropology. It rejects particularly the idea of sociology as the study of the West, and anthropology as the study of the Rest, even if the Rest are studied in their new Western context.[4]

4 I am grateful to Arif Jamal for succinctly explaining the difference between sociology and anthropology this way, and borrow the phrase from him.

Moreover, the aim of this book is not to contribute to hardening such divisions, since they are antithetical to the progress of discourses in these relatively new fields of inquiry. Dichotomies such as these tend towards dictating one's position on a spectrum of views, and can therefore be counterproductive to the integrity of scholarship. Kymlicka (2001: 18–19) has written of the liberal/communitarian dichotomy in the context of minority rights discourses, which unfolds as individualists versus collectivists. Liberals would concern themselves with prioritising the individual prior to the community, and communitarians would emphasise that individuals are embedded in their social relationships and roles, and that individuals are therefore a product of community. One's position on this political spectrum would then dictate whether one understood minority rights as just or unjust. However, this characterisation distorts the debate, since, as Kymlicka persuasively argues (1989, 1995, 2001), liberalism is not inherently adverse to claims that minority rights are just. Kymlicka's success in shattering the illusion that liberalism is intrinsically antithetical to minority rights serves as a reminder that it is not necessary to be confined by academic battle lines that have already been drawn, or by ideological divides. By adopting the method of critical theory, it does not follow that this book must fit within a preconceived notion of how the challenges of justice in contemporary societies should be viewed.

Which Diverse Societies?

I could quite simply answer the question of which diverse societies that this book focuses upon by replying, 'all of them'. Much time could be spent on defining who comes within certain groups, and agonising over labels and terminology.[5] Often

5 Much British literature in this field employs the term 'ethnic minorities' to describe its immigrant groups and their descendents. For an early example see Krausz (1971). Whilst there is considerable debate about how appropriate the numerical inferences of this term are, I would reject the term on the basis of the reductionist tendency of 'ethnicity' (which I consider in greater detail in Chapter 7), which makes this term unhelpful in locating the challenges of diversity in diverse societies. Tonkin, McDonald and Chapman (1989: 17) eloquently illustrate this reductionist tendency when they explain that majorities and dominant peoples are no less 'ethnic' than minorities. Other countries prefer the terminology 'visible minorities' to refer to people of colour. I find this equally as unhelpful as it is merely a linguistic turn: women are not considered to be visible minorities, although many women are quite visibly female; many people of colour are not as easily identifiable as the idea of visible difference suggests. For a critique of the use of 'minorities' and 'majorities' see Parekh (1990a: 60–63), for emphasis on the importance of numerical influence see Fredman (1997: 595–600), and for explication of the concept of 'ideological minorities' see Asad (2003: 75). Asad's 'ideological minorities' implicitly draws upon Foucault's thesis (1982) that actions occur within power relationships; by focusing on issues of power, Asad illustrates that the numerical nature of these minority groups is an accidental and tangential feature of their composition, although there is no *need* to abandon this numerical

a simple division is made between immigrant groups and Aboriginal peoples. I do not find this division helpful for two reasons. First, I question how easy it is to assign different analysis to these two separate groups when both contain intense internal plurality. Secondly, I do not find the tendency to categorise immigrants as perpetual immigrants helpful, when there are many instances of these groups including people who have not migrated anywhere and were born and bred in countries that are considered as their 'hosts'.

My concern in this book is non-dominant groups and individuals who are excluded from civil society. I am refraining from elaborating upon why this exclusion is my focus here, but do so in Chapter 2. Furthermore, I choose not to draw the boundaries around these groups and individuals any tighter for a number of reasons. First, when individuals and groups are excluded from civil society, it is rarely on account of one easily identifiable characteristic. Diversity and plurality are complex factors which we often make judgments about, and act upon, in equally complex and subtle ways. If I am excluded from civil society, I am first likely to question the fact that I can be sure I have suffered an injustice. If I decide that I have suffered such an injustice, I am even less likely to be certain of the grounds of my exclusion: is it because I am a different colour; or is it because of my gender; or is it because of my class; or is it because of my religion, or lack thereof; or is it because I do not like modern art? The reality is that the list of characteristics is endless, and an answer is not likely to be forthcoming. It is more likely that my exclusion is based on a complex variety of factors, as our identities are intrinsically intersectional; it is almost impossible to draw neat boundaries and create satisfactory groups this way. However, I can be sure that there is something about me, or my behaviour, that is deemed unsuitable or unacceptable. Since my arguments in this book do not turn on the nature of this unacceptability, I see no need to become involved in constructing inherently unsatisfactory boundaries.

Secondly, the ways in which we understand and theorise diversity are continually evolving. Vertovec (2007) writes about the multi-dimensional nature of diversity and argues that diversity is a complex phenomenon that occurs along many different intersecting axes. His shorthand term to encapsulate this complexity is 'super-diversity'. He also challenges theorists to develop new ways of understanding diversity so that we can begin to unpick these complexities. Although I develop a conceptual tool in this book to help ease the discomfort that is caused by writing about diversity in very abstract and general terms, my aim here, and with this conceptual tool, is not to undertake an empirical analysis of the complex pluralities that we find in today's diverse societies. Rather, my aim is to develop a tool that can expand and adapt as our understandings of diversity evolve.

(and accurate) description in order to convey the importance of this power relationship. 'Diasporas' is also a contested term (Kalra, Kahlon and Hutnyk 2005). Eriksen states (2002: 153) that a 'diasporic identity implies an emphasis on conservation and re-creation of the ancestral culture'.

Finally, it appears as if plurality around the globe is increasing. As globalisation, in its many and varied forms, continues to gather pace, we are becoming ever more aware of differences. I suspect that this awareness stems both from a better understanding of pre-existing diversities, as well as the development of new and interesting differences. Regardless of the reasons behind this seemingly relentless turn in plurality that is our modern condition, it simply becomes increasingly unsatisfactory to draw hard and fast boundaries around the condition of being different.

It is for these reasons that I leave the concept somewhat up in the air and, for the moment at least, choose to focus on the fact that individuals and groups that suffer injustices are my concern in this book. However, I readily admit that my reference to empirical examples of the social realities of diversity draw from traditional categories of diversity. The reason behind this is simply due to the availability of socio-legal literature in the field. I further readily admit that many of these examples focus upon British South Asians in particular. Again this is due to the fact that far more research has been done in this particular area than others. It is interesting to note that emerging literature which focuses upon South Asians diasporas in other countries tends also to reference the same literature.[6] Where it has been viable to draw upon broader examples, I have taken the opportunity to do so.

Scheme of the Book

This book is organised into four parts. Part I (Chapters 2 and 3) sets out a global normative framework that informs my arguments that new legal responses to diversity are necessary, as well as forming part of my fresh perspectives on justice and law. Part II (Chapters 4 and 5) draws upon the conclusions from Part I and locates the role of law in its responses to diversity. In Part III (Chapters 6, 7, 8 and 9) I supplement my global normative framework with a local normative framework. This latter framework is crafted with the aim of making room for the expression of the specificities of diversity. My normative framework, with its global and local dimensions, presents fresh perspectives on justice and law. These fresh perspectives ground my proposal for a new vista of constitutional pluralism, which I set out in Part IV (Chapters 10 and 11). This vista is intended to lead to new legal responses to diversity.

I anchor my claims in this book by outlining a diversity-conscious form of justice in Chapter 2. My aim in introducing justice at this early stage is to place it at the heart of my consideration of the implications of diversity for law. Since the injustices suffered by diverse groups and individuals prompt the inquiries in this book, it follows that justice is the primary motivating force driving the search for better, or more just, ways for law to shoulder its burden in responding to diversity.

6 See, for example, Zaman (2008) and Fournier (2001–2002, 2006).

I argue that when the citizenry of a nation-state significantly changes shape, so too must our conception of justice. Therefore, I outline a diversity-conscious form of justice that reflects these changes. Whilst my conception of justice is heavily associated with law, it is not exclusively tied to it, and also has social and political affiliations. My focus in this book, however, is to consider the consequences of a diversity-sensitive form of justice in legal domains. The form of justice that I outline represents the idea of justice that I reference throughout this study.

In Chapter 3 I build upon this diversity-conscious form of justice by arguing that pluralism also has significant implications for the ways that nation-states are theorised. In this chapter, therefore, I consider an extra-legal dimension of my fresh perspective on justice. I claim that the changes in the way that nation-states are theorised must be explicitly stated, as they orient the way that we engage with diversity. I highlight three cardinal principles that impact my approach to diversity, and which are broad enough to be applicable to any study of diversity and law. The idea of a diversity-conscious form of justice, together with these three cardinal principles, make up the global dimension of my fresh perspectives on justice and law.

I begin my case for new legal responses to diversity in Chapter 4. I provide a social, historical and political account of the evolution of Britain's anti-discrimination legislation, and argue that its underlying narrative limits its capacity to meet the challenges of justice in the context of British diversity. I then illustrate that recent amendments to this legislation, both actual and proposed, are not equipped to dislodge this limiting narrative. I go on to consider Canada's constitutional test for Aboriginal rights at common law and argue that it displays further limitations in our current legal responses to diversity.

In Chapter 5 I complete my case for new legal responses by demonstrating that human rights do not fully meet the challenges of justice in diverse societies. I do this by emphasising the tension between the universal ambitions of human rights and the local and specific nature of the demands of justice in diverse societies. I then go on further to support my claim by critically analysing Sebastian Poulter's (1998) use of human rights as a framework for the legal accommodation of British Afro-Caribbean and South Asian diversity, and demonstrate the difficulties of his approach.

Having made a case for new legal responses, I begin to complete my fresh perspectives on justice and law in Chapter 6. I start constructing a local normative framework that will ground my own proposal for a new vision of constitutional pluralism. I argue that official law functions in a manner where it acts as a type of normative shorthand, but that these underlying norms need to be restated and modified in order to take into account the changes effected by diversity. Therefore, I set out a triad of norms that aims to rework this underlying normative framework, and respond to the specific localities of diversity by making space for the expression of the local realities of diversity.

I continue setting up this local normative framework in Chapter 7, where I illustrate that the current analytical tools used to understand diversity do not

capture the realities of contemporary diversity. I do this by, first, identifying the blurred boundaries between ethnicity, culture, religion and race, and then demonstrate that they exacerbate a tendency to singularise identities, so that we categorise ourselves according to only one of these concepts. I then consider identity as a substitute for these analytical tools, and conclude that it also has its drawbacks in the form of its determinist tendency. My analysis in this chapter demonstrates that any fresh perspectives on justice and law must go beyond the limitations that I identify in Part II.

The claims of Chapter 7 culminate, in Chapter 8, in my proposal for a new analytical tool, that I term 'identity markers'. I flesh out this proposal by considering what I mean by identity markers, and how this tool overcomes the difficulties of the current analytical tools in use. My goal is to propose an analytical tool that permits a more accurate, and therefore more just, understanding of diversity.

I complete my arguments for identity markers by illustrating their relations to law in Chapter 9. This requires a plural understanding of law, and I use Masaji Chiba's model of law to demonstrate these relations. Chiba's model of law also provides occasion to demonstrate, through consideration of traditional constitutional theories, that the plurality of law is not antithetical to dominant jurisprudential theories. Given that the focus of this study is the role of law in achieving a diversity-conscious form of justice, I then lead into an account of the conceptualisation of law that grounds my proposal for a new vista of constitutional pluralism. Here, I précis Werner Menski's (2006 and 2009) global working definition of law and flying kites of law, and present this as a model of law that fits the realities of diversity. This pluralist account of law concludes my local normative framework, and my fresh perspectives on justice and law.

In Chapter 10 I propose a new vision of constitutional pluralism. I argue that constitutional pluralistic discourses, that are grounded by my normative framework, have the potential to lead to new, and more just, legal responses to diversity. I first briefly explain what I mean by constitutional pluralist discourses, and situate this proposal with a concise idea of what the British Constitution entails. I focus on the British Constitution because its unwritten nature provides a wealth of academic analysis that serves my purposes well. I then justify my proposal by illustrating why this new vista should entail constitutional pluralist discourses, as opposed to legally pluralist discourses. Moreover, I further elaborate upon the nature of these constitutional pluralist discourses by assessing them against Neil Walker's criteria for constitutional renewal.

I conclude my new vista in Chapter 11 by considering what a constitutional pluralist discourse might look like. I do this by returning to consider *Ali v Ali*, and argue that my proposals for fresh perspectives on justice and law, and my new vista of constitutional pluralism, provide a clearer picture of the significance of the missing one pound in this case. I then discuss, through a constitutional pluralist lens, the difficult issue of prohibitions on religious forms of dress in public spaces. This enables me to demonstrate further that this vista provides the potential for new legal responses to diversity. This application of my proposal for constitutional

pluralist discourses allows me to highlight its relations with my normative framework, and thereby tie together the arguments and claims in this book. I end this project by considering whether the new vista I propose is nothing short of a form of relativism. I use this as an example further to highlight why I propose discourses, rather than new legal responses or a new constitutional blueprint.

This book attempts to address the question of how we can develop our legal responses to diversity without, it must be admitted, actually providing any new legal responses. Whilst it may feel wholly unsatisfactory to some that there are no answers to the tricky and controversial issues raised by diversity in the 21st century, this is intentional. The arguments and claims in this book respond to a need to ensure that our normative foundations are sound before we provide answers that solve the problems of diversity. The urgency with which challenges related to diversity demand the attention of legal professionals, policy-makers, scholars, think tanks and others within and outside of legal circles, often lead us to skip this vital first step. This is detrimental to how we manage the intense pluralities that span our globe, and merely compounds the challenges that we face. Although I believe there are sound and good reasons to adopt the normative framework that I argue for in this book, my primary intention in this study is to demonstrate to all those involved with, or interested in the challenges of justice in diverse societies, that this first step of becoming clear about our normative foundations cannot be overlooked in our rush to find answers. Once we are clearer as to the questions raised by diversity, we stand a far better chance that our answers will achieve the justice that we so desperately seek in diverse societies.