CULTURAL DIVERSITY AND LAW

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Legal Practice and Cultural Diversity

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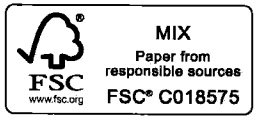

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André J. Hoekema holds a chair in legal pluralism at the Law Faculty, University of Amsterdam. His research has concerned the rights of indigenous peoples and the conditions under which local legal institutions and frames of interpretation are officially recognized, and processes of interlegality in Europe, studying cases brought before Dutch judges and other legal or semi-legal professionals by parties claiming allegiance to through adherence to a distinct religion or community different from the Dutch mainstream. Publications include 'A new beginning of law among indigenous peoples', in *The Law's Beginning*, edited by F.J.M. Feldbrugge

(Martinus Nijhoff 2003); *Multicultural Interlegality*, special issue of the *Journal of Legal Pluralism and Unofficial Law*, 2005; 'Un nuevo futuro codificado para la tenencia local de los recursos naturales?', in *Agua y Derecho* (Rutgerd Boelens et al eds, Instituto de Estudios Peruanos 2006).

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Werner Menski is Professor of South Asian Laws in the School of Law at the School of Oriental and African Studies, University of London. He writes mainly on South Asian laws, both traditional and modern, comparative legal theory and ethnic minority legal issues. His recent publications include *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (second edition, Cambridge University Press 2006). He edits *South Asia Research* (New Delhi, Sage) and maintains an active teaching programme at undergraduate, postgraduate and PhD level that connects legal issues concerning pluralism and transnational reconstructions in a number of jurisdictions.

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Russell Sandberg is a lecturer in law at Cardiff University and an associate of the Centre for Law and Religion at Cardiff. He has written widely on the interactions between law and religion in England and Wales and has published in the *Law Quarterly Review*, *Cambridge Law Journal*, *Public Law*, *Modern Law Review* and the *Ecclesiastical Law Journal*. He is co-editor, with Professor Norman Doe, of *Law and Religion: New Horizons* (Peeters 2009).

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Gordon R. Woodman is Emeritus Professor of Comparative Law at the University of Birmingham, UK. He has studied and written about customary laws and legal pluralism in many countries, and especially issues concerning the recognition of customary laws by the laws of various states. He is editor-in-chief of the *Journal of Legal Pluralism*. Publications include *African Law and Legal Theory* (Dartmouth Publishing Co. 1995, ed. with A.O. Obilade); *Local Land Law and Globalization: A Comparative Study of Peri-urban Areas in Benin, Ghana and Tanzania* (LIT Verlag 2004, with Ulrike Wanitzek and Harald Sippel); and *Law and Religion in Multicultural Societies* (DJØF Publishing 2008, ed. with Rubya Mehdi, Hanne Petersen and Erik Sand).

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Chapter 1
Legal Practice and Cultural Diversity: Introduction

Roger Ballard, Alessandro Ferrari, Ralph Grillo, André J. Hoekema, Marcel Maussen and Prakash Shah

> We have to think a little harder about the role and rule of law in a plural society of overlapping identities
>
> (Dr Rowan Williams, Archbishop of Canterbury, 2008)

This collection brings together papers by anthropologists, political scientists and legal specialists who consider how contemporary cultural and religious diversity challenges legal practice, how legal practice responds to that challenge and how practice is changing in the encounter with the cultural diversity occasioned by large-scale, post-war immigration. Questions about cultural difference, and whether, or to what extent, such difference should be recognized by legal systems, have provoked much discussion among lawyers and others, and raise issues highly pertinent to current debates across the globe about integration, multiculturalism and the governance of diversity. They are also keenly contested. Well-documented controversies such as those over the demands of Sikhs to wear turbans or Muslim schoolgirls to wear the Islamic headscarf (*hijab*), over legislation to outlaw racial or religious hate-speech, or arranged and forced marriages, or about whether or not legal systems should acknowledge claims by Muslims to be able to live their lives according to shari'a principles, illustrate how contentious is the relationship between the law and diversity.

Building on these recent debates, the present book seeks to contribute to theoretical and comparative accounts of the interaction of legal practice and cultural diversity by observing actual practices and interpretations which occur in jurisprudence and in public discussion, and examining how the wider environment shapes legal processes and is in turn shaped by them. The chapters are based on papers presented to a conference held in London in July 2007, sponsored by IMISCOE (the EU-funded Network of Excellence for International Migration, Integration and Social Cohesion), and hosted by the Law School, Queen Mary,

University of London.[1] The idea for the conference emerged from an IMISCOE working group whose terms of reference included linguistic, cultural and religious diversity and related policies. Previous initiatives on the governance of Islam in Europe, and on immigrant/minority ethnic families as objects of reflection and sites of contestation among majority and minority populations in Europe, had raised important questions about how cultural diversification in Europe is being accommodated (or not) within various institutional systems, not least the law. This suggested the value of bringing together legal practitioners and academics from various disciplines to investigate how legal practice copes with the challenge of cultural difference.

In addressing such questions, those who contributed papers to the conference, and subsequently the present volume, have emphasized the value of working through case studies of events and situations, paying close attention to what actually happens in the application of the law, at the same time recognizing the need to locate particular cases in their widest context (for example, legal frameworks and their underlying historical philosophies) and to take into account international or transnational influences on the way in which actors, legal and other, respond. The issues are complex, and our aim is to document and explore that complexity and its implications from the perspective of the social sciences, rather than intervene on behalf of any particular normative stance. Nevertheless several contributors inevitably engage with the question whether, and if so under what conditions, legal systems might or should acknowledge cultural and religious difference.

Turning to the individual papers, although the book deals mainly with Western Europe, specifically Britain, France, Germany and the Netherlands, there are also accounts of experience in North America which provide a valuable comparative perspective. Indeed, it can be argued that we cannot ignore non-European models of governing diversity, including those in India and sub-Saharan Africa. The opening chapter by Werner Menski in fact places transatlantic debates in this wider context. South Asian experience is important partly because it may offer some lessons for Europe, but also because – through transnational migration – many individuals and families live multi-sited lives, and cross-national legal pluralism frames their everyday experience. Menski argues that India's long-standing multiculturalism has consistently cultivated a plurality-conscious legal culture. Respect for diversity and difference was reflected in pre-colonial legal structures, and deep-rooted awareness of internal plurality continues to assert itself in the contemporary context of 'social welfare', affirmative action or under headings such as 'secularism', which flourishes in its Indian manifestations. Despite uniformizing trends and globalizing pressures, Indian law maintains a plurality-conscious orientation with deep respect for cultural and religious diversity and thus for maintenance of a personal law system. Indian sensitivity for diversity and

1 We thank IMISCOE, the QMUL Law School and the British Academy who each provided generous financial support for the conference. For IMISCOE see< http://www.imiscoe.org/>.

specifically for the agency of the individual in a pluralistic setting offers a useful model for others.

The chapters which follow focus on Europe or North America, and deal with both the challenges presented to legal systems by populations of migrant origin with cultural and religious traditions different from those of the receiving societies, and with the question of accommodation. Veit Bader offers a wide-ranging and thought-provoking discussion of recent debates about how legal systems might approach the question of difference. Taking the controversy about shari'a in Europe and Canada as his starting point, he shows how that controversy is characterized by the interested construction and reproduction of highly aggregated stereotypes, myths, mutual misunderstandings and dramatized fears or panics, and it is important to define what is *not* at issue. Bader strives to transcend current thinking by seeking productive solutions in the tradition of institutional pluralism, legal pluralism in particular, and argues for a stance which avoids the imposition of a hegemonic moral order on the one hand, and moral and legal relativism, on the other. Bader tests his argument through an exploration of the debate in Ontario on the application of Muslim personal law in arbitrations sparked by a proposal to establish a Darul-Qada (Muslim Arbitration Tribunal).

As the chapter by Bader shows, what to do about shari'a has become a major concern of transatlantic legal systems. Nowhere was this more apparent than during the controversy which followed a speech by the Archbishop of Canterbury (Williams 2008), widely, if misleadingly, interpreted as calling for the introduction of shari'a in the UK. Prakash Shah seeks to place the debate on Muslims and the law in the UK within a wider frame of reference. He points out that directed as the speech was to the official legal system's need to adapt to changing social realities, many of the governing assumptions about the system of law came to the surface in response to it. He argues that from a socio-legal perspective the claim of a uniform, national system of law is not sustainable either in the UK or elsewhere, and comments that the widely articulated discomfort with the Archbishop's thoughts on shari'a, and the unwillingness to respond constructively to his suggestions, which build on Shachar's idea of 'transformative accommodation' (2001), reflect a continuing adherence to what Wimmer and Glick Schiller (2002) have called 'methodological nationalism'. Even though the Archbishop's remarks have not been totally rejected by lawyers and judges, Shah feels that unless legal pluralism and comparative methodology are introduced into law teaching, prospects for the acceptance of shari'a will not advance significantly.

Mathias Rohe, who has worked in Germany as both an academic specialist on the Middle East and a judge, points out that in Europe the application of shari'a rules has in fact become a daily practice, not only informally, but also with respect to the ruling official laws. These are laws granting far-reaching religious freedom or applying foreign legal rules within the limits of public policy. In some cases Islamic legal rules have been incorporated within the formal legal system. Reviewing these developments which are fuelling a lively discussion about the scope and the limits of religious and legal diversity and the necessary amount of

unity in European states and their societies, Rohe argues that within the framework of the principles governing European legal orders, Muslims should be enabled to put their beliefs into practice their daily lives.

Against this wider background, Natasha Bakht focuses on one particular issue of recent concern, Muslim women's dress, not, in this instance, the headscarf (*hijab*), so controversial in France, but the *niqab* – a face veil – the use of which has provoked controversy in the UK and elsewhere in Europe, and in North America. Bakht deals specifically with opposition to the *niqab* in the courtroom context and asks whether there might be circumstances in which the removal of the *niqab* is necessary for justice to be done. In examining the arguments she scrutinizes judicial assessment of credibility based on demeanour evidence, and concludes by suggesting ways in which accommodation might be found for *niqab*-wearing women in circumstances when seeing the face is integral to the judicial task.

Although several contributors are concerned with the challenges to legal systems which come from the recent Muslim immigrant presence in Europe and North America, it is important to remember that not all immigrants and minority ethnic settlers of immigrant background are Muslim. Gordon Woodman, who has written extensively on legal pluralism, looks at another instance of the current ethnic 'superdiversity' in the UK (Vertovec 2007) by focusing on migrants from sub-Saharan Africa. African migrants in Britain are transnational, and remain active within their cultures of origin, including adaptation of their customary laws. At the same time, coming, as many do, from countries with strong colonial and post-colonial ties with the UK, whose structures were heavily influenced by British colonial policies and institutions, they often find much of English culture and laws quite familiar. Nevertheless, some customary laws they observe are quite different from English law, and demands for recognition of customary laws, for instance in the domestic sphere, present significant challenges to English law. He concludes that English law has generally been ready to recognize the customary laws of some of its minorities, and should therefore and where possible accommodate the customary laws of today's immigrant communities.

The issue of accommodation is central to many of the chapters. Jean-François Gaudreault-DesBiens' discusses the doctrine of 'reasonable accommodation', which Canadian courts have adopted since the mid-1980s and which, for example, allows claims for exemption from some rulings provided this does not impose an undue hardship upon the organization from which the accommodation is requested. Different types of claimants, but particularly religious claimants, have benefited from this doctrine. Until recently, the doctrine was widely accepted across Canada, and this remains the official position. In Québec, however, there have been serious misgivings and a lively political debate surrounding it, and the chapter looks closely at the socio-economic and political history of the province to determine why this is so. The Québec Provincial Government responded to the growing controversy by appointing a high-powered commission (the Bouchard-Taylor Commission) to report on the management of practices related to cultural diversity. Its report (Commission de consultation sur les pratiques d'accommodement reliées aux