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BOOK REVIEW:

*LEGAL PRACTICE AND CULTURAL
DIVERSITY*

EDITED BY RALPH GRILLO, ROGER
BALLARD, ALESSANDRO FERRARI, ANDRÉ
J. HOEKEMA, MARCEL MAUSSEN, AND
PRAKASH SHAH (2009)

PASCALE FOURNIER & ANNA DEKKER*

Barbara Johnson brilliantly proposed, in an essay on the contemporary rhetoric of reading, that the existence and production of binary relations suppose, on each part of the dualist difference, something like its opposite, which it hides. She wrote: “Far from eliminating binary oppositions from the critical vocabulary, one can only show that binary difference does not function as one thinks it does and that certain subversions that seem to befall it in the critical narrative are logically prior to it and necessary in its very structure.”¹ *Legal Practice and Cultural Diversity* subversively addresses and deconstructs one specific binary difference: the mutually constitutive relationship between the West and the East in the specific context of the (secular) reception of religious principles. Such trajectory impacts the family and operates against the background rules of immigration, international and national human rights, and international private ordering.

In their introduction, the editors note that the collection “brings together papers by anthropologists, political scientists and legal specialists who

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1. See BARBARA JOHNSON, *THE CRITICAL DIFFERENCE: ESSAYS IN THE CONTEMPORARY RHETORIC OF READING* xi (1980) (providing that the deconstruction of a binary opposition is an attempt to follow the subtle, powerful effects of differences already at work within the illusion of a binary opposition).

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.”² The theme around which all the stellar cast of contributors rally could be summed up aptly in the turn of phrase that surfaces just once in the first few pages of the fascinating contribution from Professor Werner Menski: “navigating diversities,” a lesson Professor Menski compellingly urges us to learn through the historical and continuing example of India.³ After the editors’ two introductory chapters, which provide the theoretical background on cultural diversity, accommodation, and how global balances of power influence the “irreversible social fact” of minority populations,⁴ Professor Menski embarks on a detailed study of how India’s legal system has taken a “historically grounded, sophisticated approach to such questions of uniformity and diversity . . . so much more readily than Britain or other European countries, in order to account for difference.”⁵ He notes that “legal ‘perfection’ cannot ever be a permanent equilibrium; it is always an ideal state that needs to be constantly re-negotiated.”⁶ Although there is clearly no suggestion that India has attained this ideal state, India’s legal system does, in fact, present a “plurality conscious reconstruction . . . clearly marked by legal respect for cultural and religious diversity.”⁷ A state’s attempts to re-negotiate should not be a “superimposition of one particular type of dominant law, with reluctant pussyfooting over minority systems, but a newly navigated and negotiated legal construct that takes holistic account of the wider policy issues of the state as well as the needs of its different groups of people.”⁸ Professor Menski ends on a cautionary note, that those seeking to navigate through the eyes of legal storms brought about by cultural wind shear would do well to heed:

Outright denial of the presence of ethnic minority laws and different sets of values, now part of the country’s super-diverse living history, looks not only dishonest . . . but increasingly dangerous. It is also ignorantly unrealistic, because it refuses to accept the fact that law is everywhere

2. Ralph Grillo et al., *Introduction to LEGAL PRACTICE AND CULTURAL DIVERSITY* 1 (Ralph Grillo et al. eds., 2009).

3. Werner Menski, *Indian Secular Pluralism and Its Relevance for Europe*, in *LEGAL PRACTICE AND CULTURAL DIVERSITY*, *supra* note 2, at 31, 35.

4. Ralph Grillo et al., *Cultural Diversity: Challenge and Accommodation*, in *LEGAL PRACTICE AND CULTURE DIVERSITY*, *supra* note 2, at 25.

5. Menski, *supra* note 3, at 32.

6. *Id.* at 35.

7. *Id.* at 46.

8. *Id.*

more than state law.⁹

“Re-negotiating,” however, has not always been the intuitive choice of Western legal players. In this vein, Professor Menski makes an observation not directed at any particular nation or legal system, but one that echoes profoundly for many and, in fact, reverberates on various levels for several of the subsequent contributions to the book: secularism is not, as is simplistically generally accepted, the division of “church” and “state,” but rather the “equal treatment of all religions.”¹⁰ This, coupled with his reminder that “law is everywhere more than state law,”¹¹ not only reveals the editors’ gift for ordering the contributions within the volume, but also the recurrent theme that, regardless of states’ legislative or policy choices, individuals will continue to live out the exigencies and pleasures of their cultures, whether juridical or otherwise, regardless of broader society’s formal recognition or acceptance.

On the one hand, the former observation regarding the role of secularism is nowhere more apparent than in the chapters that touch on European examples, such as in the contributions that examine recent decades in France by Martine Cohen and Claire de Galember.¹² Two contributors, Claire de Galember and Samantha Knights, specifically discuss the interpretation and application of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides a right to freedom of thought, conscience, and religion.¹³ This provision became central in the widely discussed cases of Muslim girls’ and women’s right to wear a veil in public places. Ironically, both defenders and opponents of religious freedom and religious symbols have enlisted its aid in their ideological battles, particularly in the French vision of *laïcité*.¹⁴ The latter observation, on the other hand, underlies the studies

9. *Id.*

10. *Id.* at 31.

11. *Id.* at 46.

12. See generally Martine Cohen, *Jews and Muslims in France: Changing Responses to Cultural and Religious Diversity*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 219 (recounting the experiences of these groups during different periods: pre- and post-World War II, the 1970s, and the 1980s-2000s); Claire de Galember, *L’affaire du foulard in the Shadow of the Strasbourg Court: Article 9 and the Public Career of the Veil in France*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 237 (outlining the transition of the veil/headscarf issue from mainly a French issue to an international one with implications for the European Union and United Nations).

13. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (explaining that Article 9 also includes the right to change one’s religion or belief at any time and to manifest this belief in “worship, teaching, practice, and observance”).

14. See de Galember, *supra* note 12, at 238-39 (highlighting parties on both sides of the debate as diverse as militant secularists and Islamic activists).

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and insights provided by Mathias Rohe (Europe), Veit Bader (Canada), Prakash Shah (Britain), André Hoekema (Netherlands), and Jean-François Gaudreault-DesBiens (Québec, Canada).

The issue of the informal existence (although not necessarily acceptance) of religious rules is a theme that reveals itself in many of the contributions. For example, Professor Shah notes the existence, in Britain, of “officially unregulated so-called ‘shari’a councils.’”¹⁵ Professor Hoekema’s observation is representative in this respect, although his chapter discusses the adaptation of norms and practices in the Dutch judiciary to changing (and ever-more diverse) cultural realities. He uses the term “interlegality” to simultaneously describe both a process and an outcome:

Interlegality should not be perceived as a form of interpenetration which can only come about when local law is recognized as such officially. Even when state law completely ignores local law or even actively cracks down on it, a process of intermingling of distinct legal orders will still be underway. This directly suggests that, outside the world of official law, Islamic or Hindu or Adat institutions and the standard (often Christian) institutions do touch each other and mutually impact each other.¹⁶

Rohe’s take is similar to Hoekema’s in that he recognizes the “informal” application of religious rules in daily life.¹⁷ In terms of the general adaptation (perhaps adoption) of such rules into the formal legal order, Rohe urges that debates be begun and followed in both parliament and society.¹⁸ Rohe focuses specifically on the *shari’a* system, which he cautions is not a “uniform Islamic legal system of substantive rules to be identified.”¹⁹ In the pitting of individuals’ rights against each other, he seems therefore to be urging at least a dialogue. Within such dialogue, however, he is clear that there must be limits. No avenue for influence, for example, should be given to extreme views—he uses one example of a Muslim author who advocates stoning and flogging women “in Germany (!) who are married to a non-Muslim[:]”²⁰

15. Prakash Shah, *Transforming to Accommodate? Reflections on the Shari’a Debate in Britain*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 73, 79.

16. André J. Hoekema, *Does the Dutch Judiciary Pluralize Domestic Law?*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 177, 192.

17. See Mathias Rohe, *Shari’a in a European Context*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 93, 95 (noting that most of the time, this application can be achieved without restriction).

18. See *id.* at 100 (advocating this process in light of changing convictions in Europe regarding, for example, family law and homosexuality).

19. *Id.* at 101.

20. See *id.* at 102 (explaining that the author justifies this extreme view on the logic that Muslims everywhere are subject to Islamic law and that the punishments should be carried out even when those affected are not aware of Islamic law’s applicability to

The danger of empowering such persons by opening ways for them to participate in legal life is obvious. On the other hand, it is an important task for the state and its bodies to convince all parts of society again and again of the advantages of a secular, neutral legal order protecting human rights. This includes the necessity to strengthen cultural sensitivity in administrations and courts.²¹

The contributions of Veit Bader and Jean-François Gaudreault-DesBiens are in the minority in that they focus on North American trends. Gaudreault-DesBiens offers an excellent contextual analysis, rooted in a “tentative sociology,”²² for understanding the reasons behind Québec’s sometimes vehement opposition to religious symbols in public life. Gaudreault-DesBiens, himself a Québec resident, admonishes readers from resorting to the simplistic conclusion that “Quebeckers are fundamentally more intolerant of cultural diversity per se than their fellow Canadians. However, there is evidence that they are clearly less comfortable with *religious* claims”²³ After a survey of Québec’s generally “monoreligious” (i.e., Roman Catholic) history which notes that Québec underwent a fundamental change during and since the 1960s to become Canada’s most secular province, Gaudreault-DesBiens eventually suggests that the reasonable accommodation debate has “revived old ghosts,” including “the fear of losing the French language and, with it, much of Québec’s historical identity.”²⁴ The author rightly reminds us that this fear operates “in an English-speaking sea.”²⁵ Given this peculiar historical and sociological location, a policy of “interculturalism” has recently been proposed in Québec, referring to “a process of reciprocal acculturation through contact and communication involving both the majority and the various minorities.”²⁶ Ethically promising, this form of “open *laïcité*” situates itself somewhere in-between the strict model of separation of church and state *à la française* and the Canadian model of multiculturalism. Drawing a more universal conclusion, Gaudreault-DesBiens notes, “the Québec debate has shown that alleged majorities are

them).

21. *Id.*

22. Jean-François Gaudreault-DesBiens, *Religious Challenges to the Secularized Identity of an Insecure Polity: A Tentative Sociology of Québec’s ‘Reasonable Accommodation’ Debate*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 151, 153.

23. *Id.* at 162.

24. *Id.* at 169.

25. *Id.* at 160.

26. *Id.* at 161 (explaining that this policy juxtaposes “multiculturalism,” which is prevalent in the rest of Canada and which the authors believe is not suited for a small region like Québec).

most vociferous when they realize that they are internally fissured.”²⁷

Veit Bader specifically examines Ontario’s relatively recent public debate about the role of *shari’a* arbitration. He characterizes it as a missed opportunity for giving some of society’s most vulnerable individuals some real protections in the context of family disputes,²⁸ and reiterates the now-familiar danger of forcing women—who will be subject to informal practices regardless—to choose between their rights and culture.²⁹ Geographic distance, it seems, is no obstacle to common dilemmas. Dalton McGuinty, premier of the Canadian province of Ontario, bluntly stated during a media interview in 2005 that “[t]here will be no *shari’a* law in Ontario . . . one law for all Ontarians.”³⁰ While the Premier undoubtedly had political as well as legal motivations, he clearly fell into the trap that Prakash Shah identifies as made up of misguided, unrealistic, and erroneous assumptions about *shari’a* law. First of all, Professor Shah points out that *shari’a* is misunderstood as a body of static legal or religious rules, mechanically applied, while it is actually “a system of identifying rules and then applying them to certain cases and situations.”³¹ Islamic norms are “not necessarily considered to be valid and binding at every time and place, but are subject to interpretation whether and to which extent they have to be applied in time and space.”³² In many ways, then, it is not so very different from the statutory interpretation that takes place every day in Western common law courts. But the message is even broader: all the authors who write about *shari’a* in various locations (e.g., Veit Bader, Mathias Rohe, Prakash Shah) emphasize the reality that state legal systems cannot keep *shari’a* out of people’s lives. Informal systems govern people’s lives with as much—or even more—influence as formal ones.

Another refreshing contribution to this volume is Natasha Bakht’s piece, which brings concrete, sometimes unexpected examples of how and where diversity struggles play out. Exploring the possible need to accommodate *niqab*-wearing women in the courtroom, she uses the experiences and court records of cases that have encountered judicial (or other) obstacles for

27. *Id.* at 171.

28. See Veit Bader, *Legal Pluralism and Differentiated Morality: Shari’a in Ontario?*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 49, 60 (characterizing these “most vulnerable” as exclusively Muslim women).

29. See *id.* at 67 (explaining that women who choose rights over culture can face the threat of social ostracism, which has both psychological and material costs).

30. *Update: Canada: McGuinty Rejects Ontario’s Use of Shariah Law*, WLUMI.ORG, Sept. 12, 2005, <http://www.wluml.org/node/88> (adding that Premier McGuinty also stated that religious arbitrations “threaten our common ground”).

31. Rohe, *supra* note 17, at 108.

32. *Id.*

women appearing in courtrooms, usually as witnesses.³³ Professor Bakht forces us to question whether accommodation is necessary at all. In the face of a significant (and growing) body of evidence about the limited usefulness of demeanor evidence for judges to make findings of fact, including credibility findings, Professor Bakht unmistakably concludes: “To force a choice between religious identity and participation in the justice system is to put women with already limited visibility in courts in an untenable situation.”³⁴ In this, she repeats the now-resounding refrain that informal systems of law may prevail over their subjects, to the detriment of those who seek to find a way to live with both formal and informal systems. Bakht’s thorough treatment of the topic, including an example of a New Zealand judge arriving at an “elegant compromise,”³⁵ justifies and paves the way for what might otherwise be an insulting veiled accusation: “When opposition to Muslim women’s attire is irrational, one must ask what is really going on.”³⁶

The focus on Islamic law in the volume is perhaps what instigates Professor Gordon Woodman to point out, in the first paragraph of his study of how African customary laws are received within English legal culture, that his contribution is *not* about Islamic law, “which does not form a significant element in most sub-Saharan African states’ laws.”³⁷ Tellingly, despite the distinct geographic focus, some of the same issues arise. Professor Woodman speaks of immigrants’ “double engagement”—most remain “effective members of their communities of origin” (such as through telephone calls, visits, and transfers of money) even as they become steeped in the culture and practices of their new home.³⁸ Again, the element of cultural and legal choices, both formal and informal, emerges. Also, like Professor Menski,³⁹ Professor Woodman firmly, if gently, reminds us of the commonalities between African customary law and English common law. In fact, “[i]t was assumed that the substantive

33. See Natasha Bakht, *Objection, Your Honor! Accommodating Niqab-Wearing Women in Courtrooms*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 115, 118.

34. See *id.* at 128 (concluding that since judges refuse to allow Muslim women to testify while wearing their *niqab*, many women are excluded from the judicial processes).

35. *Id.* at 130.

36. *Id.* at 132 (explaining that judges should be careful about the public impact of removing the *niqab* and look for alternative measures to accommodate Muslim women).

37. Gordon R. Woodman, *The Challenge of African Customary Laws to English Legal Culture*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 135, 135.

38. *Id.* at 136.

39. See *id.* at 142 (disagreeing with Menski’s argument that English law is unresponsive to the development of African customary law).

law was to be found in social practice.”⁴⁰ The inevitable translation of this observation is that English common law *was* customary law and the role of customary law did not end there: “By the seventeenth century a general English common law had been established, but its doctrines included a principle that local customs were to be recognized and enforced, subject to conditions.”⁴¹ This trend continued during Britain’s period of colonial expansion, during which time “the British state showed itself willing to recognize the existing laws of colonized people, repeatedly providing that the colonial courts were to observe and enforce ‘native laws and customs.’”⁴² Professor Woodman gives examples of how customs have been recognized and accommodated in the British legal system—such as through the possible availability of a “cultural defence” in various criminal laws,⁴³ a misnomer in that there is no such actual defence, but rather the possibility that aspects of an accused person’s culture “are sometimes held to be relevant facts in establishing guilt or innocence.”⁴⁴ Professor Woodman is quick to point out, however, that “this is not recognition of a customary law.”⁴⁵ Professor Woodman is far from urging a sweeping entry of customary laws into the British system but does encourage an informed understanding of it and how it can affect daily legal problems, noting that customary law practices have to be “fitted into the doctrinal structure of English law for recognition.”⁴⁶ In the end, his aim is to avoid ethnocentrism while accepting that upholding “overriding principles of human rights, public order or public policy” will necessarily limit the legal system’s ability wholeheartedly to embrace cultural diversity and normative relativism.⁴⁷

Like Professor Woodman, Alison Dundes Renteln contemplates the influence of culture on legal practices, this time in the determination of damages in civil proceedings. The issue in these cases “is that individuals may experience varying degrees of trauma when they are injured as a result of the misconduct of others.”⁴⁸ For example, Renteln cites *Bakhtiari v.*

40. *Id.*

41. *Id.*

42. *Id.* at 143.

43. *See id.* at 144 (explaining that culture defenses can be used where a defendant argued the norms of his culture “permitted, encouraged or required” him to commit such crime).

44. *Id.*

45. *Id.*

46. *Id.* at 146.

47. *Id.* (suggesting that one should recognize African customary laws in light of the legal experience in England and Africa).

48. Alison Dundes Renteln, *The Influence of Culture on the Determination of Damages: How Culture Relativism Affects the Analysis of Trauma*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 2, at 119, 215.

Zoological Society of London, in which a court ruled in favor of a larger damage award in the case of an Iranian girl who had three fingers bitten off by a chimpanzee.⁴⁹ The court accepted that the social significance of the stigma of the missing fingers might affect her future marriage prospects.⁵⁰ Renteln points out that the law has admitted such things, such as through the thin-skulled rule and the principle that one must take a plaintiff as one finds her,⁵¹ thus the doctrinal door is potentially open to culturally-based arguments. Given the likely increase in plaintiffs pleading the relevance of cultural factors (and a reciprocal rise in defendants pointing to such considerations), Renteln states, “governments would do well to devise policies appropriate for this analysis.”⁵² For her part, she offers a three-part “cultural defence test” designed to allow legitimate factors while avoiding fraudulent invocations of culture: (1) is the litigant a member of the ethnic group?; (2) does the group have the tradition claimed?; and (3) was the litigant influenced by the tradition when he or she acted?⁵³

The last word is reserved for Roger Ballard, whose anthropological insights lead to conclusions that have potentially significant repercussions for legal discussions. His message is generally hopeful, partially because of his paraphrase of the maxim that there is nothing new under the sun.⁵⁴ In the context of cultural diversity and legal practice, it takes this form: “Our future, no less than our past, appears to be inescapably plural.”⁵⁵ In the end, he notes that “[t]he accommodation of plurality is likely to be less traumatic than the unilateralist champions of myopic universalism currently fear.”⁵⁶ His offer of a more hopeful future than some imagine is founded, it seems, upon what amounts to a calling on our “better selves.”⁵⁷ Essentially, he implies that equity and justice will win out over legalism and ethnocentrism:

In contexts of de facto plurality the imposition, indeed legal enforcement, of expectations of homogeneity and uniformity, even if implemented on nominally humanitarian grounds, will lead to many components of their everyday behaviour being identified as inappropriate

49. See *id.* at 204 (citing *Bakhtiari v. Zoological Soc’y of London* (1991) Q.B. (Eng.)).

50. *Id.*

51. *Id.* at 208.

52. *Id.* at 216.

53. See *id.* (suggesting that such a defense test can avoid potential abuse of cultural defences).

54. See Roger Ballard, *Human Rights in Context of Ethnic Plurality: Always a Vehicle for Liberation*, in *LEGAL PRACTICE AND CULTURAL DIVERSITY*, *supra* note 2, at 299, 327.

55. *Id.*

56. *Id.*

57. *Id.* at 328.

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at best, and as illegitimate, subversive or even criminal at worst. Such a situation is in no way compatible with equity or justice.⁵⁸

In identifying and dismantling differences, Barbara Johnson suggested: “The starting point is often a binary difference that is subsequently shown to be an illusion created by the workings of differences much harder to pin down. The differences between entities (prose and poetry, man and woman, literature and theory, guilt and innocence) are shown to be based on a repression of differences *within* entities, ways in which an entity differs from itself.”⁵⁹ *Legal Practice and Cultural Diversity* not only presents the differences between the West and the East in the language of comparative law and society but reveals this repression of differences within both entities. The viewpoints presented in this book are a welcome, thoughtful, and thought-provoking addition to—and change from—other media. The contributions range from detailed close-ups, such as headscarves in French schools for de Galember or constrained views of religious liberty in England and Wales for Sandberg, to broad foundations—Ballard’s somewhat cynical summary of the human rights discourse in international contexts which, according to him, “has been turned into a political football, with the result that it is often used to justify initiatives whose consequences (intended or not) are as likely to reinforce, rather than undermine, established patterns of inequality and injustice.”⁶⁰ While both cynicism and optimism rear their heads by turns, the more general sense in this volume is a healthy blend of the two: realism borne of observation not just of the present but also of historical trends. The papers in this volume offer an antidote to extreme views that have sometimes taken over debates about diversity and cultural accommodation. This is fitting indeed, for a volume that also purports to blend principle with practice.

58. *Id.* at 325.

59. JOHNSON, *supra* note 1, at x.

60. Ballard, *supra* note 54, at 299-300.