



Law, Social Justice & Global Development
(An Electronic Law Journal)

Multicultural Conflicts and National Judges: A General
Approach

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This is a **refereed article** published on: 27 November 2008

Citation: Hoekema, A. J. 'Multicultural Conflicts and National Judges: A General Approach', 2008 (2)
Law, Social Justice & Global Development Journal (LGD).
<http://www.go.warwick.ac.uk/elj/lgd/2008_2/hoekema>

Abstract

The article queries what judges and legal actors in general *do as a matter of fact* in multicultural conflicts brought before them. When, to what extent and why do they take minority legal sensibilities into account? Portraying the present living together of “communities” with different world views, lifestyles and legal practices; as encounters of individuals, “actors” forced to or eager to admit that there are other ways of doing things than the conditions in their country of origin the author advises we avoid the notion of different legal orders as fixed and independent elements and focus on ways individuals use their own practices and those of others. The piece proposes we concentrate on the selective use of “the legal” by concrete persons as a resource for promoting their interests by adopting an actor-oriented approach and avoiding any notion of structural determination, but without suggesting that people are always completely free to do as they wish. Focusing on the domestic, and substantively engaging with the concept of interlegality, the article analyses how social and legal actors negotiate accommodative solutions to legal questions regarding family matters in situations involving immigrant and ethnic minorities in Europe and North America.

Keywords:

Legal Pluralism; Interlegality; Multicultural conflict; Accommodation; Dutch legality;

Author's Note:

I want to thank Fauzia Shariff for her splendid editing support.

1. Introduction

How do social and legal actors negotiate accommodative solutions to legal questions regarding family matters in situations involving immigrant and ethnic minorities in Europe and North America?¹ In this contribution I want to suggest the usefulness of the concept of interlegality to study the encounters between majority and minority legal sensibilities. In a way I am not dealing with cases and examples – although many will pass by as illustration – but rather dealing with a “meta” question how best to study this aspect of legal life. Although I restrict myself to family matters, the discussion how to study these encounters between majority and minority legal concepts and sensibilities has a broader relevance, I venture to suggest. To prepare the ground, I feel the need to introduce some preliminary questions and try to summarize some bits of current discussions.

1.1 By Way of Introduction.

My leading question is what judges and legal actors in general *do as a matter of fact* in multicultural conflicts brought before them. When, to what extent and why do they take minority legal sensibilities into account? This is a “how do” question, to be distinguished sharply from the following, normative question, the “how should” question: what *should* a judge and other legal professionals do when confronted with values, norms and life patterns with which they are not familiar because these are related to a specific legal culture of what I prefer to call a distinct community. This “how should” question is a legal, theoretical and political philosophical matter to be answered along the lines of these disciplines. Although in this contribution I am not going to deal with these matters, their importance as well as the risk of mixing the two prompts me to briefly indicate the nature of this “how should” question.

Many concerned observers of present day western countries and its legal order² are asking themselves how to construct a society and its legal institutions, allotting enough space for a wide variety of group identities and their legal traditions while at the same time fostering sufficient loyalty to common institutions and a kind of national identity to preserve a just and stable society. Some of these observers are far more engaged with critique of the reluctance of officials to accommodate other solutions to family problems while others lean more towards stressing the need for containing such legal plurality in the name of core values of English, Dutch and French society. But for all, it is clear enough that not every kind of distinct pattern of (family) life can be practised without restriction. We might hope to be able to cross the boundaries between the various identity groups and find *common* domestic³ “conflicts of law” principles and rules which are endorsed by both the majority and minorities. But in the end, these restrictions may have to be defined unilaterally, as they are now. The matter recently has become extremely politicised; the exhortation to take other cultures seriously while at the same time respecting conditions for social cohesion was recently expressed forcefully by the Archbishop of Canterbury’s masterful speech for a professional legal audience.⁴ He declared himself in favour of some – in my view – rather modest ways of accommodating minority legal sensibilities⁵ but immediately got lashed from all sides. This event warns us never to forget the wider social and political context when studying how social and legal actors cope with cultural diversity in family matters.

So far for the “how should” question. Let me stress once more the difference with my own main question, the “how do” one: what are judges and many others as a matter of fact *doing* in multicultural cases and how can we best study such matters

2. Legal Roads to Accommodation.

Within the structure of the dominant legal order, one meets a fairly restricted number of ways to accommodate distinct legal institutions. These ways bind judges because they define them as binding. First of all there is private international law. This road is leading to what can be called *institutional recognition*, like recognition of a customary marriage abroad as valid and having legal consequences in the UK.⁶ Then there is domestic law, where the law is perceived as being the same for every citizen of the Netherlands but leaves space for different patterns of practices and principles. An example of this *normative recognition* is the accommodation of practices associated with the *kafala* system of kin based child-care. A judge encounters a North African Islam-based way of transferring a child to a kindred family living in the Netherlands whereby extended family members other than parents raise the child as their own. This system avoids the process of formal adoption, which they consider to contradict the Muslim law.⁷ Eventually, *kafala* came to be seen as sufficiently similar to an existing concept like foster

child and therefore could be seen as qualifying the new parents for a child benefit.⁸ The legal technique here is one of making incidental exceptions from the norm and/or interpreting the norm differently.

Thirdly there is the vast domain of *civil law*, where we find several institutions that leave the parties free to regulate their affairs as they wish, like designing a contract for a loan in such a way as to avoid the notion of paying interest. Fourthly, many norms, particularly in family matters, are formulated in terms of *open concepts* as when the law says that the awarding of child custody after a divorce to one of the parents or both has to be determined by the best interests of the child. A harsh debate is currently going on in the Netherlands about whether this notion legally and practically implies or at least legally allows taking into account the specific distinct cultural background of a child and/or the parents or one of the parents.⁹ Politically, this is a sensitive area: social workers, child protection and welfare boards, and perhaps also judges and occasionally lawyers fear being accused of granting a “privilege” to minorities and then fall under the spell of Sir Trevor Philips’s dictum, “we have only one set of laws and that’s the end of the story (...) If you want to have laws decided in another way, you have to live somewhere else”¹⁰. They already envision headlines in the yellow press suggesting that shari’a takes over Holland.¹¹

Lastly, let’s mention the granting of *group rights* for instance in personal matters, a very extended and robust form of legal pluralization of domestic law. This way of accommodating pluralism would normally imply that people of a specific religion and/or ethnicity or culture have to bring their cases before specific distinct tribunals or councils. They have no choice. In this sense, the group rights system is quite different from Jewish councils and similar conflict-solving institutions that are formally based on voluntary participation. Because of this compulsive character, group rights are not highly regarded in Europe and not often claimed by minorities. Such a system would make it impossible for members of minorities to choose to take their conflict to an ordinary national judge.

3. Interlegality

Where is all this leading? To interlegality. We have to portray the present living together of “communities” with different world views, lifestyles and legal practices; as encounters of individuals, “actors” forced to or eager to admit that there are other ways of doing things than the conditions in their country of origin. (Nelken 2005: 5). In doing so, we avoid the notion of different legal orders as fixed and independent elements and focus on ways individuals use their own practices and those of others. We have to concentrate on the selective use of “the legal” by concrete persons as a resource for promoting their interests. This means adopting the so-called actor-oriented approach and avoiding any notion of structural determination, but without suggesting that people are always completely free to do as they wish.¹²

The stress on the relevance of individual actors’ definitions and behaviour is brought out nicely by Acton (2005). Kalderash Roma communities in the USA changed their “family law” in the direction of dominant USA law, to prevent their women from going to state law and state legal officials and walking out on their own conflict solving traditional authorities. This pattern of looking for authoritative decision making bodies where your interests are served - best called forum shopping - is a very common phenomenon among members of distinct communities. Individuals are not the prisoners of their own supposedly integrated and homogeneous culture, but choose among legal orders, pressure their own leaders and authorities to take national or international legal elements into consideration but also, vice versa, challenge national authorities to take local legal sensibilities in consideration. The way Gypsy leaders reacted to the women’s new stances, bolstered by a globalising feminism, is one of the ways in which leaders of local communities nowadays try to support and guard their specific collective identity by taking elements of global trends in majority law and blending them into their own, with the hope of maintaining themselves as a distinct community. This is often called a process of ethnic reorganisation.¹³ In this sense Muslims living in present-day France who try to find new ways to conduct an Islamic marriage are trying to reorganize the ways their life hitherto has been arranged.¹⁴ And they do so in response to pressure or demands imposed by the dominant culture. They are trying to remain loyal to their principles, the normative foundations of their culture, while at the same time taking on board norms or decisions inherent in the legal practice of state law – perhaps not just voluntarily.

My definition of interlegality has to be read in this spirit: a process of adoption of elements of a dominant legal order, both national and international, and of the frameworks of meaning that constitute these orders, into the practices of a local legal order and/or vice versa. I stress the nature of the process, but the concept also points to an outcome: hybridisation of all the “legal orders” living together within one

society or broader community. I admit that the definition in itself can also be read as pointing to an “institutional” approach in the sense conveyed by approaches to legal pluralism and interlegality, emphasising how state law and local law mutually constitute each other, or similar formulas. Instead, I advocate the everyday life approach. The fact, however, that distinct practices and values (family) are institutionalised in institutions that form the backbone of specific, sufficiently cohesive and in that sense socially existing communities, networks, groups or the society at large (and even international “communities”) must be a warning. In the everyday life approach, the weight of these institutions on the perceptions and outlook of people is easily underestimated.

In view of the spirit of this definition, I must also discuss the meaning of “legal order”, but firstly I want to discuss a central element of the thinking surrounding interlegality: crossing borders, which is the way people become aware of “other ways of doing things rather than by conditions ‘at home’” (sic) (Nelken 2005: 5).

Crossing borders is common practice for many people, certainly in the past but ever more so in the present time. People now move between the legal practice of European states, and their country of origin. But while doing so they maintain contacts with their communities overseas (trans-national families and relations of caring). Borders are fluid and porous regarding social phenomena as well. “Community”, “culture”, “legal order” are terms often used in the present debates about plural societies, social cohesion and law, but these terms produce a false idea of coherence and stability of the phenomena they point at. They suggest a wrong idea about the relation of individuals to the social structure and how these presumably stable elements are reproduced. Let me apply this insight to the phenomenon we usually call “legal order” or, broader, normative order.

3.1 Legal Order

South Asian local law, for instance, seems to be an amalgam of a wide variety of legal repertoires stemming from shari’a, Hindu legal repertoires and more local customary as well as more secular sources.¹⁵ Such a “legal order” has to be perceived as an ever-shifting, loosely connected ensemble of sometimes contradictory, sometimes parallel principles (values), wisdoms, norms, ways of doing things, authorities and fora. Moreover, the composition of the ensemble is defined and understood differently by persons with different interests, particularly interests in keeping or gaining power. People use elements of what they define as their home legal ensemble to win the hearts and reason of some official perceived to be in effective charge of solving problems. Actors can adhere without any problem to inconsistent, contradictory repertoires. People are experienced navigators through a great many legal repertoires. This unruly image of “the legal” is nowadays the dominant way of approaching “customary law” in studies of legal anthropology. In a very recent bundle of articles about Ghanaian land tenure relations, for instance, customary land tenure law is characterized not as “fixed and conservative” but as “perpetually being negotiated by various actors, who use their social networks to redefine and renegotiate customary relations” (Ubink & Amanor forthcoming: chapter 1). The Ghanaian case studies assembled in this volume strongly confirm this view.

This immediately throws up a fascinating question which I put in an 2004 inaugural lecture for my new chair in Legal Pluralism at the law faculty of the *Universiteit van Amsterdam*, a question which also caught the attention of William Twining (2003: 251): “If normative orders are permeable and fluid, how is it possible to talk of relations between them?” (2003: 251). Indeed, there is and always has been far more inter-wovenness between such “orders” than was acknowledged until recently. Many researchers stress the actors’ *forum shopping*, and also actors’ switching from one style of doing justice and normative repertoire to another and back, which one could call *discourse shopping*.¹⁶ These movements promote an intermingling of norms, meanings, values and other “legal elements” instead of keeping them apart and distinct.

But we have to pay attention also to the interests of leaders and other spokespersons for majority or minority legal repertoires and their underlying values and cultural meanings. They have an interest in drawing the line rather drastically. So, processes of ethnic reorganization – or for that matter, processes within the dominant society emphasising “Dutch identity”- serve to stress distinctiveness. Moreover, there is power. Interweaving is acceptable, but under some circumstances people have to accept their confinement to their own home, mostly a home which is despised by majority officials and the general public. I have no better answer to my own and Twining’s question than the one that in everyday life we keep seeing differences between normative repertoires. This is partly due to the dead weight of institutions and to so-called “structural differences in power”.

The fluid and permeable (porous) character of a legal order is a feature of Western style law as well to a surprisingly large extent, not only in Anglo-American law but also in European continental. Notwithstanding the impressive work by generations of legal theorists who proclaim the centrality, unity and fixedness of the Western legal order – and, indeed, keep calling it an *order* – it is now widely admitted not only by anthropologists but also by top legal theoreticians that judges and public administrators wield a high level of discretion in coming to decisions. Many, sometimes conflicting, strands of reasoning are available as an argument in a debate; the “legal” has no clear boundaries as it shades all the time into normative repertoires entertained in other networks and communities partly, but not only, legally justified by concepts like “reasonable”. “Application of norms” would be a very inadequate way of empirically summarizing what judges are doing. Perhaps in their professional legal culture the odds are against such openness, but a judge is not just the dupe of this legal culture. He can act differently.

Often the appearances seem to belie this, for instance when judges choose to define the situation as a perfect fit under a legal concept and the norm as a clear connection between the legal situation and the legal consequences. But this is more of a choice than a line of behaviour forced upon them. On the other hand, there *is* more typically legal order on the whole in Western legal practice than in customary regimes because judges in their practice rather generously support the categories of specific features of legal thought and of their role as a judge. If they don’t, their career is over, state power immediately cracks down on them. In this way a Western legal order shows more of a specific¹⁷ legal internal structure that is produced and reproduced by judges who want to be seen as professionals trying to forego a purely personal and utterly subjective way of decision-making.

3.2 Culture

Community and culture have to be distrusted as terms, too. I restrict myself here to culture. A culture consists of a wide variety of internally contested principles, ways of doing, habits, feelings and behaviour of identity, woven together and unwoven again all the time with different results advanced by different actors. An indigenous leader almost certainly qualifies the culture of his people – *the way we are* – as being there from time immemorial and containing the essence of the harmony that his community possesses. Whether or not he believes this or is acting as a smart strategist can be left open. The followers need not think likewise. Frequent encounters nowadays with other worlds outside their own territory and culture provoke a critical, at least a sceptical attitude among the rank and file.¹⁸ A smallholder who is being cheated out of part of his land in the name of the “traditional” customary law by a local chief who leases this land out to an investor and pockets the money, cannot help seeing his culture in a different light.¹⁹

3.3 Crossing Borders Revisited

Back to the crossing of borders again; the fluidness of law and culture is exacerbated by the crossing of very real borders. For ages already²⁰ but certainly in the last 25 years, there are hardly any isolated peoples left; there are no self-contained, isolated “cultures” and/or customary legal orders any more. When in the 1940s Max Gluckmann tried to come to grips with the “pure” indigenous African way of keeping order among themselves (the Lozi), he was shutting his eyes to the already long history of contact and mutual exchange between Lozi practices & principles and those of other tribes, and particularly those of Western colonizers. (Moore: 2001). Pristine orders do not exist. Van de Sandt (2007) in his study about the Nasa (Paeces) in Colombia shows how since the arrival of the Spaniards many centuries ago, the Nasa exchanged elements, taking over some forms the colonizers imposed but appropriating these forms into their own social set-up. What they have come to call “their own”, like ways of governance, is a blend of the immemorial old and the 17th century new. So, we have to be attentive to long histories of contact, of antagonisms and negative stereotyping but also of some mutual borrowing and lending. Svensson (2005), for instance, showed that in Norway there has been and still is a constant interpenetration between national Norwegian law and the legal sensibilities of the original Nordic inhabitants, the Sámi.

These challenges of crossing borders or seeing your borders crossed by different surroundings speed up the process of renegotiating your home grown ways of life and add considerably to the porosity and fluidity of legal orders. Such encounters stimulate an awareness of the existence of other ways of organizing life. This provokes a battle for meaning, fights over what the customary entails and what your culture is about. Often this is not a peaceful process as these surrounding worlds relentlessly impose their

way of perceiving the world, society and man on the others. But anyway, the crossing of borders, now almost a universal phenomenon, *makes legal orders and cultures more fluid than ever*.

3.4 The Legal

In what went before, I have already referred to many elements of law. Speaking of interlegality, one has to be clear about that “legal” part. What kind of “things” are blended and mixed? The mixing is done by people who behave like parties making a claim before a majority judge, or by the judge answering a challenge. What are they negotiating with each other? There are norms (or normative rules) to be contested and renegotiated, there is legal culture, the taken-for-granted notions that judges have about how to fulfil their task, there is power and coercion and resistance (forum shopping), and there are values and fundamental principles.

But one dimension stands out in my view: the level of *meaning*, interpretations of the world, man, nature and community, therefore of ways of conceiving of the “real” nature of things. Much of what is interesting in encounters between “legal orders” is situated on the level of meaning. Sally Merry (1988: 889 and 1990: 8, 9) once wrote about law “not only as a set of rules exercising coercive power” but also as “a system of thought by which certain forms of relations come to be seen as natural (...), modes of thought that are inscribed in institutions that exercise some coercion in support of their categories and theories of explanation.” Personally, I like to speak about frames of meaning, institutionalized in professional legal practice, or for that matter in local legal practices.²¹ For example, many non-western people nurture a meaning of what it is to be human which contrasts drastically with Western individualism. I come across this battle for meaning in my own research all the time. Studying ways in which indigenous peoples solve their problems of keeping order and restoring harmony between man, nature and the spirits, one encounters for instance notions of reciprocity that define the nature of a human being and his/her relations to nature and to the spirits. Reading the beautiful account by Rupert Ross (2006) about aboriginal thinking in Canada (*Dancing with a ghost*), one immediately grasps the wide gulf between the West and the aboriginal world with regard to the often implicit feeling and knowledge about how to live decently in a community and how to relate to others and nature. The aboriginal stress on caring for others and for nature does not mean, however, that any notion of a personal self and of individual desires, emotions and entitlements is rejected. Rather it is another way of perceiving the right balance between individual and general interests in caring for an integrated and just social life.

These frames of meaning cannot be distinguished easily from the values that justify the norms and practical ways of ordering the life of some community. Bowen, who uses the term normative underpinnings, specifies these as the values that subtend laws and procedures, like the rules governing marriage and divorce.²² Such frames of meaning include notions of the fundamental principles of social and moral order that are crucial for harmony and integration of a society or community. Frames of meaning provide an *overall* view of the nature of society, man and nature (world vision, *cosmovisión*), however. Parts of these frames of meaning are more explicit than others. Some are linked directly to values and principles, like the understanding of what it means to be human, or the understanding that God created the world and remains in charge. Other parts define what is natural, how the world is alike in customary beliefs that illnesses and misfortune are products of good and bad spirits that have to be placated lest further mishap occur. This does not preclude people from taking over elements from the dominant “white” frames of meaning and acting accordingly.

3.5 Interlegality and exclusionary relations.

To continue my analysis of what the notion of interlegality has in store for us while staying loyal to the central role of crossing borders and encountering other ways of life, I want to stress now that meeting the other law often proceeds through ways of exclusion instead of inclusion and accommodation.

It is often convincingly demonstrated that Western societies, or parts thereof like the legal order, and their non-Western counterparts have mutually shaped and still shape each other by defining “the other” as *not* like yourself. Not only has the West defined the other as primitive, undisciplined, happy but irresponsible people, collectivist and tending to sacrifice personal freedom for a unquestionable and choking concept of the common wealth,²³ but indigenous leaders as well as minority leaders in turn develop stereotyped views of Western legal orders as being purely antagonistic, formal and punitive, not lending themselves to reconciliation between parties, let alone to restoring harmony in society. This calling each other names has concrete effects in the sense that the one who is doing it, in my last example a local indigenous leader, feels reaffirmed in his view of what makes his own society exceptional. Given

this reassurance, a leader perceives it as in his interest to strengthen this image and reorganize his own community accordingly. For he is trapped. He has suggested that such a traditional system “exists”, so now he has to make this come true... At least that is what he is going to try to do (Collier 1998: 153). First of all, then, differences are stressed. An indigenous leader accusing the West of sowing bitterness through their way of organizing the execution of justice starts reinventing his own tradition in terms of stressing the communitarian and peacemaking character of their administration of justice.²⁴ Other members, however, might want to stress their need for a less patriarchal approach, for a slightly more formal approach to avoid a completely biased course of events, or a slightly more “specialized” approach – what De Sousa Santos (2002: 435) would call a Homeric style, typical for the West - so as to avoid the “holistic” but often oppressive way of publicly scrutinizing the whole life history of the parties before a decision is taken.

Therefore, like in the Kalderash Roma example, leaders often have to give in to the demands and behaviour of their people. This ethnic reorganization is not a kind of retreat to purely original, sacred and never changing ways of life. In the constant exchanges with the outside world, leaders want to have it both ways and therefore are forced by their people’s behaviour to engage in an operation of interlegality. This process of taking from the other side what suits the reorganization of their ethnic or cultural community while at the same time adapting the new to older forms was reported many times in the London 2007 and Brussels 2008 papers dealing with French Muslims and with South Asian communities in the UK. I myself have encountered this kind of reorganizing by mixing the “new” with the “old” very often, particularly in the PhD study by René Orellena (2004).

The message should be clear enough: to study law, plural society, overlapping identities and social cohesion in European countries, we need first of all to study the way boundaries are drawn and robust distinctions are set up between national legal orders and the local legal practices brought over by immigrants and minorities.²⁵ Secondly, we have to transgress this domain of ideologies and be alert to the porosity of these boundaries, particularly with regard to internal struggle and strife about the question of where to draw the line and why. In ideological statements about the real character of the other, this porosity is suppressed; authorities dominate the scene and act as if they represent “the view” of their nation, people or group. But in everyday life, minority individuals may contest their own authorities, walk out on them, reach out to “the other”, jump at opportunities that promise to serve their own interests by borrowing from the other repertoire of arguments, like the women in Zinacantan (Chiapas, Mexico) who are asking state officials to enforce state laws against men who abandon or batter their dependents (Collier 1998: 154). Within the communities the rank and file often oppose their officials’ views. Officially proclaimed harmony among the USA based Dineh in defining how to be a Dineh (Navajo) in present times is a myth more often than not. The celebration of harmony also in resolving disputes, may well be part of a political strategy to keep colonial and post colonial dominant authorities from meddling in local community’s affairs (Collier 1990: 310, Moore 2001: 104). But the followers may doubt the blessing of their “culture”.

This, however, is not to say that these communities therefore just fall apart. It is an intricate and important topic for study, how leadership and followers relate to each other in a constant process of confirming or contesting specific choices of their fellow members and/or their leaders. How, in other words, is some kind of new constellation of this distinct community built on the basis of all these everyday encounters, choices, and instances of interlegality? How do all the instances of persons engaging in interlegality add up to a kind of temporarily comprehensive situation of interlegality on the community level? The same questions hold for what can be called the majority society. Through a myriad of interactions involving politicians, the press, and reporters plus academics and many others, society is changing incrementally in a more or less pronounced monocultural or perhaps multicultural direction.

3.6 Human rights.

From the example we can conclude that individuals among the indigenous peoples, and also minorities in European countries, do not necessarily see Western-style influences and particularly legal precepts and procedures as wholly inimical to their own way of organizing life and their interests. Here again it would be false to draw too strict a line between distinct communities and societies. Lively discussions are going on as to the merits of human rights. And here, by the way, we meet international law, a dimension which I have not yet gone into in detail. These human rights, if claimed to be universal, may be accused of ethnocentric provocation, as the last and final attempt at completely undermining indigenous societies, as a means of “demonizing of culture and anthropology along the way” (Merry: 2003), as a means of finally

bringing modernity to everybody. I do endorse the view that human rights discourse is often fighting instead of supporting diversity. On the other hand, many first nations women would like to step out of their society and go forum shopping to liberate themselves of male-dominated marriage arrangements or to get a fair share of their father's estate. Not to mention people accused of being a witch and risking a death penalty. In a written sentence, the highest authorities of a self-governing Indian nation in Colombia (Jambaló) overruled a decision taken in one of the villages under their authority to punish someone far too leniently who had killed another villager suspected of being a witch. "It is unacceptable that a community condones homicide on the single argument that the victim was a witch, since this violates the right to life and human rights."²⁶ Indigenous leadership is well aware of pressures inside their own society to incorporate, to appropriate, many "foreign" elements. Thus, as supposedly wise leaders they take the lead and mix the old and the new, a process of interlegality.

As I stated earlier, these interactions between leaders and elites on the one hand and the rank and file on the other in the majority society are relevant to understanding where and how Western culture and law are changing because of the challenge of diversity.

3.7 Power and Interlegality.

The rubbing of shoulders between a minority legal practice and the dominant one is not necessarily a balanced one. Here we meet power already announced as an important element of anything called law.²⁷ Inside a community, a struggle for power permeates the way local legal repertoires are mobilized. In the relations between a minority community and the majority world, power defines to a great extent the terms on which battles for recognition are fought. Minority members often experience a forced imposition of alien principles like "the Christian idea of marriage" through the might of official legal practices that embody such values and normative underpinnings. In customary legal repertoires, notwithstanding the suggestion carried by the word "repertoire", not everything can be put forward and seriously introduced in the so-called "negotiations", power is ubiquitous; in exchanges between the local legal order and the order administered by the national (or international) elite(s), power, state power, or economic power plays an even bigger role. Accounts of asylum law in practice, of the ways family reunification is dealt with by official authorities and/or by the legislator, accounts of the way state officials react to examples of the local indigenous administration of justice are littered with sometimes very manifest condescendence and also occasionally brutish exercises of power, in the name of the law, in the name of the fundamental values supposedly undergirding that law, in the name of equality for all the citizens, and in the name of many other lofty legal principles.

But the minorities are not just helpless victims. Resistance can be detected in the way polygamous marriage is occasionally practised by South Asians in Britain.²⁸ Minority members also appropriate majority concepts and build these actively into their own legal outlook. Pearl and Menski (1998: 58) tell us "in Britain today, we find a new form of *shari'a*, English Muslim law or *angrezi shariat*, which remains officially unrecognised by the state but is now increasingly in evidence as a dominant legal force within the various Muslim communities in Britain" The authors speak of "the development a new hybrid, unofficial Muslims laws". Sometimes there is such penetration in reverse, when elements of minority law get accepted within the dominant legal order and may even leave an imprint on the dominant legal concepts, procedures and practices, possibly also blending into the normative underpinnings of national law. The blending of different world views, principles, perceptions, definitions and norms might indeed work bottom up as well, as when, for instance, Aboriginal legal practice in Canada "has affected non-Aboriginal justice philosophy and practice" (Proulx, 2005: 80). This latter phenomenon I call interlegality *in reverse*.

3.8 Interlegality in Current Majority Legal Practice?

In this exposé up till now I have neglected the way majority judges, politicians, leaders, and the public navigate from their own culture into the world of distinct identity groups within their own society. Perhaps they don't. The reports presented at the 2007 London conference are not optimistic, generally speaking, and one learned participant spoke about "an underlying spirit of reluctance" (Menski, W.) which by the way is one of the more diplomatic ways of putting this. The bar on recognition of other legal sensibilities is not lifted easily. Ignorance, arrogance in pretending to "understand the other culture", lack of time to do justice to a cultural context, many severe problems experienced by experts trying to get their message across (Ballard: 2006), not to mention the problem of experts contradicting each other; these are some of the many circumstances which tend to keep the bar firmly locked. There are "structural

conditions”, too, like the ones mentioned already (strong reservations in the judiciary to take the role of a legislator). This poses real and strict limits on any judicial navigation in the other domain. Let us not think the legislator is any more open towards amending the legal opportunities for accommodative decisions; quite the contrary, I venture to suggest. Outside the legal practice the present socio-political context is not favourable either. But we also find examples of a meeting of minds, of serious attempts to understand other patterns of family relations and apply them in understanding specific minority family patterns and decisions as to fostering out children or placing them under guardianship.

In spite of the structural conditions mentioned above, we’ve observed judges, social workers, lawyers, public administrators and school teachers grapple several times with problems of understanding what happened and how, where and why to make a new interpretation of a legal concept or introduce an exception to a rule so as to accommodate other legal sensibilities. A less rigid view of the nature of the so called one sided repudiation of a wife by the husband as it is recently refurbished by new family law legislation in Morocco, a change from a formal to a more material (empirical) way of approaching *kafala*, attempts to accommodate some forms of “religious marriages”: these are some examples, and there are many more. What is more, the professionals start thinking differently. Here comes the point I keep making. Even when rejecting a minority claim, the judge has learned something, perhaps a lot. His frame of mind has changed, possibly for the better. Legal encounters take place on the battlefield of meaning, the notions of the normal and the natural that are taken for granted. In official legal practice, therefore, we encounter similar conditions: here discussions and debate go on, standard ways of defining a situation are challenged, there is contestation from within. For instance, the solemn annual meeting of the general association of Dutch legal practitioners as the branch of constitutional lawyers discussed the problem of multiculturalism and law in the Netherlands this year (2008). Law faculty courses, refresher judicial courses, articles in professional and more general journals abound with relevant topics. Extensive empirical research into precisely the theme of my present article, the “how do” question, has been commissioned by the Dutch agency which oversees and organizes the judiciary (Van Rossum: 2007).

3.9 Interlegality in Case of Non-recognition.

All that has been said before underscores my next point. We should not think of interlegality as happening only if in official law some form of recognition as part of domestic law is granted to distinct legal practices, either by judges or a legislator. Even where the judges, legislators, politicians as well as the public at large firmly reject almost every element which they perceive as part of the other legal order, encounters between the two are going on, and some level of interpenetration will inevitably result, as a matter of social fact.

3.10 Social conditions.

Let me finally point out one of the many remaining matters to be considered in empirical studies of professional behaviour in multicultural cases. I mean the need to carefully assemble knowledge regarding the *social conditions which actors perceive as inhibiting their choice of behaviour*. One of such conditions is to be presumed when one observes judges defining their role in such a way that they feel inhibited from doing what in their view the legislator should do. For that reason they abstain from recognizing a Roma marriage as valid under domestic law.

Another example of these social conditions is the widespread assumption among judges that the officials of the Child Protection and Welfare Board do a good job and can be trusted in their judgments. This attitude is one of the circumstances that shed light on the reticence of family judges to conduct an independent evaluation of the recommendations put before them by these officials. This in turn explains why in cases of multicultural conflicts, *empirically speaking*, the decision whether to take a distinct culture into account, and how, is taken by the Board and not by the judge. Therefore, we have to study Boards where we may find liberal rhetoric but a strong reluctance in practice to take ethnic cultural differences into account.

4. By Way of Conclusion: where are we going from here?

Concluding my analysis I want to reflect briefly on how to approach the question of where Western legal repertoires are going. One could ask the same question for the legal repertoires of, say, South Asian

immigrants in the UK. Even if we fully admit that no *final* result will ever be forthcoming, only a very patchy temporary situation, it is worthwhile to try to qualify roughly where the Dutch and many other Western legal orders are going: are they moving from one expressing “Dutch values only”, “British values only” to one expressing other values as well? Are Western legal orders developing into a hybrid form in which different sets of principles are glued together into a somewhat fragmented, disjointed and ever changing “whole”?

In raising this question, I am not just thinking of an *incidental* deviation from a standard interpretation of a principle or from the obvious wordings of a rule or a precedent, even if it happens regularly. I am thinking of a *lasting* impact of distinct meanings and principles of the good life on the dominant way of thinking and defining good relations; by this very fact the dominant view would lose its character as the repository of the majority culture only.²⁹

To suggest some directions here, I return to the question of how to grasp where structures are coming from and going to. A useful metaphor is provided by the song of the whales elaborated by Susan Silbey (1992: 44) precisely for addressing this problem. The structure of law – or any other social institution - exists, but it is “constituted through active social practice” (o.c.: 43). Thus, there is acknowledgment of the actors’ role in creating the structures. For example, whales generally follow their pod tune, but occasionally one whale will slightly modify the song, and sometimes a modification is adopted by the group. All whales have the ability and social standing to change the song. Thus, by minute but incremental changes, the song of the whale pod can change over time to something unrecognisable from the original song. Structure is “enacted and encoded in regular, seemingly uneventful, and routinized experiences.” (o.c.: 44)

In the same metaphorical way, one could view the many judicial decisions as uneventful experiences, bringing a slightly different interpretation of what normally is seen as the best interests of a child. Perhaps other underlying principles than the usual majority ones have been brought to bear on the decision. Tacit frames of meaning crumble. From the sum of all these events, the “something” which we call state legal order, its principal normative underpinnings and its stock of routine interpretations slowly changes.

Endnotes:

¹ This question was the leading question for a 2008 Brussels meeting of a group of European experts on immigration, cultural diversity and legal practice headed by R.D. Grillo and sponsored by IMISCOE (a EU-funded Network of Excellence, for International migration, Integration and Social Cohesion). This group convened for the first time in 2007 in London. In my text I will refer sometimes to the papers from the 2007 London conference, to be published in Ballard, R. et. al. (forthcoming 2009).

² This concept of legal order is a most tricky and misleading one. It will be discussed in a separate paragraph below.

³ ‘Domestic’, because these conflict of law rules are not the ones meant in international private law, where they denote official legal norms which tell a court what to do when confronted with parties having a foreign nationality and/or living abroad. Also these rules tell the court when to recognize foreign legal decisions. Take the case of a divorce executed through repudiation of the Dutch wife by a Moroccan man in Morocco. Will this foreign decision be recognized as valid within the Dutch legal order? The relevant conflict of laws rules tell the judge that foreign divorces have to be recognized but provides a special regime for repudiation which up till now is not easily recognized in The Netherlands as it supposedly violates the equality between husband and wife. Between these official conflict rules and my concept of conflict rules within my domain of study (the “how do” question) there is a point of similarity. In both a possible clash between different legal orders or norms is solved, in international private law the clash between national and foreign law, in my study the clash between majority and minority legal norms and sensibilities. The former is a strictly legal and normative body of rules, the latter is an ensemble of *de facto* and empirical regularities to be observed in professional behaviour.

⁴ In the month of February 2008. See www.archbishopofcanterbury.org/1575 accessed on 26 November 2008.

⁵ He practically only touched on the establishment of specific, religiously oriented councils where people could bring cases on a voluntary basis. These councils do already exist in the UK for the Jewish

community and are legally recognized. The many UK shari'a councils however exist without such recognition. The Archbishop probably had such an official recognition in mind. Decisions of the councils would then get official legal validity but could be screened by an ordinary judge. The recent turmoil over such an establishment in a Canadian province shows that even these modest suggestions are not innocent any more.

⁶ I borrow this term and the next one from G.R. Woodman's paper for the London 2007 conference mentioned in footnote one.

⁷ Read for Islam, Muslim law, etc. always "according to the specific interpretations of a particular Islamic 'school' and the elaboration thereof in a specific country"

⁸ The fact that majority judges overcome their usual reluctance to introduce distinct, alien norms and institutions in case such an institution resembles a domestic one to a large extent has been signalled many times by Prakash Shah in his paper for the London 2007 conference mentioned in footnote one.

⁹ Like in matters of giving permission to have a male child circumcised at the age of five when his parents have divorced and one of the ex-spouses, possibly the one with (also) the nationality of a Muslim-majority country, wants this and the other refuses. Dutch judges routinely decline such requests as they reason they have to evaluate the situation according to "Dutch values and norms". Often what is deemed to be in the interest of the child is assessed "according to Dutch standards only". Further cultural and/or religious differentiation of this broad standard is rejected as unsuitable.

¹⁰ Or indeed they might fall in the hands of Gordon Brown, who is reported to have said after having heard of the speech of the Archbishop of Canterbury mentioned below: British law can only be based on British values.

¹¹ We have seen these headings recently in Germany. Introducing a very heterogeneous summing up of some multicultural developments, claims and conflicts the well known German periodical *Der Spiegel* carried the headline: Do We Have Shari'a Already? (*Der Spiegel* 13/2007, March 26, 2007 (authors translation.) As usual, it was a fully unwarranted statement, purely playing on the political emotions stirred up by irresponsible politicians and also some extremist minority leaders.

¹² I like Acton's way of expressing the same point. He writes (2005:35): don't forget that there is no general social law that determines people's behaviour. Often "non-Gypsy discourse presents all Gypsy behaviour as cultural", and: "Gypsies, by contrast, often treat non-Gypsy oppression as though it were all the outcome of the nature of non-Gypsies acting according to general laws of non-Gypsy behaviour rather than ever being the outcome of personal decisions". Acton scorns this approach, and rightly so.

¹³ Nagel and Snipp (1993: 204) tell us that "ethnic reorganization occurs when an ethnic minority undergoes a reorganization of its social structure, redefinition of ethnic group boundaries, or some other change in response to pressures or demands imposed by the dominant culture." Many examples are referred to in Jane Collier (1998). I (Hoekema 2003) have related a case study of ethnic reconstruction to be found in the recent study by the Bolivian scholar Rene Orellana. (Orellana, 2004.)

¹⁴ This is reported for France by John Bowen in his contribution to the 2007 London conference mentioned in footnote one.

¹⁵ I learned this from Prakash Shah's paper for the 2007 conference mentioned in footnote one. See also Ballard (2006: 50, 51).

¹⁶ Menski, W. and Ballard, R. come to similar conclusions. It is even possible for any person to put forward claims from different repertoires before one and the same forum.

¹⁷ The "specific" is important here, meaning a typical professional ordering which makes the legal order stand a bit apart from all the other ways of patterning relations in society. I do not think I am falling prey here to the seductive powers of smart legal professionals. I am crossing borders between the legal profession and the anthropological view myself, being a half-insider.

¹⁸ This growing skepticism about the naturalness of community practices is brought out clearly in Shariff 2007.

¹⁹ See a recent study of Ghanaian customary authorities ("chiefs") by Ubink (2008). Forthcoming is a volume of case studies in which the functioning of local communal land tenure arrangements in various countries is analyzed. Ghana is one of these countries and the case of the cheated smallholder and his chief is documented in that chapter. See Ubink, Hoekema and Assies (forthcoming).

²⁰ Encounters between widely different legal repertoires happened and still happen all the time and not just today in times of a deep plurality in European societies. The challenge of non-Western legal practices has been there all the time, was felt poignantly in colonial times and perhaps now comes home in the metropolitan countries. The other way round, confrontations of say Muslim or Hindu legal repertoires between each other, and between them and Western ones, are a constant feature of history, too (Geertz 1983).

²¹ One cannot help thinking of Geertz (1983: 173, 184) famous saying that law is a distinctive manner of imagining the real.

²² In his contribution to the 2007 conference mentioned in footnote one.

²³ This view of the collectivist leanings of indigenous communities still circulates among powerful elite members of European (and generally first world) countries. In development circles this is sometimes heard as an accusation against regimes of communal land tenure, supposedly blocking any individual dynamic economic behaviour and thereby condemning people to lasting poverty. The Colombian Constitutional Court, although quite progressive and enlightened, occasionally lapses back to such a stereotyped vision of the moral and social principles orienting an indigenous community, counterpoising typical individualistic notions and thereby completely neglecting the real place of individual obligations towards the common wealth. One can think of the moral principle of reciprocity. It is quite difficult if not impossible to explain to a western court the intricacies of such a principle and how it permeates daily practices.

²⁴ “But even as Zinacantecos are revising their legal procedures to resemble national ones, they are simultaneously emphasizing differences between indigenous “custom” and national “law”, elaborating a vision of local custom as promoting ‘reconciliation’ in contrast to ‘punitive’ Mexican law” (Collier 1998: 153).

²⁵ The Sámi in the Nordic countries and Russia cannot be called immigrants. They themselves would reject the term “minority” as well and prefer to be called first nations.

²⁶ In 1999, see comments by Assies (2003).

²⁷ Viz. the element of coercion mentioned in Merry’s typification of “law”.

²⁸ See chapter 5 of Prakash Shah’s book on Legal Pluralism in conflict (2005).

²⁹ The spirit of this approach is well captured in a nice saying by Craig Proulx (2005:83): “Rather than simply discussing conflicts between culturally different justice/legal sensibilities or orders, we must also look at how justice/law is translated to, and appropriated by, others and how these resources are used in reciprocal cultural production”.

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