



Religious Diversity and
Secular Models in Europe –
Innovative Approaches
to Law and Policy

Religare Working Paper

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In pursuit of the pagans: Muslim law in the English context

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Abstract

In this Working Paper, I make the case that a reconfiguration of law is taking place in the contact between Western and Muslim law. Muslim law is itself a complex, pluralistic amalgam of different legal 'bricks', and in the context of the struggle for Islam to be acknowledged as a legitimate source of value pluralism in the Western context, the religious aspects of Muslim law, with their doctrinal justifications, are being foregrounded. With the English case as the main focus, I further argue that customs among Muslims are suppressed in this process of 'shariatisation'. Beyond that, even Muslim doctrines are being placed under the spotlight in various ways. These changes are taking place as a result of Muslims living as non-dominant communities in Europe, where they are under the gaze of the dominant culture and are judged to be potential or actual violators of human rights and the rule of law. Relying on Balagangadhara's (2005) explanation of the 'dynamic of religion', I present these processes as an outcome of the collision of two religious cultures, the Islamic and the Western.

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Introduction: The return of the pagans

The field of non-state law is getting some new life in the British and European context after a period of decades when it was not considered of much importance. But this new life may yet turn out to be still-born, unable to satisfy the demands of a full-blown and methodologically sophisticated appreciation of non-state law in all its dimensions. Meanwhile, uncertainty is the order of the day as we muddle along trying to navigate through a still fairly hostile terrain. The fiction of the singularity of law as the property of the state has prevailed for long. As we know, anthropologists who had focused on non-Western countries brought back their insights to study the increasing number of settlers in Europe, and that continues to be the case today. Some in this group formed the discipline of legal anthropology (Rouland 1994, Foblets 1994), but that field is also in need of resuscitation, with those concentrating their research on minorities in Western countries becoming the poorer siblings of those who remain focused on the non-West (or Global South as it is now fashionably known). Some legal pluralists have taken greater interest in what is happening among those same population groups, although on the whole legal scholars have not felt the necessity of diversifying their state-focused methodologies to undertake fieldwork among communities, which contributes to the relative marginalisation of knowledge of non-state law. This is not to say that they were wholly incapable of that as the thriving field of criminology, which also offers employment opportunities for some in sociology departments, demonstrates. But if criminology is viewed as a sub-set of sociology, the latter also has not helped to develop much of the study of minority non-state law in Western countries.

There is something else at play here. The skill set required is not just a willingness and ability to depart from positivist presuppositions about the monopoly of state law and to go out into the field to study ‘social facts and fabrications’ (Moore 1986). Some knowledge of culture and language also seems necessary to undertake good work, although it is not a prophylactic against error or criticism. ‘Ethnic’ others have predominantly inspired interest when there was something negative to talk about – and this has led to a number of studies and legislative initiatives designed to target the so-assumed deviant behaviour of the minorities. Otherwise we are happy to allow people to run their corner shops or kebab takeaways, or to make their music, which serves our ‘secular’ consumptive interests. Even then, there is no real agreement about, much less adequate theorisation of, what culture is, what cultural differences are, and how they are relevant to law. There is a widespread tendency to fear the ‘reification’ of culture (which translates as ‘thingification’), while prosecution for ‘essentialism’, a new category of academic crime, is just around the corner. Talk of ‘Christianity’ or ‘Islam’ as existing real-world phenomena can also lead to accusations of essentialism or reification. I am not sure what insights such potentially destructive demonisation offers other than a kind of methodological cul-de-sac. The other favourite, presumably in reaction to potential accusations of reification or essentialism, is to declare that culture is not fixed but a changing phenomenon. One is never sure how such a mantrically recited ‘finding’ helps us to elucidate anything even though it is presented as a major insight into the phenomena being studied. Seldom do we get clarification about the directions in which cultures change and through what influences and under what conditions. This might underline, again, that no adequate theorisation of culture exists. In fact, the situation is far more insidious than that as there is a general tendency to applaud when cultural change indicates a shift towards the dominant ethical system, a kind of implicit assimilationism in the name of encouraging good practice. If this is the position we find ourselves in after decades of social science in the West then there is no wonder

that we have serious problems, which socio-legal scholars cannot necessarily be expected to address by themselves.²

Today, therefore, we have severe intellectual bottlenecks in assessing ethnic minority phenomena in Europe. After the recent riots in England, we cannot yet decide what the role of ‘ethnicity’ or ‘race’ was. Those who attempt to make the connection between black deprivation and failures to appropriately socialise angry youngsters, who see no reason to respect the property and personal integrity of those around them, are often shouted down as ‘racialising’ the analysis of problems. ‘Racialising’ thus also becomes a term of abuse to reinforce what I interpret as being some colour-blind, and culture-blind, politically correct agenda. As Roger Ballard (1992) argued some time ago, not everything can be put down to class factors, and that the ‘ethnic’ dimension matters (also Menski 1997). I daresay that in France, when similar events occurred some years ago, and lasted longer, it was not on to talk about ethnicity or race. Some French colleagues privately confide about their reluctance to engage in the field given the strong political and intellectual ethos against raising the question of ethnic minority laws. One does not want to end up in some academic *kabristan* (graveyard) after all. Having said that, even in France, the collection of ethnicity-based data may be on the cards, after much struggle and hand-wringing about potential implications for *égalité* (Ringelheim and De Schutter 2009, Hargreaves 2010). This will not solve all problems and may lead to new ones.

There is much emphasis on religion now in Europe and elsewhere, and this is also where the minor resurgence in the academic research on non-state law is focused. American research still seems very preoccupied by the constitutional wall of separation erected in the country’s early years, and behind which religious freedom was to be enjoyed, but the Muslim factor is changing this somewhat (see Moore 2010). European concerns almost certainly seem to have been generated by the Islamic factor. This brings back to European minds some of the old, and often fierce, intra-Christian struggles about religion which the Americans wanted to avoid, but also the historical hatred and fear of Muslims, which has been given its own ‘phobia’ (among the rising number of publications on ‘Islamophobia, see Runnymede Trust 1997, Gottschalk and Greenberg 2008, Allen 2010, Sayyid and Vakil 2010). In this new scenario, with millions of Muslim immigrants and their offspring (some 18 million in 17 West European countries, about 4.5% of the population in 2010: Pew Research Centre 2011), not yet as many as in India though (Indian Muslims number nearly ten times that at 180 million, about 15% of the population: *ibid.*), the legal and other apple carts were bound to be upset. Having proclaimed the ‘disenchantment of the world’ (Gauchet 1999) or the arrival of ‘a secular age’ (Taylor 2007), non-legal commentators have not helped much in the analysis, effectively universalising Christian theological presuppositions and Euro-American experiences, which also lie under some other issues already mentioned. Some European commentators now comment that the activists in the ‘Arab Spring’ are indicating their wish to become part of ‘universal history’, reflecting a classic Eurocentric ‘appropriation of the multiple pasts and histories of peoples on earth within the framework of one past of one people’ (Balagangadhara 2005: 56). Still, the dogma of unidirectional progress towards secularity and uniformity of law are being challenged by the large-scale presence of Muslims, and a fight-back now seems in play at many levels, most radically demonstrated by the massacre by Anders Breivik in Norway in July 2011.

² Being accused of essentialism is evidently such a problem in contemporary social science that Modood (2007) devotes a chapter rebutting accusers. See also Fitzgerald (2000: esp. 235-57) who also tries to bring some balance into the discussions about studying culture, while doubting whether much of what anthropologists ‘see’ is really ‘religion’ which, he argues, serves theological purposes.

In the analysis of the trajectory of legal reconstruction by Muslims in diaspora, which this article seeks to partly address, a key factor has to be the cultural, religious, and legal backdrop of the West. Western culture and law have experienced various phases of ‘secularisation’ which, according to Balagangadhara (2005), is one of two ways in which Christianity has spread, the other being proselytisation and conversion. Secularisation, can be seen as the extension of Christian ideas into the general or common place attitudinal framework of a society which then function as heuristic tools (*topoi*) for the development of theories (de Roover et al 2011). As those ideas spread, they lose more of their specific and ostensible Christian character, and mix in various ways to assume their specific characteristics. This accounts for the different ways in which these *topoi* emerge in different European countries. The Christian theology which informed them moves more to the background and becomes invisible. Christian common place attitudes are also extended to other societies according to what is assumed to be a universal framework. While there may be a number of agencies for effecting secularisation in this manner, legal mechanisms appear to be a key tool for generalising Christian *topoi* in a secular guise, not least because of the uniformising tendencies of law. It may be observed that such processes of secularisation, despite their source in Christian teachings, also affect the status of *specific* religions, including the Christian churches and believers, because of the requirement that the specific rules of any particular religion, especially in civic life, must give way to general secular rules.³

Not surprisingly, such processes are resisted by Christians. Recently retired judge of the English Court of Appeal, Lord Justice Sedley (2011) writes of an incident in which the former Archbishop of Canterbury, Lord Carey, prepared a witness statement for a case pending before his court. Lord Carey mentioned two prior judgments that ‘were insensitive to Christianity’, and requested a bench of judges ‘who have a proven sensitivity to religious issues’ *and*, wider than that, ‘a specialist panel of judges designated to hear cases engaging religious rights’. One of those may have been the case of *Eweida v British Airways plc* [2010] EWCA Civ 80, in which the English Court of Appeal had to rule on a discrimination claim by a Christian employee suspended for refusing to conform to the airline’s uniform policy as she wanted to wear a visible cross over her uniform. Sedley LJ made critical remarks in his judgment about ‘the intemperate sweep of the allegations initially made against BA [the employer]’, expressing ‘my unease that a sectarian agenda appeared to underlie the claim’, given that the claim was initially ‘framed and pursued on the footing that BA was indirectly discriminating not simply against the claimant but against all Christians in its uniformed workforce.’ Christian organisations have not given up, however, and are mounting their own offensive against perceived discrimination with litigation pending in the European Court of Human Rights. This involves a group of British cases arising in employment contexts where Christian employees have had action taken against them for wearing a cross or when their views about homosexuality have affected their workplace duties.⁴ More cases wait on the sidelines. No doubt, this recent litigation strategy is designed to compensate for the loss of voice for faithful Christians and their marginalisation amidst the overwhelming tide of secularisation in European societies and legal systems.

Such Christian battles for their religious rights could also be set against the prominent attention to Muslim concerns most sharply brought out in the aftermath of the lecture in February 2008

³ A widely discussed recent case is *National Secular Society and another, R (on the application of) v Bideford Town Council* [2012] EWHC 175 (Admin), where a local authority was found to have been acting *ultra vires* when prayers were said as an integral part of the formal meetings of the council.

⁴ Inter alia, *Lillian Ladele and Gary McFarlane v the United Kingdom* (Application nos. 51671/10 and 36516/10).

by Dr. Rowan Williams, the Archbishop of Canterbury, in which he highlighted the question of Islamic law and the prospects for the recognition of a Muslim supplementary jurisdiction within English law. Dr. Williams' own explanation is that part of the responsibility of his office is to speak out on behalf of all faiths in Britain and that it is theologically right to think in pan-religious terms (Milbank 2010: 54-5). There may be other considerations here too. One hypothesis, not inconsistent with the pan-religious posture, is that without giving attention to the status of Muslims in Britain, Christians could not effectively argue against persecution and, perhaps, against restrictions on proselytisation in other countries. A wider, global universalizing Christian agenda may therefore lie at its heart. In the wake of the speech, which was greeted by a mixed and sometimes hostile reaction by commentators in Britain, a number of low profile discussions have been taking place in select academic and legal practitioner circles about how to actualise any accommodation for Islamic law within English law. Governments and politicians have taken a somewhat backseat position and have publicly distanced themselves from any institutionalisation of legal pluralism, and the British government also decided in 2011 not to publish a study commissioned by the Ministry of Justice on the operation of *shari'a* councils.

In this article, I want to make a number of claims with respect to the sphere of non-state dispute resolution carried on by Muslims. I argue that a reconfiguration of non-state law is taking place in the contact between Western and Muslim law. Taking as a given that Muslim law is itself a complex, plural amalgam of different legal 'bricks' (Menski 2006: 279-379; Hallaq 2009), I argue that in the context of the struggle for Islam to be acknowledged as a legitimate source of value pluralism in the Western context, the *religious* aspects of Muslim law, with their doctrinal justifications, are foregrounded. With the English case as the main focus, I further argue that customs among Muslims are suppressed in this process of '*shariatization*'. I also claim that even Muslim doctrines are being placed under the spotlight in various ways. These changes are taking place where Muslims are living as non-dominant communities in Europe, under the gaze of the dominant culture and judged as potential or actual violators of human rights and the rule of law. Relying on Balagangadhara's (2005) explanation of the 'dynamic of religion', I present these processes as an outcome of the collision of two religious cultures, the Islamic and the Western. We thus need to draw upon certain features of Christianity and Islam to explain the trajectory of Muslim law in Europe. To that end, I have picked on a key insight offered by Balagangadhara's (2005) reading of the role of the 'secular' within the West. As he explains, the 'secular', as a theological construct, marks the absorption of the pagan world by early Christianity through the purging of the former's idolatrous practices:

As western Christianity expanded, so did the Christian-religious world. The earlier civic, pagan world contracted and marginalised in this process. 'Idolatry', a theological concept, drew the boundaries. After having gone through purgatory and neutralised of its sin, once a practice was admitted into the Christian world, it could find a place in this world. It is thus that a 'secular' world was to emerge later, but within the Christian world. It is a Christian-secular world that came into being, as generated within a religious world. That is why the secular world is in the grips of a religious world. (Balagangadhara 2005: 444)

Coming to the contemporary picture, Balagangadhara (2005: 445) notes:

In other words, I suggest to you, the western experience of other cultures ... is no different from that of the early Christians. It is not called 'idolatrous', to be sure, but that is because the 'secular' world of ours is also a de-Christianised religious world. (*Ibid.*: 445)

According to this reading, Christianity preserves a space for the secular which is the realm of false, pagan religions cleansed of their idolatrous elements.⁵ Islam has been considered a pagan and false religion in this sense and its fate is to be cleansed of those elements.⁶ Modern, post-Protestant Western law takes the realm of the secular as a vastly expanded space, as reconfigured through the rhetorical arsenal of human rights and the rule of law, thereby losing its character as belonging to a specific religion, and becoming universal in character. The cleansing process continues apace, and is renewed with respect to the diasporic communities in multicultural Europe. There is consequently a struggle to identify and root out the pagan practices and those that are seen as embodiments of false religions; only that they are not now referred to as pagan, idolatrous or false, but rather as violators of human rights and the rule of law.

Islam shares some of these tendencies as it also has a vocabulary of heathendom and idolatry.⁷ While some space is preserved for religious traditions ‘proper’ - Judaism and Christianity - which are nevertheless said to have lost their way somewhat, its mission is yet to cleanse all cultures of their idolatrous elements. Islam has not, however, created a realm of the secular in the way that the Western Christianity identified, even though there are some under-theorised conceptual contenders for that role.⁸ In the diasporic context, the pressure upon Muslim cultures grows in the shadow of Western culture and law. As noted, Muslims are placed under pressure to refrain from engaging in idolatrous practices. In the process, they are compelled to resort to doctrinal justifications for their actions and, where that is not possible, are placed in a position of having to expunge their cultures of idolatrous elements, exacerbating a tendency that is already latent within the Islamic tradition. As we will see, however, Muslims remain identified as followers of a deficient tradition and their *doctrines* are just as much liable to contestation within a dominant Western context as are the *practices* associated with Islam. As hinted by the title of this article, therefore, Muslims attempt to hunt down pagan practices within their communities, but are also pursued from without as bearers of false practices which must be eliminated.

⁵ For a brief description of Christian positions on ‘culture’ and, in particular, pagan culture, see McGrath 2011: 115-8. He notes (at p. 115): ‘A study of church history strongly suggests that the Christian church is engaged in a perennial struggle to clarify its relationship with culture.’

⁶ This statement is of course a broad-brush characterisation of the view of Islam in Western Christian discourse. In the period of the Crusades, when Western Christians were learning more about Islam, Muslims were often referred to as pagans, i.e. the unbaptised (Hamilton 1997). Later, characterisations of Islam changed somewhat. Masuzawa (2005: 59) writes: ‘Thus four seemingly well-marked categories - Christianity, Judaism, Mohammedanism, idolatry (or heathenism, paganism, or polytheism) - recur in book after book with little variation from at least the seventeenth century up to the first half of the nineteenth century.’ For a summary of Christian approaches to other religions generally, see McGrath 2011: 435-43.

⁷ Medieval Muslim comparativists, reflecting on knowledge of Indian and other traditions, took the view that pagans had ‘deviated’ from the true religion and practiced idolatry, also placing much emphasis on the distinction between book and non-book traditions (Lawrence 1976, Latief 2006). See also Alam (2004) on the status of pagans under theories of *shari’a*.

⁸ An-Na’im (2008) attempts to consider Islamic law vis-à-vis a secular state context arguing that Muslims can, within the terms of their own doctrines, accept a secular state, although he fails to account for fact that the ‘secular’ state emerged within Christian theology.

1. Aspects of Muslim legal reconstruction in diaspora

When the Archbishop of Canterbury, Dr. Rowan Williams, made his speech, it was already becoming known more widely that *shari'a* councils, had been operating across Britain at least since the early 1980s (Pearl and Menski 1998: 74-80; Shah 2010). Since their emergence, their work has tended to concentrate on matrimonial issues and, notably, the issuance of divorces for Muslim women (Badawi 1995, Shah-Kazemi 2001, Bano 2007). Such councils are established according to the various sectarian strands of Islam represented in Britain, including Barelwi, Deobandhi or Salafi, Ahmadi, and various Shia groups, and are often linked to mosques which may refer questions that they do not feel able to handle. Some have taken on a more formalised structure with established and evolving procedures, websites, record keeping, form-filling, and a panel of *ulema* who can consult each other, sometimes across *maddhab* (school of law) lines, before making decisions. Research at Cardiff University, led by Prof. Gillian Douglas, studying the procedures of case handling and decision making by the Birmingham Shari'a Council, the London Beth Din and the Catholic Tribunal for Wales was reported in 2011 (see Douglas et al 2011). It confirms the above observations, although the findings cannot necessarily be generalised for other councils (see e.g. Bowen 2010). *Shari'a* councils tend to be run on a voluntary basis and charge minimal fees, especially when compared to the costs involved in going to official courts. Besides lawyers and official courts being seen as too expensive, they may also not necessarily be regarded by the clients as capable of understanding or responding to their problems. This is particularly so if a marriage is not registered or it is a case of enforcing the terms of a *nikah* (Islamic marriage contract) which the courts have not regarded as binding. Similar reasons are reported by Bunting (2009: 84-89) for Canadian Muslims opting out of official family law.

The establishment of a network known as the Muslim Arbitration Tribunal (MAT), just some months prior to Dr. Williams' speech, has excited some additional interest. Some reporting in the European press has mentioned that the MAT is now recognised as capable of delivering *shari'a*-compliant decisions enforceable in English law, while some legal scholars have also received the same impression. In a recent article, American scholars, Witte and Nichols (2010: 123), provide a similarly exaggerated reading of the accommodation of non-state tribunals under English law:

English courts have regularly upheld the arbitration awards of Muslim tribunals in marriage and family disputes, so long as all parties consent to participate and so long as all arbitration takes place without physical coercion or threat. The same deference is accorded to the marital arbitrations of Jewish, Christian, Hindu, and other peaceable religious authorities.

According to English law, if the parties to a dispute want to agree to a binding arbitration it could be enforceable under the Arbitration Act 1996. This practice is already well-established among the Jewish *Batei Din*. However, such agreements only apply to non-family disputes (the exception being inheritance) and is better known in business rather than family practice. So, in fact, English law mirrors the situation in Ontario *since* its passing of the Family Statute Law Amendment Act, 2006, requiring that only family arbitration decisions made in accordance with Ontario and Canadian laws be enforced in courts (Bunting 2009: 80-84). Meanwhile, anecdotal evidence suggests that the MAT is largely consulted on family casework, and its bid to become a hub for settling business disputes has not yet borne much fruit. In practice, therefore, in terms of the types of cases it mainly refers on to its network, it appears to be not so different to the other *shari'a* bodies. However, press and academic reporting to the effect that *shari'a* dispute resolution is now recognised in English law could be

explained by the fact that the MAT's own website announces that 'any determination reached by MAT can be enforced through existing means of enforcement open to normal litigants'.⁹

The emergence of *shari'a* councils is seen by Menski (in Pearl and Menski 1998: 74-80) as part of the rise of *angrezi shariat*, which is a wider concept incorporating the whole range of unofficial legal practices among British Muslims, and which has even been taken notice of in the British parliament.¹⁰ Since previous demands for the official recognition of *shari'a*, made as far back as the early 1970s, had been met with silence by the government,

Like the communities themselves, these semi-official Muslim bodies are pursuing a strategy of operating *angrezi shariat*, aspiring for its eventual official recognition without claiming this as a definite right at the present time and lobbying vigorously for it. In other words, by the creation of social facts, a quiet process of legal restructuring is being achieved from within the community.... (Pearl and Menski 1998: 80)

An issue which remains difficult to assess is why this has occurred in Britain to the extent that it has. A possible explanation is provided by Bowen (2010: 417-8), who distinguishes French and British postcolonial arrangements, influenced by the backdrop of their respective colonial settings. In the French case, the civil law tradition has remained influential among postcolonial North Africans. The British case, notably in India but also elsewhere, was characterised by a policy of recognition of religion and personal status law, and this finds echoes in the British post-colonial diasporic context (also Rohe 2007: 93).

A possible extension of this argument can be made with respect to migrants originating in Turkey, and their descendants, who constitute a substantial proportion of the ethnic minority population in Western Europe today. As is well known, Turkey already has a fairly long history of living with civil law in family matters, once *shari'a* was officially 'abolished', and that may mean that *shari'a* is seen as an ethical issue to be dealt with by oneself or within one's social circle, but which one does not expect to be recognised in the courts of the state. Further, political parties in Turkey running on a platform for the resurrection of personal law have been closed down, which has probably meant a much more cautious strategy being followed by the proponents of reform along Islamic lines.¹¹ But for other migrants, politically-led secularisation in countries of origin may not prove to be as strong a factor. An additional explanation for why European countries remain relatively shielded from the kind of semi-public profile of *shari'a* in Britain is provided by Rohe (2007: 19) who says:

⁹<http://www.matribunal.com/>, accessed 22 August 2011.

¹⁰See Lord Lester, House of Lords Debates, 30 Jun 2000, cols. 1246-7.

¹¹ The *Case of Refah Partisi (Welfare Party) and others v Turkey* (Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, judgement of 13 February 2003) in the European Court of Human Rights is well known. It followed the closure of the political party by Turkey's Constitutional Court on the ground that the party's programme of establishing a plurality of legal systems in which each group would be governed by a legal system in conformity with its members' religious beliefs was in conflict with the constitutional principle of secularism (*laiklik*). The case of *Fazilet Partisi and anor v Turkey* [2006] ECtHR 488 (Application no. 1444/02) (27 April 2006), in which the party had been closed down by the Constitutional Court on the ground that it offended against the secular nature of the Turkish Constitution, was formally struck out by the European Court after the party withdrew the case alleging bias of the Court in *Refah*. Meanwhile, Rohe (2007: 93-94) notes: 'The Turkish Republic, being the state of origin of the Muslim majority in many parts of Europe completely abolished the *Shari'a* rules, and the vast majority among Turks would reject the re-introduction of such rules in European countries.'

As it comes to the areas of family law and the law of succession, the application of legal norms in Germany and in other European countries are often determined on the basis of nationality of the persons involved rather than by their domicile. In this respect it may generally be stated that Islamic law has a strong position especially within these areas.¹²

And Rohe (ibid.) immediately thereafter notes, ‘Furthermore, a powerful lobby obviously tries to preserve this area as a stronghold due to religious convictions as well as for reasons of income and exercise of power’. Therefore, the maintenance, through the principles of private international law, of the rule that the law of one’s nationality is to be applied in court cases, which often means a version of *shari’a*, could have meant a more diminished perception of the necessity for *shari’a* fora than in Britain. In that sense, the assumptions of courts in many continental European countries may effectively be more legally pluralistic than the British application of the *lex loci* or the Swiss application of the law of residence.¹³ As Rohe (2007: 115) notes further, ‘the application of Islamic family law – within the limits of public policy has become everyday business in German courts.’ I do not mean to suggest that there are no other considerations playing on the minds of European judges to avoid the application of *shari’a* or other ‘foreign’ rules. In fact, European courts regularly have recourse to rules of public policy/*ordre public* e.g. to avoid recognising the effects of the *talaq* (unilateral Islamic divorce issued by a man: Fulchiron 2010 for France; Rohe 2007: 115-125 for Germany). Since the 1970s, British private international law rules have also moved steadily to prevent reliance on overseas laws (Pearl and Menski 1998: 86-104), often creating havoc for the recognition of transnational family relations with confusions among lawyers, judges, and the individuals caught up between laws (e.g. Menski 2011, Shah 2011).

2. Pursuing the pagans

The formal gap between *shari’a* fora, and *shari’a* principles in general, on the one hand, and English law, on the other, does not mean that there is no interaction and mutual accommodation in practice. Aina Khan, a London-based solicitor specialising in advising Muslim clients, suggests some measure of success in getting courts to enforce *mahr* agreements, and this is the kind of claim that the official courts might find even more difficult to resist in future given that the UK Supreme Court has accepted that pre- and post-nuptial contracts are enforceable (*Radmacher v Granatino* [2010] UKSC 42). A further gap opens up, however, when marriages are not registered officially and the courts have not always wanted to generously apply the presumption of marriage to afford recognition to such marriages, with a wide range of potential implications.¹⁴

¹² See, similarly, Rohe 2007: 90; and Büchler 2011: 27-34.

¹³ The Archbishop’s message for the closer examination of a possible accommodation of *shari’a* in English law was echoed by social anthropologist Christian Giordano at the University of Fribourg who argued for the official acknowledgement of legal pluralism. See http://www.swissinfo.ch/eng/politics/Theres_no_place_for_Sharia_in_Switzerland.html?cid=7147982, accessed 23 August 2011.

¹⁴ E.g. *AAA v ASH* [2009] EWHC 636 (Fam), involving a father’s loss of child custody. As with some others, this case also illustrates that men can suffer a gender penalty in official legal contexts, could also be part of the explanation for the numerical significance of unregistered marriages as a way of de-linking from official English law. For a recent confirmation that Islamic marriages taking place in England without registration are ‘non-marriages’, see *El Gamal v HRH Sheikh Ahmed Bin Saeed al-Maktoum* [2011] EWHC B27 (Fam).

A case...

Still, we now have a case that reached the Court of Appeal from the Islamic Shariah Council, in Leyton, East London, via the county court (*Uddin v Choudhury* [2009] EWCA Civ 1205; see also Bowen 2010). It concerned a very short lived unregistered and unconsummated marriage between two British Bangladeshis. The groom's father wanted back mainly some jewellery said to be worth over £25,500 which the bride and her mother had taken from the groom's family. The *shari'a* council dissolved the marriage at the instigation of the bride. The groom had agreed to the *shari'a* council being asked to do so on the condition that the jewellery and portion of the *mahr* (dower) already paid be returned, although the bride claimed that none of the promised £15,000 *mahr* had been paid. But the *shari'a* council made no decision as to return of either. Then, at the county court, a single joint expert, Faiz ul Aqtab Siddiqi, one of the scholars behind the establishment of the MAT (also an English barrister), was appointed by the court to advise on the position in *shari'a* law, but significantly not on the customary practices followed in the community of the parties. Sheikh Siddiqi stated, and the court accepted, that unless mentioned in the contract, the gifts were just that - gifts - and, further, that the *mahr* was due given that the marriage had been broken off at the groom's instigation. The court ruled that the contract was enforceable and that the wife was also due *mahr* of £15,000. When the groom's father, representing himself, applied to the Court of Appeal for permission to appeal and an extension of time for preparation, the court refused and said that it accepted the county court's findings. For present purposes, the interesting thing is that the proceedings went ahead on the assumption, at least on the part of the bride, the *shari'a* council and the expert, Sheikh Siddiqi, that the principles of *shari'a* were applicable and, conversely, that customary practices and understandings were of no relevance. Bowen (2010: 430) cites an interview with Sheikh Siddiqi where the latter states, '*Nikah* is a contract and should be entered into through education and not based on cultural background, for example on Pakistani or Indian ideas.'

The *Uddin* case therefore illustrates a more or less consistent thread running through the entire discourse around Muslim law - the prioritisation of the doctrines of *shari'a* and, conversely, the marginalisation of or lack of attention to customary practices and conventional understandings. One could take the view of the conduct of the legal proceedings and argue that at least the *nikahnama* (or *kabinama*, a written marriage contract) was given effect by the courts. Marriage is, after all, a contractual arrangement in Islamic law and that sits well with a Western 'secular' understanding of contract. On that reading, one may say that there is a conversion of the Islamic norm to the Western norm on the basis of similitude. On a different reading, however, it could be said that the wife's family were unjustly enriched by having gone through a short, unconsummated marriage, but how can such arguments obtain a fair hearing in the current trend to *shariatization* in the context of flirtation between official law and British Muslim law? On a wider canvass, this case can also be seen as part of the struggle among Muslims in Western societies, which extends to the legal sphere, about the ethics of being a Muslim (Ramadan 1999; 2008), but in this struggle the doctrinal elements of Islam tend to be used as a means of suffocating a clear understanding of other legal elements. What has happened to custom, *adat*, *riwaj* and *urf*?¹⁵ The relative lack of academic analysis of the fate of this type of non-state law (see however Ballard 2006 strongly arguing for the importance of custom) typifies other discussions of Muslim legalities, whether we are speaking of a rethinking of Muslim law with respect

¹⁵ See further, the fascinating evidence produced by Bowen (2010: 430-3) on custom (*urf*) in the context of marriage gifts and *shari'a* council decision making, again demonstrating the ambiguity towards custom among *ulema* in Britain.

to recent initiatives to provide *fatwa* guidance to European Muslims (Rohe 2007: 137-165; Caeiro 2010) or the manner in which inter-*maddhab* surfing occurs in cyberspace (Yilmaz 2005; Ali 2010). Part of the reason may lie in the rather back-door manner in which Islamic jurisprudence has historically acknowledged custom (Libson 1997) – and it appears that if it came in by the back door, it may as well leave silently through the same door! However, this has to be supplemented by the often implicit assumption in Western contexts that Muslim law is governed by texts and beliefs based on them.

.. and a Bill

Another important development is the proposal to legislate against certain activities of *shari'a* councils and similar bodies by the introduction of a Private Member's Bill by Baroness Cox in the House of Lords. The Arbitration and Mediation Services (Equality) Bill had its first reading on 7 Jun 2011, and it may not eventually pass into legislation as is the fate of many private members Bills. Although the title of the Bill is not specific to *shari'a*, the fact that *shari'a* councils, the MAT and similar bodies are the targets of such legislation is evident from the surrounding debates and public statements made on behalf of those who support the Bill including members of the campaign group, One Law for All, and the National Secular Society.¹⁶ Among the things the Bill seeks to do is to amend the Equality Act 2010 so as to make unlawful, in the provision of arbitration services, discrimination, harassment or victimisation on grounds of sex, and it includes within that

- a) treating the evidence of a man as worth more than the evidence of a woman, or vice versa,
- b) proceeding on the assumption that the division of an estate between male and female children on intestacy must be unequal, or
- c) proceeding on the assumption that a woman has fewer property rights than a man, or vice versa.

Another relevant provision of the Bill, seeking to amend the Arbitration Act 1996 with respect to similar concerns, states that:

No part of an arbitration agreement or process shall expressly or implicitly provide—

- a) that the evidence of a man is worth more than the evidence of a woman, or vice versa,
- b) that the division of an estate between male and female children on intestacy must be unequal,
- c) that women should have fewer property rights than men, or vice versa, or
- d) for any other term that constitutes discrimination on the grounds of sex.

The Bill also makes a criminal offence where a person '(a) falsely purports to be exercising a judicial function or to be able to make legally binding rulings, or (b) otherwise falsely purports to adjudicate on any matter which that person knows or ought to know is within the jurisdiction of the criminal or family courts.'

¹⁶ For audio links or the texts of speeches given at one such interesting debate held at the Houses of Parliament on 28 June 2011, see <http://www.onelawforall.org.uk/successful-debate-on-sharia-law-in-britain-at-house-of-commons/>

These provisions amply demonstrate that the target is *shari'a* based dispute resolution now widely practiced in the UK, although it appears to proceed on the assumption that that tends to take place under the Arbitration Act, the same as some commentators on the official status of *shari'a*. Still, the issue of greater importance is that *shari'a* tribunals will be subject to legal action on the basis that they have breached one or another provision (of which the above are illustrations) of the legislation, if it is passed into law. It could bear down further on their activities or drive them out altogether, which seems to be the intended aim of at least some of the proponents of the legislation. At a broader level, this development signals the fact that while *shari'a* dispute resolution takes place in parallel to the framework of the official English law, there is further pressure to bring English law to bear upon it. The kind of step we see in the Bill is far from being a unique development in Western legal systems. Mention has been made of the Ontario legislation passed in 2006 which sought to avoid official imprimatur being given to family arbitrations based on religious law. In Oklahoma, an initiative seeing to amend that state's constitution stated in part: 'The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.' On 10 January 2012, a Federal Appeal Court concluded that by singling out Islam for unfavorable treatment in state courts, the law was likely to violate the Establishment Clause of the First Amendment, and it upheld a preliminary injunction against the bringing into force of the amendment.¹⁷ The Oklahoma initiative is, however, part of a wider campaign also being pursued in several other states to prevent *shari'a* rules from being considered by courts in the United States. In relation to the theoretical point made earlier, one might say that these are further steps in the elimination of pagan elements.

3. Concluding remarks

The evidence discussed here, primarily in relation to the English case, seems to bear about the perspective that there may be some merit in assessing the realm of non-state law as introduced by diasporic minorities in Europe with reference to the pervasive cognitive influence of the Christian heritage. Secularisation has entailed the spreading of Christian theological concepts and attitudes into the commonsense of European (and North American) legal orders. The effect of this inheritance is that non-Western legal traditions are treated in Western legal systems in a deprecatory manner, to be purged of their character as false, 'pagan' religions before being admitted to the realm of secular Western law. The case of Muslim law demonstrates that this dynamic provokes an internal reconfiguration of legal bricks under the gaze of Western culture and law which suffocates or marginalises custom as a relevant legal element and, indeed, treats it as something that should be cleansed of idolatry, while doctrinal elements come to the fore and claim a space that may they may not otherwise have had. Meanwhile, Muslim legal entrepreneurs have not saved themselves from further probing since the Islamic tradition is itself implicitly viewed as a false, pagan religion. Further testing is of course required to examine the precise character of authority structures within Western and Muslim law to explain how the baggage that both carry prevents all but a hesitant and mutually distrustful interlegality. We could fruitfully also test the hypothesis introduced here to examine the fate of non-Abrahamic legal traditions in their diasporic Western contexts.

¹⁷ *Muneer Awad v. Paul Ziriak, Oklahoma State Board of Elections, et al.* See: <http://journalrecord.com/23rd-and-Lincoln/files/2012/01/Awad10thcir011012.pdf>, accessed 24 January 2012.

References

- Asad, T. (1993). *Genealogies of Religion*. Johns Hopkins University Press.
- Alam, M. (2004) *The languages of political Islam: India 1200-1800*. Chicago: University of Chicago Press.
- Ali, S. S. (2010) 'Cyberspace as emerging Muslim discursive space? Online *fatawa* on women and gender relations and its impact on Muslim family law norms.' *International Journal of Law, Policy and the Family* 24: 338-60.
- Allen, C. (2010). *Islamophobia*. Farnham: Ashgate.
- An-Na'im, A. (2008). *Islam and the Secular State: Negotiating the Future of Shari'a*. Cambridge: Harvard University Press.
- Badawi, Z. (1995) 'Muslim justice in a secular state.' Pp. 73-80 in King, Michael (ed.), *God's law versus state law*. London: Grey Seal.
- Baangadhara, S.N. (2005). *"The Heathen in his Blindness..." Asia, the West, and the Dynamic of Religion*. New Delhi: Manohar.
- Ballard, R. (1992). 'New clothes for the emperor? The conceptual nakedness of the race relations industry in Britain.' *New Community* 18: 481-492.
- Ballard, R. (2006). 'Ethnic diversity and the delivery of justice: The challenge of plurality.' Pp. 29-56 in Prakash Shah and Werner F. Menski (eds.), *Migration, Diasporas and Legal Systems in Europe*. London: Routledge-Cavendish.
- Bano, S. (2007). 'Muslim family justice and human rights: The experience of British Muslim women'. *Journal of Comparative Law* 2: 38-67.
- Bowen, J. (2010) 'How could English courts recognize Shariah?' *University of St. Thomas Law Journal* 7: 411-435.
- Bunting, A. (2009). 'Family law's legal pluralism: Private 'opting-out' in Canada and South Africa'. Pp. 77-97 in Albert Breton, Anne Des Ormeaux, Katharina Pistor and Pierre Salmon (eds.), *Multijuralism: Manifestations, causes, and consequences*. Farnham: Ashgate.
- Büchler, A. (2011). *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*. Farnham: Ashgate.
- Caeiro, A. (2010). 'The power of European fatwas: The minority fiqh project and the making of an Islamic counterpublic.' *International Journal of Middle East Studies* 42: 435-449.
- Douglas, G., N. Doe, S. Gilliat-Ray, R. Sandberg and A. Khan. (2011). *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts: Report of a Research Study Funded by the AHRC*. Cardiff: Cardiff Law School <<http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>>
- Fitzgerald, T. (2000). *The Ideology of Religious Studies*. New York: Oxford University Press.
- Foblets, M.-C. (1994). *Les familles maghrébines et la justice en Belgique: anthropologie juridique et immigration*. Paris: Editions Karthala.
- Fulchiron, H. (2010). 'The French family judge encounters cultural pluralism.' pp. 613-33 in M.-C. Foblets, J.-F. Gaudreault-DesBiens, A.D. Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World*. Brussels: Bruylant.
- Gauchet, M. (1999). *The Disenchantment of the World: A Political History of Religion*. Princeton, N.J.: Princeton University Press.

- Gill, M. S. (2007) 'Politics of population census data in India.' *Economic and Political Weekly*, 20 January 2007: 241-249.
- Gottschalk, P. and G. Greenberg. (2008). *Islamophobia: making Muslims the enemy*. Rowman and Littlefield: Lanham, Maryland.
- Hallaq, W. B. (2009). *Shari'a: Theory, Practice, Transformations*. Cambridge: Cambridge University Press.
- Hamilton, B. (1997). 'Knowing the enemy: Western understanding of Islam at the time of the Crusades'. *Journal of the Royal Asiatic Society* 7: 373-87.
- Hargreaves, A. C. (2010). 'Discourses of ethnicity in contemporary France.' Pp. 83-103 in Roland Hsu (ed.), *Ethnic Europe: Mobility, Identity, and Conflict in a Globalized World*. Stanford: Stanford University Press.
- Latief, H. (2006) 'Comparative Religion in Medieval Muslim Literature.' *American Journal of Islamic Social Sciences* 23: 28-62.
- Lawrence, B. B. (1976). *Shahrastānī on the Indian Religions*. The Hague: Mouton.
- Libson, G. (1997) 'On the development of custom as a source of law in Islamic law.' *Islamic Law and Society* 4: 131-155.
- Mcgrath, A. (2011). *Christian theology: An Introduction*. Oxford: Wiley-Blackwell. 5th edition.
- Masuzawa, T. (2005). *The Invention of World Religions or, how European Universalism was Preserved in the Language of Pluralism*. Chicago: The University of Chicago Press.
- Menski, W. (1997). 'Race and Law.' Pp. 61-75 in Paddy Ireland and Per Laleng (eds.), *The Critical Lawyers' Handbook 2*. London: Pluto Press.
- Menski, W. F. (2006). *Comparative law in a global context. The legal systems of Asia and Africa*. 2nd ed. Cambridge: Cambridge University Press.
- Menski, W.F. (2011). 'Life and Law: Advocacy and Expert Witnessing in the UK.' Pp. 151-71 in Livia Holden (ed.), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. London: Routledge.
- Milbank, J. (2010). 'The Archbishop of Canterbury: The man and the theology behind the Shari'a lecture.' Pp. 43-57 in R. Ahdar and N. Aroney (eds.), *Shari'a in the West*. Oxford: Oxford University Press.
- Modood, T. (2007). *Multiculturalism: A Civic Idea*. Cambridge: Polity Press.
- Moore, S. F. (1986) *Social Facts and Fabrications: "Customary" Law on Kilimanjaro, 1880-1980*. New York: Cambridge University Press.
- Moore, K. M. (2010). *The Unfamiliar Abode: Islamic Law in the United States and Britain*. Oxford: Oxford University Press.
- Pearl, D. and W. Menski (1998). *Muslim Family Law*. London: Sweet & Maxwell.
- Pew Research Centre (2011). The future of the global Muslim population: Projections for 2010-2030. Washington: Pew Forum on Religion and Public Life. <http://pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Muslim/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf>
- Ramadan, T. (1999). *To be a European Muslim*. Markfield, Leicestershire: The Islamic Foundation.
- Ramadan, T. (2008). *Radical reform: Islamic ethics and liberation*. New York: Oxford University Press.

- Redding, J. A. (2010). 'Institutional v. liberal contexts for contemporary non-state, Muslim civil dispute resolution systems.' *Journal of Islamic State Practices in International Law* 6 <<http://ssrn.com/abstract=1648945>>.
- Ringelheim, J. and O. De Schutter (2009). *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights*. Brussels: Bruylant.
- Rohe, M. (2007). *Muslim Minorities and the Law in Europe: Chances and Challenges*. New Delhi: Global Media Publications.
- Roover, J. de, S. Claerhout, and S. N. Balagangadhara (2011). 'Liberal political theory and the cultural migration of ideas: The case of secularism in India.' *Political Theory* 39: 1-29.
- Rouland, N. (1994). *Legal Anthropology*. Stanford: Stanford University Press.
- Runnymede Trust (1997). *Islamophobia, its features and dangers*. London: Runnymede Trust.
- Sayyid, S. and Abdoolkarim Vakil (eds.) (2010). *Thinking through Islamophobia: Global Perspectives*. London: C. Hurst & Co.
- Sedley, S. (2011). 'When should a judge not be a judge?' *London Review of Books*, 6 January 2011: 9-12.
- Shah, P. (2010). 'Between God and the Sultana? Legal pluralism in the British Muslim diaspora'. Pp. 117-139 in Jørgen S. Nielsen and Lisbet Christoffersen (eds.), *Shari'a as Discourse: Legal Traditions and the Encounter with Europe*. Farnham: Ashgate.
- Shah, P. (2011). 'When South Asians marry trans-jurisdictionally: Some reflections on immigration cases by an 'expert'.' Pp. 35-52 in Livia Holden (ed.), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. London: Routledge.
- Shah-Kazemi, S. N. (2001). *Untying the Knot. Muslim Women, Divorce and the Shariah*. London: Nuffield Foundation.
- Taylor, C. (2007). *A Secular Age*. Cambridge, Mass.: Belknap Press of Harvard University Press.
- Williams, R., The Rt. Rev. (2008). 'Civil and religious law in England: A religious perspective'. Speech given at the Royal Courts of Justice, 7 February 2008 <<http://www.archbishopofcanterbury.org/1575>>
- Witte, J. Jr. and J. A. NICHOLS (2010). 'Faith-based family laws in Western democracies?' *Fides et Libertas: The Journal of the International Religious Liberty Association*: 122-135.
- Yilmaz, I. (2005). 'Inter-maddhab surfing, neo-ijitihad, and faith based movements.' Pp. 191-206 in Peri Bearman, Rudolph Peters, and Frank E. Vogel (eds.), *The Islamic school of law: Evolution, devolution and progress*. Cambridge, Mss.: Harvard University Press, pp. 191-206.

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Short Description:	The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood.
Partners:	13 (10 countries)
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