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**Accommodating religious needs in relation to marriage:
Flying kites and navigating state law and other forms of law ***

SUMMARY: 1. Introduction - 2. Legal pluralism as a conceptual challenge: Flying kites - 3. Multi-legality and its challenges - 4. Does legal pluralism offer a way forward? - 5. Conflicting claims over Muslim law - 6. Pluralism and 'White Tigers' - 7. Constructing a pluralist model - 8. Practical application - 9. Conclusions.

1 - Introduction

I thank Alessandro Ferrari and the University of Insubria for inviting me to this interesting and highly relevant Workshop in the memory of Eduardo Dieni, a brilliant young scholar who passed away far too early. My instructions were not quite to act like a priest in a memorial service, rather to speak as a sort of missionary in a still quite positivistic land. From this brief I understood that before I address specific recent developments in the UK in the difficult relationship between state law and religions when it comes to family law matters, I should talk a little more generally about law and religion, maybe specifically in the context of Menski's triangle of law, as my students call it now. Incidentally, that triangle, found in the 'blue bible' (Menski, 2006: 612), has by since last year changed into a typical South Asian image, namely a kite.¹ This image with four corners rather than three will most probably appear in the next edition of the book, unless we change the model again, since discussions are obviously ongoing. One of my most recent students, a few weeks ago, produced a wedding cake of legal pluralism, with layers of cake topped by positivism. That model, however sweet and tempting, did not persuade me that the current kite model of predatory

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¹ I am grateful to one of my brightest students, Ms. Hirra Hayat, who first came up with a computer-generated model of the kite, and who continues to help me develop further thoughts on this productive image.



global legal realism should be replaced by something less cutting-edge than an Indian kite.

You may know that a proper Indian kite or *patang* is a brilliant contraption to navigate the skies. Especially when there is less wind, it requires some skill to get it floating in the sky in the first place, and to keep it up there as a much-loved instrument of leisure. But it can also become virtually a weapon of war. First of all, it can cut your fingers, since it often has a string fortified with broken glass. And the greatest fun on earth for many South Asians appears to be to cut down their neighbours' kites, to cry '*patang, patang!*' and to catch all those kites that have been cut loose and are drifting away or dropping down somewhere. It is often a real battle scene, and there is much 'honour' and status involved in such games. Battling it out till there is only one kite left in the sky of an entire city is wonderfully described in Khaled Hosseini's novel *The Kiterunner*, situated in Kabul. Of course, many Muslims, and not only in Talebanistan, claim that flying kites is rather a totally unacceptable Hindu custom and needs to be punished. Such indications of contested discussions within religious and cultural traditions also teach us that conflicts over law, religion and culture arise not only in Europe today, and over the place of Islam in relation to state law, but all over the world and between different cultural groups. So it is nothing new in principle. But we seem still surprised, all the time, about such conflicts, and do not appear to know how to handle them and to manage them skilfully. Do we not know better, or could it be that we do not wish to know?

2 - Legal pluralism as a conceptual challenge: Flying kites

So right in the middle of London, we are flying now an Indic kite of legal pluralism that makes even more sense than the triangle in Menski (2006: 612) with its numbers salad. I am told also law students in Italy, in some intellectually advanced places, have begun to discover this. The main point to remember about this legally pluralist kite flying exercise is, however, that it is not designed to cut out rivals, but to *include* them in a complex pluralistic structure of legal theory and accommodative practice. Legal systems and the lawyers that manipulate them have to learn to be more accommodative and accepting of cultural and religious difference, that is the key message in today's interconnected post-modern world. The centre of the triangular structure, and also of the new kite model, is certainly taken up by different manifestations of legal pluralism, which remain to be defined more neatly. Law, in a



nutshell, so much is clear already, is not just legal positivism, OR some other type of law (major traditional candidates being natural law and socio-cultural norms) but law is *at the same time* legal positivism AND natural law AND socio-legal norms AND now also globalised 'new natural law'. So my newly globalised Indian heaven of legal pluralism has many kites flying at the same time.

The winner in this global contest is not going to be the one with the sharpest string that cuts out all the others, and eventually asserts one particular theory over another, but the one with the most highly developed plurality-conscious approach and the most effective techniques of skilled legal navigation, designed to accommodate all of these structures within the global sky of legal pluralism. So let us fly many kites, not just the kite of legal pluralism. Let a hundred kites fly, Mao might have said! Maybe, after all, there are as many kites as there are people on this globe, and more. Chiba's (1989) model of the identity postulate of a legal culture suggests that every legal system could be perceived as a separate kite, too, competing all the time with other kites.

The current moral panic in the UK and in other parts of Europe over the extent to which Islamic law should become part of our legal systems can also be seen as reflected in this particular image. We are trying to cut out the intrusive Islamic kites and combat their boisterous claims to superiority, asserting somehow that some other kind of kite, an English kite, or an Italian kite maybe, should dominate the sky. That predator kite, it remains a fact, is still most probably statist positivism, with huge ambitions of dominance underwritten by convenient concepts like 'rule of law' and 'good governance'. It is often made to sound as though only one such type of law or management exists, when in fact there are many types. So we continue to hear the claim that the state should be the final arbiter of what is and what is not law. I am increasingly convinced that this claim was never even maintainable from a Eurocentric perspective, and for any length of time - remember positivist aberrations and disasters such as the Third Reich in Nazi Germany or the Apartheid regime in South Africa. Today, however, we live in a world where America has just elected its first mixed-race president, and few people seem to have noticed that India has quietly elected a female President who is not the widow of some assassinated *grand home* and the same country now has a Dalit Chief Justice for the next few years, too. These are signs that we have perhaps become a bit cleverer about handling diversity and pluralism, but there are many ongoing battles that tell us otherwise, too.



3 - Multi-legality and its challenges

So how realistic are continuing statist and Eurocentric superiority claims in today's multicultural and of course multi-legal global context? The current panic over the superiority claims of Islamic law as a religious system as opposed to secular state legal systems can of course be seen as a reaction to renewed claims of religious authority. Somehow religion has crept back only legal agenda - how good for scholar in state-law relations who for some time thought they were a tribe facing extinction. One can imagine a kind of ongoing war between law and religion, a straightforward clash certainly. We thought that time had gone, but that assumption has proved wrong. As my triangle image illustrates and confirms, religion and culture were never totally absent in the era of positivistic domination, it was simply that less emphasis was given to them. While the floodlight has now increasingly focused on the state, the other makers of law were not wiped out from the global plural image of law. So the alleged and to some extent real resurgence of religion and culture add discordant notes to the cacophony of eurocentrised global legal theory, which many thought was floating in the direction of a calm heaven of uniformising globalisation, of course dominated by modern Western values in the garb of allegedly culture-neutral secularism.

We have also found it convenient so far to ignore largely that the global kite contains many elements of non-Western laws beyond Europe (Menski, 2007), and thus would not necessarily move in the same direction as the Eurocentric kites. Perhaps we should image that the global heavens generate different streams of air that push and pull the various kites in different directions. At any rate, what is increasingly clear today is that we are not certain any more into which direction law, as a global plural phenomenon, is actually going. We seem today globally, as Professor Anderson found for Pakistani law in the 1960s, like boys on roof tops in Pakistan flying a kite on a misty day (Menski, 2006: 373, citing Anderson 1967: 136): 'They cannot see it; they cannot tell where it is going; but they certainly feel the pull'. We often talk clever about law without knowing enough about its composite nature and its volatile tendencies.

Faced with such invisible pulls, denying the existence of legal pluralism does not make any sense at all, since there is manifestly more than just state law in what Sally Falk Moore (1978) thirty years ago famously called the 'semi-autonomous social field'. Since we continue to struggle with the basic definition of what actually is 'legal', we should perhaps accept that at the end of the day no one element is



dominant on its own. Yes, there is the risk that this becomes messy. But if law is ubiquitous, as an important forthcoming study argues (Melissaris, 2009), this does not mean we need to give up on claims to be able to regulate things. Certainly, though, no one type of law is culturally neutral and ideologically indifferent, and this should have been clear to us all along.

But none of that! We love our politics of law as much as South Asians love playing with kites and using them as battle tools. We enjoy the politics of law, and are less concerned to understand law as an internally plural entity than to have fun with words that seek to hide uncomfortable and difficult-to-understand basic truths. Barristers, above all, love verbal sparring matches, but are we learning much about law and life from such mock battles? While the voices of uniformising globalisation have recently grown loud and strong, often trying to cut out all the other sounds of law, the worldwide storm clouds of religious resurgence and cultural revival have whipped up a new battle of the skies which again tends to come out in war images: 'War on terror', *jihad*, *dharmayuddha*, and many more.

In the postmodern world today, then, the symphony orchestra of what Chiba (1986) called Western 'model jurisprudence', in other words legal positivism as a dominant sound, not just the first fiddle, has been seriously disrupted and faces irritating noises. The global orchestra of law is in danger, many feel. There are fears that it will get out of tune if non-Western, non-statist sounds are getting too loud. Modernity means progressing to something better – lawyers are still indoctrinated to perceive religion and culture as dark backward forces that must be combated. So we are tempted to strike back, often answering perceived terror with terror. But who or what made us believe that only state-directed legal regulation would make for harmonious sounds and storm-free skies? Who can guarantee that state-made laws are leading us to a peaceful heaven? That question can be answered by a detailed analysis of legal history, for which we have no time here, and which will at any rate find many contradictions. The self-congratulatory claims of statist positivism, having triumphed at long last, centuries ago, over the equally self-congratulatory winds and noises of traditional natural laws, are of course a loud and partly visible feature in this complex history. But in the current age of supposedly sophisticated legal theorising, we are still often struggling with the basics.

4 - Does legal pluralism offer a way forward?



Focusing on current battles over the nature of 'law' and specifically over legal pluralism, we can use many types of images to describe this ongoing scenario of conflict. But like kite flying, the negotiation of inherently conflicting positions, and thus of plurality and diversity, does not actually have to be a cutting edge conflict. It can be managed as a harmonious process of flying many kites together on a sunny day, enjoying the many bright colours in the sky, and a bewildering plurality of shapes and sizes. Let there be many kites in the sky, what is wrong with that? In other words, accepting the reality of pluralism, accepting difference in the first place, appears like a precondition for accommodating religions, social systems, economic orders, ethical and other normative systems together with state law. None on its own, then, can claim to rule the skies. That, perhaps, is the simplest rule, rule number 1 if you wish, of the skilful game of legal pluralism, the never-ending task of understanding and managing legal plurality in a global context.

But being a pluralist is easier said than done and being a global pluralist breaks and pierces many supposedly fixed boundaries. It deflates the inflated egos of particular theorists of law, and leads to crashes of illustrious kites of legal theory. Anguished debates over law and religion all over the world confirm now that we are currently engaged in a revisiting of all major theories. Many ancient heroes of legal theory must be turning in their graves. But let them rest in peace, they may be innocent and said rather different things than we have assigned to them. Or, often subsequent generations have interpreted particular theories in ways that the old masters never really imagined – which may of course precisely mean that a brilliant theory did not pass even the most basic reality test. Hans Kelsen's disgust about his 'Grundnorm' theory being 'used' to justify Pakistani dictatorships during the 1960s is only one such example, there are many more (Kelsen, 1970).

As we all should know if we are studying law properly as a social science - rather than engaging in simplistic 'black letter' legal plumbing courses - there are ongoing tensions over where and how we draw the boundaries between what Chiba (1986) so instructively called 'official law' and 'unofficial law'. This is so especially where these laws involve different cultures, and where the element that Chiba (1986) instructively called 'legal postulates' creates new dichotomies (Chiba, 1989). In theoretical terms, conflicts of law, whatever we call them, are thus nothing new at all. Flying different legal kites has been an ancient pastime, more so when people moved around – and migration, too, is



clearly a normal human phenomenon that much predates post-modernity.

5 - Conflicting claims over Muslim law

Significantly, current debates appear to be focused on Muslim law and on the superiority claims of *shari'a* law over other legal orders. But the picture is, globally and even locally, much more complex than that, we are constantly reducing skilful kite-flying in a crowded sky to a duel between two rivalling kites. This, itself, is quite dangerous and does not promote clear thinking about the wider phenomenon of global legal pluralism. Little wonder, then, that European lawyers and judges should get upset when faced with claims by Muslim law to increased recognition in our midst today. Greater plurality consciousness could actually reduce the heat of adversarial competition.

We had occasion to witness a fresh and depressingly familiar example of this kind of flat reasoning a few days ago in a much-publicised event in the Temple Church in London, the site of the famous speech about the place for *Shari'a* in English law by the Archbishop of Canterbury on 7 February 2008. There one could see English judges squirming when told that Muslim values were actually better than Christian values.² What one needs to understand is that those same judges did not squirm when an earlier speaker, an English barrister, never came off the positivistic high horse and virtually claimed that English law alone was law. The predictable result, then, was a shadow boxing exercise, full of empty gestures, reflecting no advancement in the understanding of legal pluralism and the realities of the interaction between English law and Muslim law in places like the UK today.

What we object to, rightly in my view, is that one particular legal system, whether religious or not, should claim to have the only valid truth and the only voice in the process of making and negotiating law. Secularism has apparently also become a religion, and thus makes familiar claims to first fiddle status, especially in the cacophony of international law. We go wrong, I think, if we treat such kinds of

² The event, on 13 November 2008, was a public discussion in The Temple Church on 'Family law, minorities and legal pluralism: Should English law give more recognition to Islamic law?' between Ian Edge of SOAS and Sheikh Faiz Ul-Aqtab Siddiqi, Chairman of the Muslim Arbitration Tribunal, introduced and presided over by Baroness Butler-Sloss, formerly President of the Family Division.



misguided conversations only as a problem for English law, or a Muslim problem, because we ought to know by now that Muslim law itself is internally plural and does not find it possible to assert that law is only God's law. There are many Islamic kites, in other words, not just one superkite powered by divine authority and equipped with a rope to heaven that has invincible glass coating. Religion, as a matter of belief and unifying doctrine, has to co-exist with religion as a matter of practice and of pluralising application by different people who may share one religion, but adhere to very different cultural norms.

But if we accept that, we also have to accept that state law and positivist theorising do not have a secure glass-coated rope to heaven either. State law, too, depends on other types of law to become a real, living entity. It is significant that in the debates on 13 November, the term 'living law' (Ehrlich, 1936) or any particular equivalent (such as *angrezi shariat*) was not used by any of the speakers, though the Muslim speaker did mention the flexibility of Islamic traditions over time. The failure to address the theme of accommodation in more depth, more than anything else, confirmed a significant ongoing unwillingness in the UK to engage in a full and frank discussion of the realities of legal pluralism. So English positivism was simply pitted against Islamic assertions of positivist law, and the result was a well-phrased war of words in a polite surrounding, but no advance of understanding, no addition to scholarship. Instead there were deliberate silences. A missed opportunity indeed for debate of what really matters!

Scholars of law, and especially our students, the people - Inshallah - who will live much longer than their current teachers and will see much more kite-flying still in the 21st century, need to be aware of these deliberate silences and gaps when it comes to debating legal pluralism. For a start, it seems we need to apply a pluralistic method of 'doing law' not only when it comes to law, but also when it comes to 'religion'. Perhaps we should all know this as a matter of common sense, but it seems we are no longer born with silver spoons of common sense, if indeed that ever happened. Perhaps the world around us has simply become so complicated, and so diffuse and confusingly complex, that we lack what I keep calling plurality-consciousness. I find Indian villagers wiser than metropolitan lawyers, whether in London, Delhi or Bangalore. It seems that we study and teach reductionist theories all the time, desperately trying to make life simpler for ourselves and our students, and then of course we find all these irritating troubles in accepting complexities like legal pluralism.

Perhaps, and here I speak openly as a missionary again, our increasingly globalising and yet glocalising world is witnessing now the



last glimpses of the sinking ship of legal positivism that has dominated the modernist age. We are now global citizens, and as we are sailing towards postmodernity – maybe drifting is a better word here than the somewhat planned activity of sailing – the movement away from eurocentrism is becoming ever more evident. Global realism and eurocentrism are bound to clash if the latter does not come off its high horse. Claims of colonial grandeur and state-driven legal navigation are clearly challenged by what I have called ‘ethnic implants’ (Menski, 2006: 58-65), states have to work extra hard today to retain control of movements of their respective kite, or to influence the direction of the ship, whichever image you prefer.³ States, of course, may not know what they are doing, blinded by the axioms of legal positivism and belief in Austinian magic. But some states today appear to become increasingly sophisticated in navigating the skies of legal pluralism. Faced with manifest plurality at all levels, and increasing refusal to follow officially existing laws, states may engage in silent law-making, not telling a volatile and nervous electorate what the agenda really are (Brown, 2008). There are many examples of that silent strategy, a rather useful management tool, because the calm silence generates less negative reaction than an aggressive top-down strategy of law making that imposes certain rules and demands compliance. Law, it seems, may facilitate diversified reconstructions rather than imposing uniform solutions. All around us, we see accommodations of this kind: acceptance of same-sex relationships, more state intervention in domestic violence scenarios, but less state involvement in other fields. *Verstaatlichung* and *Entstaatlichung* seem to co-exist in the pluralistic centre space. There is probably no one method for skilful legal ordering to maintain control in Moore’s semi-autonomous legal field. And what, after all, is ‘control’?

6 - Pluralism and ‘White Tigers’

But it appears we are about to see significant changes as we reach the heaven of postmodernity. Despite jitters, America elected a mixed-race leader, for the first time in history. When my sons were small, 25 years ago, we used to enjoy stories of the pink panther and his magic powers. Those times of fiction have been replaced by another kind of fiction,

³ States may not know what they are doing, of course, or are busy hiding the realisation of their own limits, as a new, as yet unpublished study by Jeremy Brown (2008) on silent law making so magnificently shows.



much more realistic, which can even win the Man Booker Prize. Aravinda Adiga's *The White Tiger* is about a little Indian village boy from the darkest part of India, whose rickshaw puller father implants in him the dream of becoming a great 'white man' with power and money, a 'White Tiger'. Even here, of course, the image that West is best and whitest if brightest is powerfully re-enacted and re-enforced. The protagonist of this novel writes his life story in the form of letters to the Chinese Premier from his hotel hide-out in Bangalore, after having killed his corrupt employer in Delhi with a broken whiskey bottle. The runaway murderer, who sees his pictures everywhere on police posters, but nobody recognises him, because he looks like millions of other Indians, compares not only India and China, but asserts that white domination globally and in places like India will be replaced by the rule of dark-skinned former sweet makers and tea boys or *chaiwalas* turning into 'White Tigers'. This is a brilliant story of ethnic empowerment, then, but there is much more to it. If necessary after murdering their exploiters, the local bigwigs, corrupt politicians and other representatives of what the ancient Indians called 'shark rule' (*mātsyanyāya*, 'rule of the fish'), these new bosses turn out to be more morally upright than their masters, perhaps since they have seen and experienced what it is like to suffer from selective blindness and deliberate silences about the suffering of 'the other'. As new masters are beginning to replace the old class of landlords and corrupted power brokers, only to become power brokers themselves, the critical question becomes, yet again, whether the world will become a better place. Will the new bosses be any better than the old class? Will the naked brutal force of law take account of other 'softer' forces and values?

The indications in this particular novel are that there may be progress in navigating difference and conflicting expectations. Adiga's novel, as he is at pains to stress, is not a piece of social activism, but it contains a powerful message also for lawyers and legal theorists: The world will go on also once we have become Globalistan, and there will be the same need as before to navigate the skies and the waters of social and legal theory to make sense of the complex world around us. So then, are we afraid of Globalistan? Or will we see a better world if we accommodate religious needs?

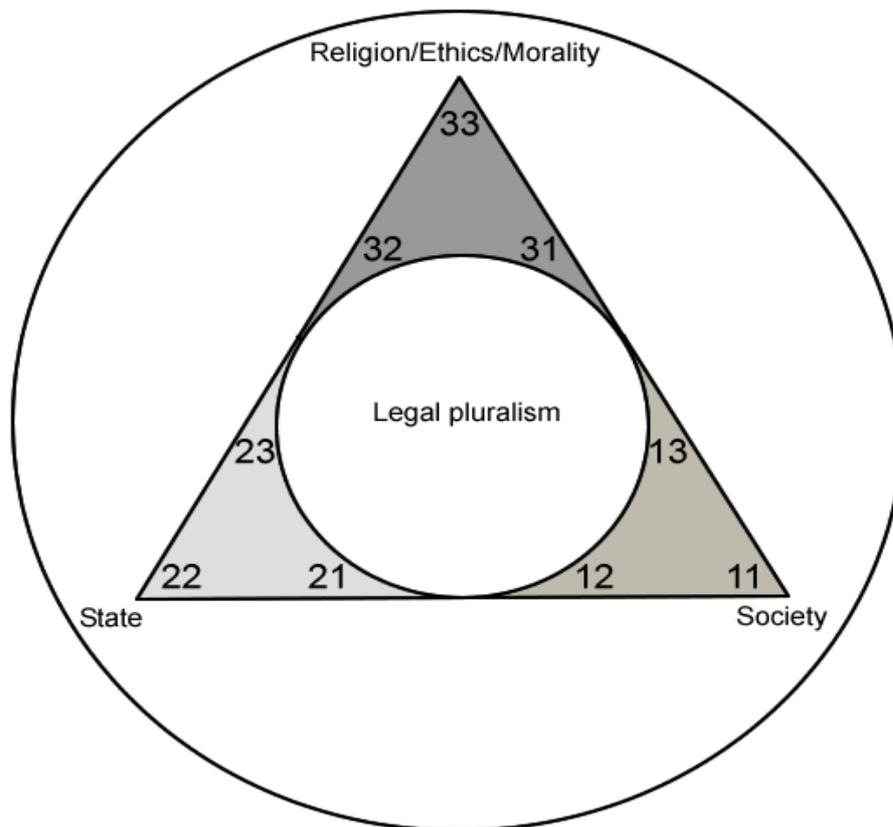
Seen in this light, the moral panic about *shari'a* law in Europe is perhaps just like a storm in a cup of *chai*. Moral panic arises to some extent because in Europe we have far too long blanked out the presence of 'the other. We went all over the world to colonise, mostly of course through indirect rule, but today even that erstwhile rebel colony, America, is going to be led by a mixed-race kind of 'White Tiger', quite



typically being suspected of being a Muslim. But let's leave US politics out of here and concentrate on legal theory and global legal realism. Should we be afraid of legal pluralism? Or is Globalistan not actually legal pluralism, but legal positivism with an Islamic flavour, which rather easily turns into a bitter taste if we let the aggressive kite of Islamic religious positivism rule the skies to the exclusion of all other entities?

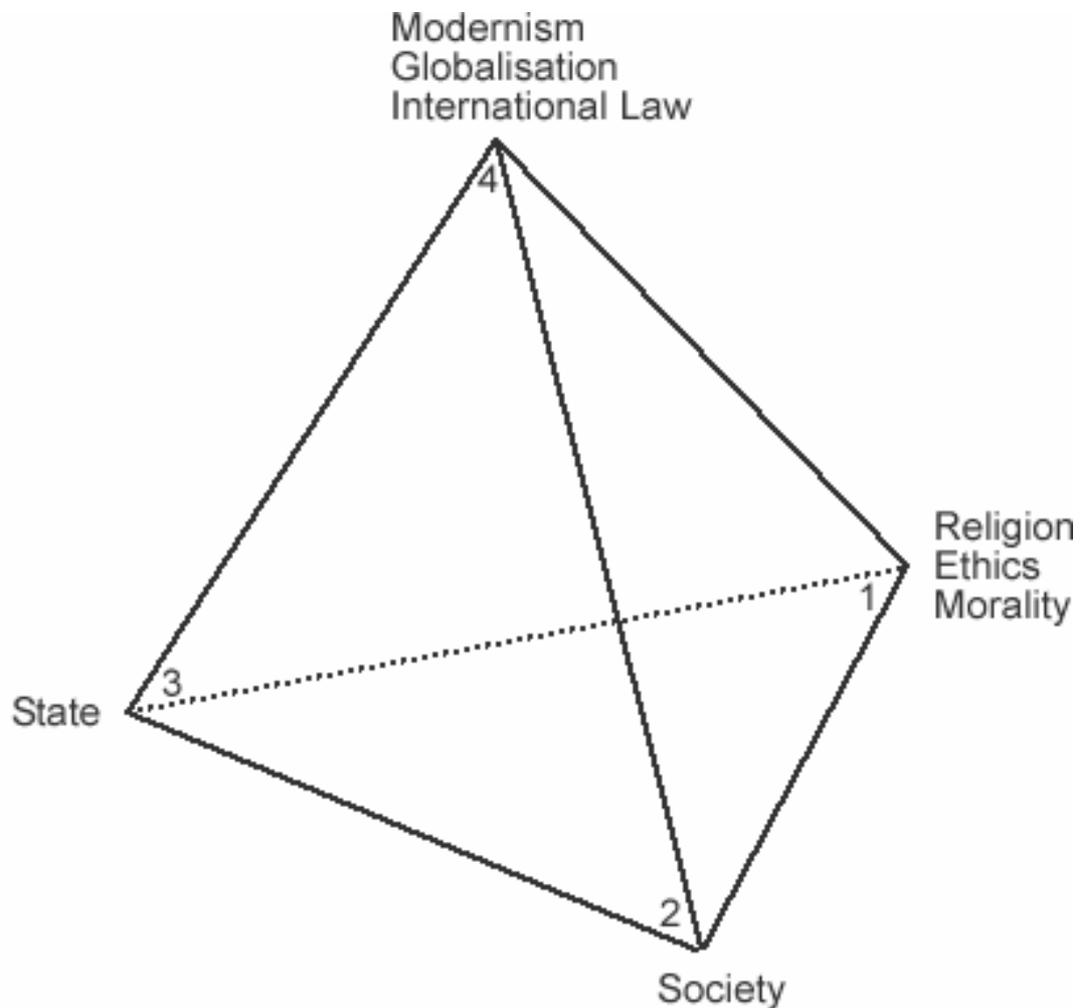
7 - Constructing a pluralist model

Building on the work of others, especially Chiba (1986), I suggested in 2006 that law is everywhere a kind of superstructure, built out of and feeding on elements that may only partly be recognised as 'legal', such as statist power, morality and ethics and socio-economic norms and historical structures. I illustrated this in the triangular structure that was found to match the three major theories of law that have been developed over time in many different more or less pure manifestations (Menski, 2006: 612):



In the 2006 book, globalisation is still treated as a kind of extra-legal force that impacts on law, but it is not part of it. By 2008, however, we built globalisation into this legal structure, so that my picture of the semi-autonomous plural field of law now has four corners, and thus took the shape of an Indian kite, which we are now flying globally. Since we are still struggling to turn the kite into a proper computer-generated image, we now have a new pattern with four end points, which is not quite the kite but a so-called tetrahedron:⁴

⁴ I am grateful to Jeremy Brown for producing this particular model, which at this draft stage illustrates best what we need to understand: 'new natural law' has become part of Moore's 'semi-autonomous social field' and thus, as another type of 'law', conflicts with all other end points in this tetrahedron.



Menski's Tetrahedron of Law

Legal pluralism was, and still is, the central part of this particular structure, and different combinations of numbers will have begun to enter into this central space. But as we began to think more about this, the numbering itself has been changing. If earlier we had what you saw in the diagram above, three end points as entities that are sources of legal norms, we now have four elements, four law-making entities. Religion, which would fall under point 1, now competes not only with social norms (2) and state law (3), but also with new global values or international law (4).

Legal development moves within this structure not just on the ground, but in a kind of upward spiral inside this structure, which then turns into a kind of pyramid. Finally, the end point of 'the right law', as



Rudolf Stammler called this in the 19th century, is found somewhere in the middle of this structure, but not necessarily always at the very central point. Not all law, this means to say, very clearly, is composed in equal parts of all these four major elements. But we can draw chains of numbers, like 1-2-3-4, to indicate where a particular legal element, whether a rule, a concept or a process, originated, and who else joined in to give this legal phenomenon the shape that it may have today. For reasons of time and space, we have to leave this matter here and move on now to practical application. The question still is: To what extent can state legal systems, in Europe today and elsewhere, accommodate and account for religious elements?

8 - Practical application

So, what does all this mean for the accommodation of non-Western laws and religions by Western legal systems? Quite clearly, while our flashlight in late modernity might shine on the state legal orders, a legally pluralist analysis will not ignore the presence of other legal orders in the same social field. We are still following the method of Sally Falk Moore (1978) here in analysing law as a process.

Let us take an obvious example, a Muslim marriage in the UK. We know that unless this Muslim marriage was registered in the UK, more precisely in England and Wales, in accordance with English law, it would not be recognised as a legally valid marriage by English law. The only exception would be that there was an overseas Muslim marriage, a *nikah* in accordance with Muslim law and the respective state law, which English law would then recognise as legally valid under private international law rules. This example already shows that in a global context, it was always necessary for a national legal system to allow for official acceptance of other formal legal orders, which were maybe not a statist legal order of the same kind as the UK knows and accepts as official law. So if the overseas Muslim marriage had taken place in India, for example, or in Somalia, the absence of state-endorsed legal regulation of that marriage and the mere acceptance of 'religious law' or personal law by that respective other state would not be a barrier for inclusion under the formal and official English law of marriage. In places like Pakistan and certainly also Egypt or Morocco, various types of state legal intervention in Muslim family law as personal status law are notable and have made it easier (but by no means less confusing) to argue for official recognition of 'the other' legal system under a European domestic legal order. I presume that we



are all familiar with the basic principles of private international law – though we cannot assume that all states will simply follow them.

In this process of international recognition, though, English law has already accepted the pluralising principle identified sharply by Chiba's (1986) twofold distinction of 'official law' as (a) types of law *made by* the state itself or (b) types of laws *accepted by* the state, but not made by the state. In this way, religious norms and local customs can easily become official law where a state legal system is ready to accommodate religious norms and rules. The internally pluralised structure of official law, as highlighted by Chiba (1986), was thus maintained and upheld or accommodated in certain situations, but not in others. Most evidently, this earlier and apparently liberal approach in English law was a necessity at a time when many British people were living abroad and did not want to fall under the respective rule systems of the territories in which they were living.

Thus, a British colonial officer in India would not wish to be married under the local Hindu law or Muslim law, but would seek the formal protection of the English legal system, even if he and his wife got married in India. They would probably have a Church wedding in the colony and register the marriage there in some form to have official documentation, while a Hindu or Muslim marriage would be solemnised and contracted solely in the sphere of religion and custom, without formal registration, but would nevertheless be recognised as a legally valid marriage. This happened within a well-developed intricate personal law structure, with different rules for different kinds of people. Personal law structures are thus mechanisms that permit the accommodation of religious norms and facilitate their migration into the realm of 'official law'. But of course we do not like them in Europe today because we have been taught to think that they are remnants of medieval times – but how wrong we are! (Menski, 2007). Colonial regimes thus built on earlier personal law structures, creating new and often in fact additional personal law structures in their colonies for their own colonial staff and for others allied to them, mainly Christians. These are all different forms of extraterritoriality that colonial legal regimes skilfully managed and navigated for the benefit of their own citizens.

In Europe today, though, we have a different scenario. I have made a distinction between the old and well-known model of a legal transplant (Watson, 1974) and what I call an 'ethnic implant' (Menski, 2006: 58-65), a privately imported new rule system as a result of immigration of different ethnic minorities to places like the UK. Such minorities may then often continue to follow their own customary laws



in the realm of unofficial law, initially completely ignoring the official state law. In fact, twenty years ago, I first identified three stages of such accommodative interaction (Menski 1988, now 2008, chapter 1). A first stage of ignorance of the law of the new place of settlement was followed by (often dramatic and painful) realisation that such a law existed, and thus a change of practice occurred when people learnt to basically marry twice, once under Muslim or Hindu or African law, and then also learnt to register their marriage in England. The third stage, initially, was a more intricate combination of the ethnic minority custom and of the formal English legal requirement, so that the customary ritual and the official registration ceremony could come closer and closer together, taking up a weekend, like time-tabled religion – you go to Church on Sundays, on other days God can wait.

But there was no full mutual accommodation. English law has continued to see only the registered ceremony as a legally valid marriage and has continued to disregard the personal law element of the religious or customary type of marriage altogether. Ethnic minorities, however, began to build the official legal elements of the registration into their respective ‘religious’ customs, pluralising them further.

Ultimately, though, maintaining this deliberate ignorance of English law about ‘the other’ ceremonies was not possible without causing injustice, which the *Bath* case of 2000 brought out and remedied so very well, but of course only for this particular case.⁵

But meanwhile, things have moved on. I have since discovered not only more intense accommodative interactions between religious laws and customs on the one hand and state law on the other in stage 3 (Menski, 2008, chapters 8 and 9), but there is now in Britain a fourth stage, namely deliberate refusal to follow English law. We know this

⁵ In *Chief Adjudication Officer v. Bath*, [2000] 1 FLR 8, the Court of Appeal in London finally recognised that Mrs. Bath, a Sikh wife who had only undergone a religious Sikh marriage in London during the 1950s, and had consequently been denied pension rights as a widow after the death of her husband, had been party to a marriage that could be presumed to be legally valid under English law despite the absence of official registration. This is a classic case of applying the principles of equity, or fairness, seeking to avoid harshness of the official law. The Court of Appeal has been very concerned not to let this case become a precedent, and my positivist legal colleagues are not making much sense of this case. Significantly, a Muslim test case following *Bath*, a few years ago, seeking to establish that an unregistered *nikah* marriage might also be legally valid in English law was promptly thrown out of court. Equally significantly, in America, Muslim *nikah* marriages, even if unregistered, are routinely treated as legally valid, merely because they are taken to be a contract based on offer, acceptance and consideration (the *mahr*). For details see Zaman (2008).



with particular strength from fieldwork conducted by two female Muslim scholars in Slough and Luton, places close to London with huge Muslim minorities. Both scholars report that even Muslim women today often refuse to register their marriage under English law, despite knowing the rules of English law. They are content, in other words, to have only a legally invalid Muslim marriage in England and thus consciously run the risk of not being given any assistance by English law in case of difficulties. It is very important to understand why this should be so, since this kind of evidence contradicts earlier assumptions (shared also by me to some extent at first) that Muslim women in the UK were defrauded out of legal entitlements by refusal to register Muslim marriages. If Muslim women in Britain now exercise agency to reject English law's supposedly protective mechanisms, what else do we need to know to make sense of this new socio-legal phenomenon? What does this happen? Here is evidence of a refusal of Muslim individuals, women even, to accommodate to English law – the question is no longer to what extent English law should accommodate to Muslim concepts. Or do we miss something here?

This new development clearly occurs despite the fact that ethnic minorities have learnt that there is an official English law which expects to be followed. So if we thought for some time that cheeky Muslim men in the UK would deliberately deprive their wives of legal security by not telling them and/or their families that there also needed to be a registered marriage under English law we have missed something. As indicated, we are now discovering in ongoing fieldwork, as yet unpublished, that even many Muslim women are refusing to follow English law rules and remain deliberately within the realm of the unofficial law by only having a *nikah* in the UK but not registering the marriage. The main reason for this, we are being told, is not only the familiar argument that Muslim law is anyway higher than English state law, but there is a reluctance to get involved with the administrative processes of English state law and to deal with English family lawyers, who are often perceived as incompetent and delivering bad service. It appears that this reluctance relates particularly to the time of a potential divorce, when it is much simpler, we are now told, for a Muslim couple to simply terminate the marriage through an agreed divorce (*mubaraat* or even *khula*) under Islamic law, bypassing English law altogether. This, then, is also where the new Muslim Arbitration Tribunals are coming in. More needs to be known about this particular arena of accommodation, or is the right word rather 'lack of accommodation'?

It is not a crime not to register your marriage. If this was so, a third of all English couples would be criminals, given the widespread



new custom of simply living together as cohabiters. Probably no state in its right mind could force all couples who live together in that state to formally register their relationship as a marriage. Wanting to be a liberal state and tolerating massive cohabitation as a phenomenon of social modernity among 'white' couples, as well as liberalising the rules about gay relationships and now 'civil relationships', the English state cannot now turn round and demand that Muslims and other ethnic minorities must register their religious marriages. Here again, we see definite limits of law, meaning positivist law, of which we have been aware for a long time (Allott, 1980). But again, this is not the whole story, because in certain respects English law does claim to wish to get more deeply involved in the regulation of marriages – but only some, as we shall discover.

There has been some, but rather undeveloped, discussion about the fact that English law actually allows ethnic and religious minorities to have their places of worship recognised and formally registered as a 'Registered Building'. But this bureaucratic recognition process was for decades severely marred by all kinds of barriers and has only recently been liberalised. What positivist scholars do not seem to understand and do not wish to admit, quite evidently, is that by now it is too late to become liberal about accepting applications for the status of 'Registered Buildings'. Muslims have given up on this approach, as have others. Quite evidently, the earlier bureaucratic hurdles eventually discouraged most ethnic minority communities from choosing this process. This clearly goes as much for Muslims as for other communities. As a result, as we are beginning to understand better, only just now, that hardly any mosques in the UK are actually 'Registered Buildings'.

More significantly, what most lawyers have totally failed to take account of is that a Hindu wedding or a Muslim *nikah* does not actually normally take place in a place of religious worship anyway, but within a solemn secular surrounding. Actually, more recent changes to English marriage law facilitated the arrangement of weddings in posh places, so for a bit of extra money, religion becomes a peripheral matter – one calls the registrar to a grand castle and simply pays an extra fee. Again, research is urgently needed to throw light on current changes in the practice of marriage solemnisation and marriage registration, if indeed the latter takes place. We have discovered, also only belatedly, that millions of couples are actually missing from the British marriage statistics. These are not only 'white' couples who merely cohabit, but also thousands of Muslim couples and others, whose deliberate absence from such statistics is now beginning to be officially noticed. These new



elements of evidence tell us that the refusal to marry in accordance with the state's formal rules has taken on much more complex manifestations than researchers realise. The state and its rule system regarding marriage have simply been abandoned by a growing number of people, not only ethnic minorities, but also many of them, but perhaps for different reasons than apply to 'white' couples.

So what should the state in such a situation do if millions of people refuse to follow its basic rules on marriage? As we have already seen, large-scale avoidance of state laws puts the state under pressure on all sorts of fronts: Statistics are becoming increasingly meaningless exercises in number-crunching and tick-boxing. The tentacles of the state law do not extend into the hugely expanded unofficial realm, so how does a state in such a scenario reclaim control, which it has clearly lost?

The first problem is, of course, that the state will not admit that it has lost control. Totally significantly, when the Archbishop of Canterbury in February 2008 indicated that there would be a need to discuss the place of Muslim law in English law, not only did the popular press howl in disapproval, but the Prime Minister pompously stepped in and announced that there was one law for all. Some of his lackeys did the same. Well, it was perhaps their official task to make such a statement, but how unreal is that? One law for all is a fiction, more so in a legal system that constantly makes different laws for different groups of people and does not even bat an eyelid when one asks about rationality and compliance with supposedly firm rule of law standards.

The latest example of supposedly rational, but in fact totally irrational state intervention is a rule that comes into effect in the UK on 27 November 2008. It implies that when someone wants to marry a spouse from overseas, both spouses have to be at least 21 years old. The declared policy aim is to protect vulnerable young adults from certain communities, in other words, young Asians and mostly Muslims, from so-called forced marriages. Whether this kind of state intervention will withstand legal challenges in the courts on the basis of criteria of reasonableness and non-discrimination remains to be seen. It can already be predicted that this kind of rule will be misused by officials under the mantle of discretion in decision making to regulate the migration of additional spouses from the Indian sub-continent in particular, thus a re-emergence of the notorious 'primary purpose rule' (formally abolished by the Labour government in 1997, see Sachdeva, 1993) is predicted.



Such new battles in a context where an established state legal system makes exceptions for certain communities and/or certain scenarios as it sees fit, is bound to strengthen the perception that the state law is deliberately discriminatory and does not really know what it is doing. I think the jury is still out on whether English law does not know any better, or is deliberately playing games of inclusion/exclusion. Meanwhile few, but too few, studies tell us from a Muslim perspective what is actually going on in multicultural Britain (Badawi, 1995; Shah-Kazemi, 2001).

One recent suggestion struck me as quite significant proof of the continuing lack of plurality-consciousness and a basic failure to understand the discussions about the nature of legal pluralist accommodation. In the discussion on 13 November 2008, it was suggested by the representative of the English legal establishment, my colleague Ian Edge, that the time may now have come to recognise a Muslim *nikah* contracted in the UK (more precisely in England and Wales) as legally valid under English law despite the absence of formal registration of that marriage. It was asserted that this would be a useful gesture of conciliation on the part of the formal legal system, which may be a valid point. But it was not even indicated that making a special exemption for Muslim marriages would then have implications for all other 'ethnic minority' marriages in the UK that are not registered. This argument thus shows, yet again, that narrow focus on Muslim issues is not productive for working out plurality-conscious compromises for the entire plural nation.

If we had the time here, we could examine to what extent the current English law is actually entirely and hopelessly messed up by a number of recent cases on this issue regarding recognition of legal validity of unregistered marriages. Briefly, the case of *Bath* was already mentioned above.⁶ This is ultimately a somewhat liberal Court of Appeal case of 2000, based on equity, i.e. the desire to avoid injustice to a Sikh widow who simply did not know that, when she got married in London in a Sikh temple during the 1950s, she should have registered her marriage. When her husband dies forty years later, she had to fight for her pension, and ultimately she won, but the law is as restrictive as ever. This important case, applying a presumption of marriage after almost 40 years of married life in a religious minority context, was however preceded by the High Court case of *Gereis v. Yagoub* [1997] 1 FLR 854. Here, an unregistered marriage between two Koptic Christians from Egypt lasted only one year, but was held to be legally

⁶ *Chief Adjudication Officer v. Bath* [2000] 1 FLR 8 [CA]



valid under English law, because this kind of marriage (which had been conducted in an unregistered Koptic Church in the UK) was held to be rather akin to a marriage under English law. This decision was thus reached on the basis of an argument of cultural affinity – or the absence of cultural distance – and thus discretion was exercised in favour of a Christian couple.

The opposite reaction is evident not only in Muslim cases, but also in the Hindu case of *Gandhi v. Patel* [2002] 1 FLR 603. This was an unregistered Hindu marriage in a restaurant, and it is evident that the judge did not like the scheming young wife and mother when he held that this marriage was no marriage at all! She had knowingly married an older man who was already married and not yet divorced, and then fished for property, even after the husband's death, opposing the husband's will in favour of her child from him. Here was no attempt made at all to accommodate ethnic minority culture, and of course it did not help that this was in effect a polygamous marriage. But the overall picture is one of a hopeless mess.

9 - Conclusions

The current brief analysis of recent developments in English law regarding legal recognition of Muslim and other marriages continues to demonstrate a significant inability on the part of the state and its officials to navigate legal pluralism and to accommodate the expectations of different religions. Marriage continues to be perceived as a prerogative of the official law, claimed by the state law as its domain. But the boundaries of official law and unofficial law continue to be broken and perforated in multiple ways by spouses, Muslims and non-Muslims alike, who are not willing to simply subject themselves to the formal state law.

Apart from widespread cohabitation among 'white couples', thus, it continues to be a notable pattern that many non-English people living in the UK move abroad to marry, and then rely on basic rules of private international law to gain formal legal recognition of their marriages. Normally, this should not be a problem. However, in practice, even most recently, I have come across several cases where after a divorce abroad questions were raised about the legal validity of the second marriage, leading to severe problems for some couples when it comes to immigration rights for the overseas spouse.

More interesting for the present concluding discussion are three recent scenarios of conflict that remain unresolved at least in the two



case scenarios concerning Muslims. The simplest scenario of non-accommodation involved a Hindu woman who now wanted to marry in an Anglican Church in England, and whose marriage is actually today. This matter was quickly resolved by recourse to expert evidence. Questions about legal recognition of the divorce arose because of the misguided assumption by a church official that the intending female spouse could not be married in a Church of England ceremony because her previous marriage, solemnised under Hindu law in India in 2003, had been dissolved by carrying out a religious ceremony. What I could figure out and ascertain, based on the official documents from India, was that this was actually a divorce by mutual consent under the Hindu Marriage Act of 1955, s. 13-B, which is a secular state-made law and certainly not involving a religious ceremony. So in this case, the official concerned assumed that since this was something 'Hindu', it must be 'religious', and thus not properly legal! Familiar reasoning, though (Menski, 2002).

Similar assumptions about what is religious and what is not appear to govern official approaches to marriages and divorces under Muslim law. But here conflicts remain unresolved, because English public policy wants to assert itself over 'foreign values' and the rules of other legal systems. Two case scenarios illustrate this very clearly. In the case of a severely autistic Bangladeshi man living in London, with a mental age of three, the parents had arranged a marriage with a cousin in Bangladesh, who knew of the boy's disability, but was ready to agree to the marriage and willing to come to the UK to care for her husband and also look after her uncle and aunt. The marriage was conducted over the phone, given that the boy's passport had been confiscated by the Social Service Department and so the family could not travel to Bangladesh. My expert report to the effect that this particular Muslim marriage or *nikah* over the phone was fully valid under Islamic law and also in Bangladeshi civil law has been accepted by the High Court and the Court of Appeal in London.⁷ At the same time, it was held that such a marriage was hit by English public policy and thus steps would be taken to ensure that the marriage could not be implemented. To date, the 'boy-husband's' passport is still not returned to the family, whose appeal about this matter is now pending before the House of Lords.

Even more tricky but equally dramatic are the various cases that have come up in the past few years over the legal validity of so-called

⁷ See *City of Westminster v. IC, KC and NNC* [2007] EWHC 3096 (Fam) and *KC and NNC v. City of Westminster Social and Community Services Department* [2008] EWCA Civ 198



'forced marriages', many of whom involve cousin marriages to a party in Pakistan or Kashmir. Here again, even when there is clear evidence that the marriage in question is legally valid under Muslim law, and even where the marriage was conducted in Pakistan or Kashmir itself and thus it should be entitled to legal recognition by English law, our Courts are taking a negative stance. Worse, there are serious concerns that social work departments are abusing their powers, hidden behind the closed doors of Family Courts, which have therefore recently been forced open. What I am beginning to see, though, is growing adversarial intervention in such family arrangements on the part of English law and social work agencies, and this drives Muslims, in particular, further away from using English law processes. The less said the better at this particular point, perhaps, because I have evidence of some recent decisions by the English courts that would not be maintainable under more intense human rights scrutiny.

We thus return to the scenario of flying kites and making accommodations for Muslim religious and cultural expectations. If lawyers, courts and social workers in England are now fine tuning their aggressive strategies of cutting well-flying kites by invalidating and de-recognising family arrangements among Muslims, in particular, there is no miraculous revelation in a conclusion that Muslims, individually, as families and collectively as a community, will then seek to take evasive actions and will simply not use the official processes of English wherever possible. The current strategy to rename the negatively loaded Shariat Councils as Muslim Arbitration Tribunals and to drag them under the more informal arbitration procedures of English law is a highly significant move in the ongoing struggles between English state law and Muslim legal perceptions.

If the state law continues to be hostile, insisting on its positivist prerogative to govern the field to the exclusion of other law-making entities, and the law disregards and even hurts Muslim sensibilities, the distance between formal law and multi-cultural society will continue to grow. The state will then have ever less influence in this field. It is not the first time that I have said that non-communication is not a good option (Pearl and Menski, 1998: 116-7). Continued evidence that there is lack of readiness to debate these critical matters openly is not a healthy sign. If religious needs are not seen to be accommodated by the modern state, the modern state itself will be the main loser, since in the realm of unofficial law, there remains much room for the plurality-conscious navigation of highly sensitive matters concerning family, morality and 'the good life'. A plurality-conscious state in this post-modern age needs to recognise that it is only one of many entities making law,



certainly not the only one. Sadly, that message remains drowned in the current tense climate of economic downturn, nervousness about continued migration to Europe, and worldwide competition over the right Truth.

Despite such a gloomy conclusion, the kite of legal pluralism is flying high. It appears that we can make significant progress in researching competition scenarios and avoiding damaging legal conflict if only we understand better how law works out in real life. And to fly kites successfully, you need not just a competent puller of the kite, but also air and much else. Like flying kites, 'doing law' is a complicated activity that requires multiple inputs. Without thoughtful accommodation of perceived religious needs, the law will become sidelined. But then, if the law gets too deeply involved in regulating these 'religious' and 'social' matters, they are themselves becoming part of the official law. One wonders why states remain worried about this? Are we afraid that laws that are not *made* by the state, but *accepted* by it, somehow overrun and overshadow positivist law-making. Are states so weak now that they have to worry about that? Or is it cockiness on the part of positivist claims to superiority that prevents harmonising accommodations?

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