The Politics of Legal Cultures

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Sociology and anthropology of law were partly developed from inception to empirically address the complexity of the relationship between law and society. Many of their insights into how law is socially constructed through the interaction between cultural, religious, economic and political factors remain incompatible with the aims and concerns of mainstream legal scholarship. Most social scientific approaches to the study of legal institutions and legal behaviour have revealed the plurality of forms of law, demonstrating that law can simultaneously manifest itself in different forms and at different levels of social reality. In contrast, various schools of legal positivism have conceptually separated law from morality, legality from justice, and facts from norms, in order to create a normative basis for justifying the unity and autonomy of law. This paper argues that the use of such antinomies as facts and norms, or law and morality, which are employed by legal theory in order to conceptually organise itself, diverts our attention away from the fact that law, whether it is defined as the command of the sovereign or the inner order of associations, is not divided into two opposing or contradictory poles. Instead, it consists of countless fragments which are not necessarily related in a formal rational manner.

1 Prologue

On a journey to a London airport, the taxi driver asked of my origins. I told him that I was born in Iran, to which he responded that he was from Bangladesh and, in what appeared to be an attempt to make conversation, went on to ask what the Iranian food was like. I described what I thought to be the typical Iranian dish, to which he replied, 'I have a few friends from Afghanistan and what you're telling me sounds like Afghani cooking'. I replied that I was not surprised if Afghani and Iranian cuisines were similar, for Afghanistan and Iran were, until a few hundred years ago, parts of the Persian Empire and a large section of the population of Afghanistan spoke Farsi. I added that the shared language suggested cultural kinship and was about to elaborate on how national cuisines might be linked to culture, when the driver cut me short. He asked if I were a Muslim. The abruptness of his tone suggested that being a Muslim should override all such trivial concerns with history, culture and language. I replied that I was born into a Shia family, but was not a practicing Muslim. At this point the driver said in a grave tone, '*My brother*, this is such a waste. You must surely know that it is a great privilege to be born into a Muslim family. You were born with *the* knowledge and you are throwing away this great gift that Allah has bestowed on you'.

I asked myself in silence: 'Did he call me his brother?' If he was a Farsi-speaking Afghan, we could perhaps pretend to be related by history, however, he was Bengali born and at that, thousands of miles away from my birthplace. At the same time, I felt that looking upon him as a Bengali and myself as a Persian failed to capture what was at stake. If we were having a conversation, it was because we were speaking in English and lived within the confines of the English culture and not because we spoke Bengali or Farsi. This meant that the context of our interaction was more complicated than our prima facie cross-cultural conversation. Neither he nor I could truthfully describe ourselves in

terms of one culture or one language alone as each were made up of parts of many cultural identities.

For the next twenty minutes, he gave me a lecture on the virtues of Islam, while repeatedly addressing me as "brother", explaining how richer my life would become once I embraced Allah. 'Being born Muslim', he told me, 'sets you apart from all the non-believers, from all those who don't know any better and are doomed to hell'.

A few days later, on my way back to London, the significance of my conversation with the taxi driver dawned on me. A man born in a different part of the world with a different custom and language regarded me as his "brother" because he, rightly or wrongly, identified me as a Muslim. Was Islam a super-national communion, the *ummah*, which transcended the artificial geopolitical boundaries of nation states, common languages, and shared historical experiences, uniting people of different ethnicities and cultures? Or was he calling me his "brother" because many immigrants from Muslim countries, such as he and I, felt that they were categorised as one and demonised irrespective of what they thought of their faith or the West? I wondered if he, a Bengali Sunni, would have addressed me, a non-practicing Persian Shia, as his "brother" and would have tried to save my soul had we met seven years earlier on 10 September 2001.

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This paper argues that we cannot satisfactorily explore the interaction between Western legal cultures, which emphasise democratic values and principles of human rights, and the legal cultures of certain Muslim immigrant communities, which are neither based on democratic principles nor are sensitive to Western standards of human rights, without considering the political processes through which such interactions are realised. In this study, the relationship between Western and Islamic legal cultures of the immigrant communities living in the West is conceptualised, not only in terms of the compatibility of their value systems, but also in terms of the imbalance of power and authority which shapes this relationship. Which factors influence the interface of legal cultures, where one legal system is operating within the jurisdiction of the other and, thus, is subject to its conception of legality and moral standards? To what extent is the acceptance or rejection of the legal culture of the "other" a function of an assessment of the actual compatibility of the cultures in question, that they can or cannot coexist in the same social space, and to what extent is it the outcome of legal ideologies and transient socio-political interests?

The remainder of this paper is divided into four parts. The next section, part two, starts by exploring the interaction between legal cultures by reference to three case studies: 1) a study of how the Bolsheviks attempted to engineer the modernisation of the Muslim parts of Soviet Central Asia during the1920s; 2) a 20-year-old case of domestic violence from the lower court in Sandviken in Sweden (tingsrätten i Sandviken) where the court regarded the cultural background of a Kurdish immigrant as a mitigating circumstance in sentencing; and 3) the negative reactions to the Archbishop of Canterbury's recent proposal to integrate parts of Sharia law into UK law, in order to address the needs of

certain Muslim communities living in Britain. These case studies are used to conceptualise the relationship between law, culture, religion and politics in the multicultural setting of late modern societies. These cases will allow us to explore the thesis that the encounter between legal cultures, such as the Muslim and UK law, often takes place in a social setting which is defined by an imbalance of power and authority, and where different interest groups struggle for political stakes. They also throw light upon the strategies of resistance to power, which are adopted by the weaker legal cultures.

Part three defines "legal culture" as a sub-category of the concept of culture, emphasising the importance of a shared language for the formation of a common cultural identity. This draws attention to the misleading presentation of Muslim communities in terms of one mono-cultural or mono-ethnic identity. A point is made that these communities consist of many different ethno-cultural groups with different histories, languages, customary practices and, subsequently, localised versions of Sharia.

Part four revisits Eugen Ehrlich's work. It argues that his sociology of law was sensitised by the cultural diversity he experienced in the Bukowina, where he lived, and that his theory of "living law" remains a useful tool for studying law in multicultural settings. The incompatibility of Ehrlich's "living law" with the formalist project of legal positivism of the time was captured in his debate with Hans Kelsen who criticised him for confusing "is" and "ought". This paper argues that Kelsen could not acknowledge Ehrlich's sociology of law as a bona fide theory of law because "living law" described how law manifested itself empirically and, at times, in a contradictory fashion. This allows a two-fold re-interpretation of "living law", either as an approach that recognises the irrational (or contradictory) elements of law, or as a theory which introduces a different form of rationality (e.g. communicative rationality), thereby transcending the understanding of law as a system, which coheres internally.

Part five concludes the discussions by briefly referring to Harmann Hesse's novel *Steppenwolf*, published a few years after the publication of Ehrlich's sociology of law. The story is about a middle-aged man who has become aware of his inner duality. Outwardly, he is a cultivated and moral man while, inwardly, he is a "wolf of the Steppes". As it unfolds, the man discovers his belief that he was made of one, or even two souls or personalities, to be illusionary; for every human being consists of ten, a hundred or a thousand souls or identities. This idea is used to return to the distinction between "is" and "ought" and to throw new light upon the three case studies of this paper.

2 Three Case Studies on Law, Culture, Gender and Religion

2.1 The Bolshevik's Modernisation

In a study published in 1968, Gregory Massell describes how the Bolsheviks attempted to engineer the modernisation of the Muslim areas of Soviet Central Asia, by legally strengthening the status of women in these regions during the

1920s.[1] The Bolsheviks decided that women, who hardly had any social or legal rights and were excluded from public life, could be used as "a surrogate proletariat" and an instrument to remove the "backward" Islamic customary practices. Although women did not represent the working class, which in these agricultural regions was yet to emerge, they could nevertheless be empowered to gradually "loosen and disintegrate traditional social relations" which hampered the progress of modernisation.[2] The Bolsheviks assumed that Muslim women would readily welcome and embrace such a reform and that a fundamental improvement in their status would automatically lead to the gradual demise of the traditional structures and institutions. This would in turn pave the way for the transformation of these communities into modern societies. Subsequently, Muslim women were granted civil rights, which were supported by a new judicial system staffed, in part, by women. The legal reforms ensured that women could publicise their grievances against their husbands, file for divorce and take employment and, thus, participate in public life. At the same time, the traditional court structures, including religious and customary tribunals, were abolished and replaced by Soviet courts.

Changes that ensued took the Bolsheviks by surprise. Women took advantage of the new laws reluctantly and the male population subjected those who did so to hostile treatment and violence. Moscow-trained judges and officials, who were introduced to administer the new system, had neither the knowledge of the local language nor any understanding of the culture of the local people. Understandably, they soon felt lost in the maze of claims and counterclaims that flooded the courts. To make matters more complicated, women who dared to leave their husbands in search of the promised emancipation, often found no employment and were either forced into prostitution or had to return to their husbands. Far from revolutionising or modernising the Muslim societies or improving the situation of women, Soviet social engineering through law reforms reinforced traditional attitudes, values and structures.

In their zeal to achieve their revolutionary aims, the ideological aspirations of which were politically and culturally alien to these traditional Muslim societies, the Bolsheviks disregarded not only the moral implications of their actions, i.e. if they had the right to interfere in other people's ways of life, but also the effectiveness of the methods they employed. They started transplanting their own set of political values, socio-cultural norms, brand of law and legal institutions into the body of communities, which already had functioning cultural norms, formal and customary laws, and legal institutions. They also did not attach any importance to Central Asia's "patchwork of religious and tribal tribunals, usages, and laws".[3] Far from being uniform, the natives' legal order consisted of two systems with local variations: the official or semi-official

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1 Massell, Gregory, *Law as an Instrument of Revolutionary Change in A Traditional Milieu: The Case of Soviet Central Asia* 2 (1968) Law and Society Review 178-240. For a brief discussion *see* Kidder, Robert L., *Connecting Law and Society* (Engle-Wood Cliffs, New Jersey, Prentice-Hall, 1983) at 39.

2 Ibid. at 184.

3 Ibid. at 182.

Islamic courts, which implemented the rules of Sharia, and the local customary rules of *adat*. This meant that in these societies "conflict resolution could be formal or highly informal, public or private, and the prevailing legal forms, norms and practices depended to a large extend on the particular region, communal organisation, and ethno-cultural milieu, as well as on the personal charisma of the particular judicial mediator".[4] The combination of formal laws of Sharia and the local customary laws of *adat* were intimately related to the social structures and dominant forms of social life in these societies. While the Bolsheviks could restrict the practice of Sharia, which had to be conducted publicly, they could not curb *adat*, which was an extension of cultural traits and did not require publicly implemented procedures.

Massell's account of the Bolsheviks' social engineering is one among a large number of studies conducted after World War II to criticise the naïve assumptions regarding the possibilities of using law as an *instrument* of social change.[5] These studies questioned the prevailing belief among some lawyers and policymakers that social norms, cultural traits, social relationships, patterns of conduct and institutions could be reformed or transformed in a predetermined fashion using law. By implication, they also opened up a new line of inquiry into issues of law and policy research by demonstrating that law needed to be recognised not as an agent apart from, but as an integral part of what is to be regulated.

Similar examples to that of the Bolshevik experiment can be found in the studies of how British colonial rule disrupted the lives of the people of India by reproducing its own legal system in India and how the natives reacted by "perverting" the new legal system through, for example, flooding "the courts with law suits against each other".[6] In contrast to the Bolsheviks, the British did not try to transform the customary rules of the native Indians and, instead, tried to enforce Hindu and Muslim customs, using the procedural frameworks and traditional institutions of English law. This approach, which appears to be more sensible than the Bolshevik's method, was not without its problems. Hindu law "assumed the hierarchical cast system, and the ancient codes prescribed different penalties for the same crime, varying with the cast of the offender" and

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4 Ibid. at 182.

5 It would be a mistake to assume that all state interventions are morally blind, out of touch with the social reality they try to regulate or doomed to failure. The United States Supreme Court decision in *Brown v. Board of Education* charged much of the school system in the Southern States of the US for its unconstitutional racial segregation. This ruling had little socio-cultural support among the white population of the South on whom the Supreme Court in effect imposed its ruling. Not surprisingly, the state officials in Georgia responded immediately by declaring the ruling of the Supreme Court as an "illegal" infringement of their state rights and vowed that the decision would never be implemented. However, when the desegregation policies expressed in *Brown* were combined with economic sanctions, the resistance of the school system in the South decreased and the principles expressed in *Brown* eventually were put into practice. The problem of racial segregation in the Deep South, or elsewhere in the US, did not size as a result of the Supreme Court's decision in *Brown*. It came, however, to be practiced to lesser extent, but also in less explicit forms.

6 Kidder, 1983, n.1 at 41.

Muslim law distinguished between the Muslims and the *Kafir* (infidel).[7] In such a legal setting, where justice is realised through unequal treatment, the British introduced the principle of equality before law. The British gave too much regard to the homogeneity of the Hindu and Muslim customary laws, which led them to ignore the differences between the practices of numerous Hindu sects and sub-sects, on the one hand, and Shia and Sunni Muslims, on the other. In addition, the British ignored the localised variations of Muslim laws and customs. In order to bring these customary rules within the framework of English law, they had to be recorded, which meant that the Hindu and Muslim laws had to be codified. This task was carried out by learned scholars using authoritative texts.[8] By codifying the customary law of Hindus and Muslims, the British deprived them of their dynamic property and their ability to register and respond to the changing conditions of the life of the people who used them. As a result, the version of Hindu and Muslim customary laws, as described by the courts, soon came to be viewed as alien by the natives. According to Derrett, "if Hindu law 'stagnated' under British, Islamic law died".[9]

2.2 The Sandviken Case

In October 1989, a 24-year-old Iraqi immigrant of Kurdish origin was brought before the Sandviken Lower Court in Sweden charged with assaulting, coercing and threatening his pregnant ex-girlfriend who had left him to live with another man.[10] Although, the court found the defendant guilty as charged, it nevertheless released him on a suspended sentence and a fine of 3000 Swedish Kronor (ca $400). Conviction on this type of criminal offence against a person ordinarily carried six months imprisonment, but in this case, when the court came to sentencing the accused, it argued that his "cultural" background provided a mitigating circumstance. According to the court's judgement, the fact that the accused had a different (non-Swedish) culture meant that his perception of his actions, which were in Swedish law labelled as "assault", were different.[11] Moreover, the court added that at the time when the assault took place, the accused felt that his integrity had been violated.[12] It should be noted that the judge and the lay judges who participated in making this decision were all Swedes and the court had not called for any independent expert assessment of the Kurdish customs and traditions.

This ruling was met with protest from several quarters. Lawyers and the judiciary questioned the relevance of the assumed cultural background of the

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7 Smith, Donald, *Religion, Law and Secularism* in Deva, Indra (ed.) Sociology of Law (New Delhi, Oxford University Press, 2005) at 160-61.

8 Ibid.

9 Derrett, J. Duncan M., *Administration of Hindu Law by the British* in Deva, Indra (ed.) Sociology of Law (New Delhi, Oxford University Press, 2005).

10 Case B 61/89, Sandvikens tingsrätt.

11 *See* Case B 61/89, Sandvikens tingsrätt, at 7.

12 I have previously discussed this case elsewhere. *See* Banakar, Reza, *The Dilemma of Law - Conflict Management in a Multicultural Society.* (Swedish title: Rättens Dilemma: Om konflikthantering i ett mångtkulturellt samhälle) Bokbox Publishing, Lund, 1994.

accused for sentencing. Various women's associations and interest groups highlighted that the ruling legalised violence against women. Immigrant associations, each in their own way, regarded the wording of the judgement as a threat to the precariously balanced ethno-cultural relations in the country. In an article in the editorial pages of one of the morning newspapers, the chair-person of the Conservative Women's Association in Malmö asked if the Swedish women married to foreigners were, from then on, to be subjected to a different set of legal rules than those of the Swedish law.[13] Also, many Kurds challenged the court's interpretation, arguing that violence against women was not, as it was implied in the judgement, a part of their custom.[14] The prosecutor also criticised the ruling, pointing out that although an immigrant's cultural background might explain his actions, it could not provide an excuse for assault. Not surprisingly, the Sandviken ruling was appealed and the accused was sentenced to two months imprisonment.

The significance of this case lies in the court's acknowledgement that Sweden was ethno-culturally diverse and that the recognition of the "other" was unavoidable. What appeared as a progressive step failed disastrously because the ideological structures of Swedish law and legal policy were mono-culturally constructed and not conducive to recognising the "other". The court's attempt to acknowledge the ethno-cultural diversity of Swedish society, thus, revealed law's male-centric perceptions of gender relations, but also its ethnocentric images of other cultures.

A final issue concerning this 20-year-old case is that neither in the court's judgement, nor in the public debate that followed the ruling, can we find arguments that explain the defendant's behaviour in terms of his religious beliefs. This is in stark contrast to the way recent cases involving Kurds living in Sweden have been presented and discussed publicly. In these cases, the Kurdish culture is linked to, or defined in terms of, Islam. In a recent case of honour killing we read: "The father who is suspected of the crime is a Muslim", suggesting a causal relationship between Islam and honour killing.[15] This demonstrates how religion, or more specifically Islam, has recently become an ethnic signifier in public debates. However, this religious marker of ethnicity can function meaningfully only as long as one works with a monolithic conception of Islam, in other words, as long as one regards Islam as a system of immutable principles which produce a uniform set of social practices across cultural, linguistic and national boundaries. It is noteworthy that a similar monolithic conception of Islam and Muslims also informed the Bolsheviks' and

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13 Fredriksson, Ingrid, *Rättens hänsyn drabbar kvinnor* in Svenska dagbladet, 19 January 1990.

14 During the 1980s, few people had heard of "honour killing" among Kurdish immigrants. Today, the Kurdish associations might find it more difficult to argue that extreme forms of violence against women are alien to their culture.

15 *Skyll inte på islam* in Aftonbladet, 8 January 2008, accessed on 20 March 2008, posted at "www.aftonbladet.se/debatt/article1582947.ab". Islam's attitude towards women is one of the factors facilitating honour killing. However, the patriarchal traditions which in certain Muslim and non-Muslim societies perpetuate violence against women exist independently of Islam.

the British colonialists' understanding of the religious and cultural practices of the natives.

2.3 Incorporating Aspects of Sharia into UK Law

In a lecture delivered to the Royal Courts of Justice in London on 8 February 2008, the Archbishop of Canterbury, Dr Rowan Williams, argued that the legal system in Britain needed to engage constructively with the religious concerns and motivations of members of the diverse communities which make up contemporary British society. There are some 1.6 million Muslims currently living in Britain (2.7 per cent of the total population), many of whom use Sharia law in matrimonial and private law-related matters to settle disputes. Yet, the decisions of Sharia courts are not recognised by UK law. In his lecture, the Archbishop argued that UK law should incorporate parts of Sharia into its corpus. He further pointed out that the accommodation of aspects of Sharia into the law was "unavoidable" and would, in his opinion, enhance community cohesion by making various religious minority communities part of the public process.

In an interview with BBC Radio 4, ahead of his lecture, Dr Williams explained that the recognition of certain aspects of internal laws of various religious communities by the British legal order could not be rejected causally as impossible, because there were already instances where UK law recognised the internal law of religious communities. Jewish courts, for example, already operated in Britain legally because there were "modes of dispute resolution and customary provisions which apply there in the light of Talmud".[16] The Archbishop made it, however, clear that he did not advocate an indiscriminate adoption of all aspects of Sharia, and did not condone the inhumane way in which it had been interpreted and enforced in certain Islamic states with extreme punishments and the oppressive treatment of women. UK law was in such a strong position in relation to Sharia to allow it to provide the right of appeal and the necessary safeguards against possible extreme and inhumane interpretation and application of Sharia. The Archbishop added that Britain did well to avoid situations where the law challenged "religious consciences" over issues such as abortion and treated it as a secular matter "saying 'we have no room for conscientious objections'".[17] Neither did Britain want a situation "where, because there's no way of legally monitoring what communities do, making them part of public process, people do what they like in private in such a way that becomes a way of intensifying oppression within a community…".[18]

Despite these clarifications, most headlines on both the broadsheet and the tabloid press suggested that the Archbishop was advocating the introduction of the whole of Sharia law in Britain. Even liberal newspapers such as the

16 *Archbishop - UK law needs to find accommodation with religious law codes* "www. archbishop ofcanterbury.org/1580" posted on Thursday 07 February 2008.

17 Ibid.

18 Ibid.

Guardian carried the headline: "Uproar as archbishop says Sharia law inevitable in UK".[19] One of the free London papers wrote on its front page:

> Dr Rowan Williams said the adoption of elements of Islamic Sharia law – which includes all women wearing burkhas - in the UK "seems unavoidable". He hopes a "constructive accommodation" in areas such as marriage which could allow Muslim women to avoid Western divorce proceedings.[20]

The Archbishop was criticised by the Government, his own Church and the representatives of other religions, including the Muslim Council of Britain and Liberal Judaism and other organisations. The British Prime Minister's spokesman swiftly distanced the Government from the Archbishop's proposal by declaring that British law had to be based on British values and "Sharia could not be used as a justification for committing breaches of English law, nor should principles of Sharia be included in a civil court for resolving contractual disputes.[21] Similarly, the Conservative party Shadow Minister for Community Cohesion stressed that "All British citizens must be subject to British laws developed through Parliament and the courts".[22] Britain's only Asian Bishop, the Bishop of Rochester, went further, by pointing out that it would be impossible to introduce Sharia into the corpus of UK law because "English law is rooted in the Judaeo-Christian tradition".[23] Dr Williams's predecessor, Lord Carey, who does not usually directly criticise the Archbishop, made an exception in this case, by stating that "…there could be no exceptions to the laws of our land which have been painfully honed by the struggle for democracy and human rights", adding, "acceptance of some Muslim laws within British law would be disastrous for the nation".[24] Finally, two members of the General Synod in London called for him to resign whilst other senior figures had remarked "Dr Williams's standing as the [Anglican] Church's worldwide leader had been diminished", thus making it difficult for him to resolve the other disputes within his Church.[25]

The Archbishop's lecture, published on his website, amounts to a seven thousand word long paper, in which he tries to "…tease out some of the broader issues around the rights of religious groups within a secular state, with a few thoughts about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United

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19 *The Guardian*, 8 February 2008.

20 *thelondonpaper*, Friday, 8 February 2008.

21 Reported by Times Online in *Archbishop of Canterbury argues for Islamic Law in Britain* posted at "www.timesonline.co.uk" accessed on 5 March 2008.

22 Ibid.

23 Ibid.

24 *Williams resists calls to quit over Sharia comments* in The Independent, Monday 11 February 2008.

25 Ibid.

Kingdom".[26] His overall approach is pluralistic. His message is based upon the assumption that we all possess overlapping identities. This means that the "membership of one group" should not:

> …restrict the freedom to live also as a member of an overlapping group, that (in this case) citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship – or, better, to recognise that citizenship itself is a complex phenomenon not bound up with any one level of communal belonging but involving them all.[27]

Expressed more simply, one should be able to be a British citizen, a practising Muslim and a member of the Conservative or Labour Party. The sources, which the Archbishop uses in his paper to argue his case, consist of works of reformist Muslim scholars who wish to bring about what amounts to the reformation of Islam. Sharia does, admittedly, depend for its legitimacy on the Qur'an, but as the Archbishop argues:

> [I]t is to some extent unfinished business so far as codified and precise provisions are concerned. To recognise *Sharia* is to recognise a *method* of jurisprudence governed by revealed texts rather than a single system… [A]n excessively narrow understanding of *Sharia* as simply codified rules can have the effect of actually undermining the universal claims of the Qur'an.[28]

One interpretation of this is that the Archbishop is suggesting that by engaging with Sharia, which is currently operating within certain (but not all) Muslim communities in Britain, in a constructive fashion and by recognising its already functioning courts, one could support the reformist movement in Islam. However, the angry reactions sparked by this suggestion revealed that the media and other interest groups and organisations in Britain were not concerned with having a "constructive" dialogue with anyone related to, or representing, the Muslim faith. Instead of asking if such incorporation was legally feasible, if such a step would support the reformists to introduce a new interpretation and practices of Sharia which were in line with the democratic underpinnings of English law, and if it would strengthen the community cohesion as suggested by the Archbishop, the general tendency was to reject the proposal as "impossible",[29] denounce it as "the pitiful contortions of a dying Church"[30] or dismiss it as an idea which if implemented would lead to "all women wearing

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26 Archbishop's Lecture - *Civil and Religious Law in England: a Religious Perspective* posted at: "www.archbishopofcanterbury.org/1575", Accessed 7/2/08.

27 Ibid.

28 Ibid.

29 *Impossible to have Sharia law in Britain* in The Telegraph, 9 February 2008.

30 *Rowan Williams has shown us one thing – why multiculturalism must be abandoned* in The Independent, 11 February 2008.

burkhas".[31] This is not to say that had the public debate on Sharia been informed by reason and a genuine attempt to explore the possibilities of incorporating Sharia into UK law, various commentators and interest groups would have necessarily concluded that; 1) the law in Britain was capable of accommodating Sharia; and 2) it was desirable to engage with and recognise the cultural identity of various groups, Muslims in particular, because it enhanced community cohesion. Even the mere incorporation of the Sharia family law, which discriminates against women, entails great challenges to a Western legal system.

Instead of denouncing the Archbishop's proposal off-hand, one could have asked concrete questions. For example, according to Sharia, a man may initiate divorce proceedings against his wife at will, while the wife is denied the right to appeal the outcome of such proceedings. However, if the wife wishes to initiate similar proceedings, she requires the consent of her husband. Sharia also allows polygamy, which means that the man has the right to leave his first wife, refuse to divorce her and re-marry. Was the Archbishop suggesting that UK law ought to recognise the decisions of Sharia courts which are brought about through procedures pitched against women's rights simply because these courts are already operating? Or was he suggesting that by recognising these decisions as legally valid, UK law could give women the right to appeal and to initiate divorce proceedings? In the BBC interview quoted above, the Archbishop mentions the need to legally monitor what communities do, suggesting that when certain practices are forced into the private sphere, they can intensify "oppression within a community".[32] Is the Archbishop attempting to undermine the traditional conservative forces within the Islamic communities living in Britain and pave the way for a reformist movement in Islam by giving Muslim women the right to appeal and to file for divorce? One cannot help noting the similarity between the latent (and perhaps even unintentional) consequences of the Archbishop's proposal and the Bolshevik's experiment in Central Asia.

In the public debate, Sharia was presented as an undemocratic value system incompatible with UK law. It is, admittedly, true that the practices of Sharia have taken inhumane and oppressive forms in most Islamic states and much of this oppression is directed towards Muslim women. However, this does not mean that UK law in general, and English law in particular, is a haven for democracy and functions strictly according to unalienable principles of human rights. English law has, for example, no insurmountable difficulty in incorporating provisions which allow the authorities to hold terrorist suspects without charge for 28 days, which clearly undermines the fundamental principles of civil liberty and the criminal law principle of the presumption of innocence.[33] Neither has English law any difficulty in incorporating provisions such as *Stop and Search Orders*, which indiscriminately target minority groups.[34] This means the reason for denouncing the Archbishop's proposal

31 *thelondonpaper*, Friday, 08 February 2008.

32 Ibid.

33 The Home Secretary, Jacqui Smith, recently put forward a proposal to extend the period to hold "terror suspects" without charge to 42 days.

34 B. Bowling and C. Phillips, *Disproportionate and Discriminatory: Reviewing the Evidence of*

cannot be that Sharia is inherently undemocratic and, subsequently, will introduce contradictions into an otherwise democratically coherent system of English law. The English law already contains many such contradictions and appears equipped to cope with them.

The examples given above are all concerned with the clashes of different systems of belief, mores and, ultimately, legal cultures. They also show that once cultural values and beliefs are brought face to face, political convictions and interests, rather than systematic investigation into the possibility of co-existence of plural systems in the same social space, come to prevail. The political and ideological convictions of the Bolsheviks, together with their military dominance of Soviet Asia, made them oblivious to the significance of the natives' formal and informal laws. Similarly, in the Sandviken case, the question of whether the decision of the court to recognise the "otherness" of the defendant was justified, even though its sentencing decision might have been wanting, was overshadowed by the political interests of various groups and the mono-cultural policy of the Swedish law. Finally, the Archbishop's proposal regarding Sharia was met with intense hostility and rejected not because UK law's internal modus operandi rendered it impracticable, but because it too was politically incorrect. No aspect of Islam, which in the political climate after 9/11 is linked to terrorism and anti-Western sentiments, could find accommodation within the democratic structures of Western law and polity.[35]

The three cases which I used above suggest that the political discourse against the backdrop of which the interaction between various legal cultures takes place tends to stress the *differences* between rival systems. However, the political discourse can, and does, disregard differences if focusing on the similarities between the rival cultures serves its ideological ends. The publication of Salman Rushdie's *Satanic Verses* in 1988, which provoked protests among some Sunni Muslim communities in towns such as Bradford with large Pakistani and Bangladeshi immigrant populations, is a case in point. The protests were initially locally organised, but once the local organisers received financial support from sources outside Britain (allegedly with links to Saudi Arabia), the local protests spread beyond Britain's borders and transformed into an international movement. The Sunni organisers of the protest eventually took their grievance to Ayatollah Khomeini, the spiritual leader of Iran's Shia Muslims at the time, who declared the book as blasphemous and, on 14 February 1989, proclaimed a *fatwa* sentencing Rushdie to death. The point made here is that the politics surrounding the Rushdie affair required Sunni Muslims, who ordinarily do not recognise the legality and authority of Shia Islam, to set aside their legal cultural differences and bring their case to a Shia court. They did so because the Shia Court of the Ayatollah was the only place the Sunni protesters could obtain the type of verdict they wished to be imposed against Rushdie, i.e. a death sentence, but also a verdict which was more than a

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Stop and Search in (2007) 70/6 Modern Law Review at 936-7.

35 Since 9/11, the public perception of Islam as an extremist militant faith which condones, encourages and justifies political violence more often than other faiths has deepened in the West. *See* Ansari, Humayan, *Attitudes to Jihad, Martyrdom and Terrorism among British Muslims* in Tahir, Abbas (ed.) Muslim Britain (London, Zed Books, 2005).

symbolic action.[36] And surely enough, soon after the proclamation of the *fatwa* in 1989, the Hezbollah made an attempt to assassinate Rushdie in London.

3 Monolithic and Plural Conceptions of Legal Cultures

Legal culture refers to "relatively stable patterns of legally-oriented social behaviour and attitudes",[37] and as such should be regarded as a sub-category of the concept of culture. Culture is, in turn, defined in terms of "meaning" or the dynamic *processes* which make social life meaningful and help individuals and whole communities to develop their own particular worldviews.[38] Expressed differently, culture refers to the process of reproduction of beliefs and attitudes that people hold about the social world.[39] These beliefs and attitudes help the individual to interpret, create and re-create the social reality within his/her own universe of meaning. At the same time, they form cultural patterns by manifesting themselves as the intersubjectively shared *values* of a community. Thus, the notion of meaning gains cultural significance when it becomes intersubjective. It is also at this stage when the intersubjectively shared values contribute to the social integration of groups, communities and whole societies. Culture is not, however, an entirely subjective phenomenon, for its various value formations possess observable "factual" properties. Although these formations are products of human consciousness, they are by no means confined to the individual actor's subjective inner life. Values are externalised through

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36 Two points should be underlined here: Firstly, only a few years earlier, the Islamic Republic had conferred its literary prize upon Rushdie for his *Midnight Children*, which was published in 1981. It suggests that ayatollahs might have initially wished to stay clear of the Rushdie affair in order to avoid embarrassment, and there is no evidence that Iran was involved in the protests against Rushdie which, as mentioned above, were organised by certain Sunni groups in Britain. Secondly, once a blasphemy case was brought before Ayatollah Khomeini, he had no choice but to issue a *fatwa* sentencing Rushdie to death. Once such a *fatwa* was issued by Khomeini, rather than say by some Sunni spiritual leader in Cairo or Medina with no political influence and resources, it could not be treated as a symbolic gesture, but as a *fatwa* backed up with such force of violence that the state of Iran could mobilise internationally. For a discussion *see* Banakar, Reza, *Salman Rushdie and the Holy Cow of Liberalism*. (Swedish title: *Salman Rushdie och liberalismens heliga ko*) in 2 (1992) Häften för kritiska studier (Swedish Critical Studies Review).

37 Nelken, David, *Using the Concept of Legal Culture* in 1 (2004) Australian Journal of Legal Philosophy at 1.

38 Legal culture is a relatively new concept which, according to David Nelken, can be traced "to terms like *legal tradition* or *legal style*, which have a much longer history in comparative law or in early political science. It presupposes and invites us to explore the existence of systematic variations in patterns in "law in the books" and "law in action," and, above all, in the relation between them". *See* Nelken, David, *Culture, Legal* in Clark, David S. (ed) Encyclopedia of Law and Society: American and Global Perspectives (Sage, London, 2007). Also see Nelken, David, *Defining and Using the Concept of Legal Culture* in Örücü, Esin and Nelken, David (eds) *Comparative Law* (Oxford, Hart, 2007).

39 Wuthnow, Robert, *Meaning and Moral Order: Explorations in Cultural Analysis*. (Berekeley, University of California Press, 1987).

symbolic and non-symbolic social interaction and given an objective status which, in turn, helps to create and maintain patterns of behaviour. Language, which is the most basic expression of any culture, provides the best example of how the subjective and the objective aspects of a cultural process are linked. Language is subjectively created by sharing and reproducing symbols, rules and conventions, and is objectively manifested in writing and speech, making it independent of any individual actor's personal usage of the language. Expressed differently, language does not determine what is communicated (the content of the communication is decided by the individual actor's interest and the context of the interaction), but because of its objective characteristics it determines *how* the communication takes place. This also suggests that the objective features of a culture are to be observed by focusing on the *mode* of symbolic communication, rather than on the content of such communication.

A common language is, therefore, vital for the formation of cultural identities and, by extension, for the development of legal cultures. People who do not share a common language cannot form a cultural group and cannot share the same legal culture. Hence, it is misleading to suggest that Muslim communities belong to a single Islamic (legal) culture. It is, admittedly, important to recognise that Islam contains fundamental values in regard to how the private and public lives of Muslims are to be organised. In this sense, Islam can be used as an ideological beacon for mobilising groups of people who might otherwise have little in common, but such a mobilisation will be a political rather than a cultural project. Malaysians, Bangladeshis, Saudis, Persians and Albanians are all Muslims, but they do not belong to the same cultural and linguistic spheres. A closer scrutiny of these nations reveals that their cultural identity is not a function of Islam, but a product of social, political and historical processes, some of which have very little to do with Islam or other religions. More importantly, their interpretations of Islam and religious practices are shaped by their socio-historical backgrounds and experiences. To give an example, after the Mohammedans invaded Persia and converted Persians to Islam, the Persians revolted against the rule of the Abbasid caliphates, who were Arabs, in order to reassert themselves and regain the control of their country. Thus, Shia Islam was the recreation of the Persian identity "beneath a veil of religion" and a part of the political struggle against the Arab domination of Persia.[40]

As we saw in relation to the case studies in the previous section, Islam and Muslim immigrant communities were depicted as homogenous entities in public political discourse. There was no recognition of the cultural diversity among Muslims, whose language, history and customs are as diverse as Christians'. As Goodall points out, the word Muslim is frequently used in Britain "to mean someone who looks 'Asian'"; more specifically, to indicate a person from Pakistan, India or Bangladesh, where the majority of the British Muslims have traditionally come from.[41] This has linked Islam and race in the public opinion

40 Bausani, Alessandro, *The Persians: From Earliest Days to the Twentieth Century* (London, Elek books, 1971) at 77.

41 Goodall, Kay, *Incitement to Racial Hatred: All Talk and No Substance?* in 70 (2007) Modern Law Review at 98.

and as various cases of racial hatred brought before the courts have shown, "Muslim" has been used as a racist marker".[42] Notwithstanding the usage of "Muslim" in public discourse, and despite the fact that both "Jew" and "Sikh" are recognised in law as racial groups and, thus, protected against the offence of incitement to racial hatred, "Muslim" is considered to be a religious category in English law. This is correct because Islam is a world religion encompassing many ethnicities and cultures, but incorrect in the British context because its everyday usage has come to refer to South Asians as a racial category. Thus, the anti-Muslim hostility, which has targeted Asians in Britain, was not considered an offence of incitement to racial hatred and could not be successfully prosecuted until recently when incitement to religious hatred was made unlawful by the new Racial and Religious Hatred Act 2006.

The everyday conception of "Muslim" as a mono-racial or mono-cultural category also tainted the debate on the Archbishop's proposal lacing it with negative sentiments. No attention was paid to the fact that Sharia courts operating in Britain are mainly run and used by Muslim immigrants from the Indian sub-continent, or that there are different versions of Islam. Nor any notice was taken of the link between Sharia and local customs (a link which is often ignored by Western scholars). Arguably, the divine origin of Sharia is believed to render it immutable. However, Sharia too needs to be interpreted before it is put into practice, which opens it to the possibility of change, a point which was underlined in the Archbishop's paper. According to Lawrence Rosen, within every Muslim legal system, we find "some local variation of the proposition that custom must take precedence even over that which is sacred law, 'Whatever dictated by custom is as if dictated by law'".[43] Islamic law has a symbiotic relationship with the custom of communities which, in turn, means that there are many versions of Sharia in operation in Britain. At the same time, UK law was depicted as a fundamentally democratic and coherent unit whose internal cultural and moral integrity will be violated by the introduction of the undemocratic rules of Sharia. This is reminiscent of Edward Said's description of the creation of an Oriental other, by making an immutable distinction between the West and Orient.[44] At the same time, it demonstrates the need to conceive and present the legal system as a rationally constructed coherent system of legal rules, doctrine and decision, to be deeply ingrained in the modern psyche and in jurisprudence. We return to this issue in the final section of this paper.

It is not only the dominant political and cultural discourses in the West, but also militant and extremist Islamic groups that use the immutable dichotomy of West and Muslims to describe the relationship between themselves and their host countries. These groups conceptualise the West as a mono-cultural entity

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42 Goodall, ibid, at 96. See for example *Norwood v DDP* [2003] EWHC 1564 (Admin); 2003 WL 21491815 (QBD (Admin Ct)).

43 Rosen, Lawrence, *Law as Culture: An Invitation* (Princeton, Princeton University Press, 2006) at 38.

44 Said, Edward, *Orientalism* (Harmondsworth, Penguin, 1985).

and regard a rejection of the Western identity of their host countries as the first step towards the "promotion of a single united *ummah*".[45] In countries such as Britain, the second generation immigrants' return to Islam has increased since 9/11, and markedly intensified since the Iraq war. Why young Muslims turn to Islam is often explained by reference to their socio-economically marginalised place in British society. However, Akhtar argues that young Muslims' return to religion has a more complicated socio-cultural mechanism, "one that offers individuals who feel in some way constrained by their circumstances an alternative ideology, a sense of belonging, solidarity and means of political mobilisation".[46] According to Akhtar, this also means that the young Muslims' return to religion, is not a revival of Islam as such, it does not necessarily mean "an increased adherence to the Islamic code", but "instead refers more to individual empathy with a religious identity, an identity that provides group solidarity".[47] We are, thus, not dealing with a conventional cultural construction of Muslim communities, but with the rise of a political movement among the young generation of Muslim immigrants, who make an instrumental use of Islam to unite a diverse group of people whose primary common denominator is not religious but socio-political. These children of immigrants feel that they are being victimised, marginalised and demonised; not for what they are or have done, but instead for how the majority culture perceives them.

The political discourse which shapes the confrontations of Western and Islamic legal cultures is not uniform either. One important distinction can be made between the concerns which are voiced from within the legal systems by the judiciary or other officials of the law, and the concerns raised by those outside the legal system, i.e. by political actors, interest groups and citizens. The concerns and approaches of the judiciary are not always in agreement with those of the political system and the public in general, and in some cases clash. For example, the judiciary in Britain has been, on the whole, opposed to the detention of terrorist suspects without charge and to the proposals to extend the period of detention from 28 to 42 days. Whilst many members of the judiciary see the proposal to extend the period of detention as an unnecessary measure which further undermines the fundamental principles of law, sections of the political establishment present the proposal as a necessary and logical measure to ensure "security". The public opinion is also divided on this matter, but ordinary people's concerns with "security", and the fact that the majority of citizens will not be at the receiving end of such measures, tend to move the public opinion in favour of the proposal. Such disparities could be explained by distinguishing between internal and external legal cultures, i.e. between legal meaning, which is generated by the judiciary and other functionaries of the legal system in relation to the internal operations of the law, and the attitude and perception of citizens towards law, legal institutions and legal regulation.[48]

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45 Akhtar, Parveen, *'Return to Religion' and Radical Islam* in Tahir, Abbas (ed.) Muslim Britain (London, Zed Books, 2005) at 164.

46 Ibid.

47 Ibid.

48 Friedman, Lawrence M. *Law and Society: An Introduction* (Englewood Cliffs, Prentice-Hall,

This distinction may, arguably, serve conceptual and analytical ends in certain circumstances – it helps for example to explain why there can never be one single legal culture in a modern society – but as with other dichotomies, it can draw our attention away from the dialectical interaction between various forms of legal meaning; for example, between the attitudes of the officials of law and those of the citizens, which ultimately create our image of the law as a body of norms and practices.[49] Perhaps more importantly, it fails to reflect the diversity of views and attitudes which can exist both within and without a legal system. The judiciary is often divided on many important policy issues, such as how to treat terrorist suspects, while the public discourse on legal issues often consists of conflicting and contradictory viewpoints on the relationship between law, culture and religion. Yet, legal positivism, which remains the dominant perspective within legal studies, continues to propagate an understanding of law in terms of a single coherent (i.e. free from internal contradictions) system of rules, doctrine and decisions which are largely, if not entirely, independent of moral, cultural and social forces. This perhaps explains why mainstream jurisprudence continues to debate the separation thesis, i.e. if and how law and morality are related, as if it were *the* fundamental problem of law.[50]

The remaining parts of this paper hope to show how the socio-cultural diversity of the type we have discussed above can be explained theoretically, while throwing some light on why both political and legal discourses tend to present the legal order as a single homogeneous unit.

4 Living Law and Cultural Diversity

4.1 Ehrlich's "Living Law"

The concern with the complexity of the relationship between law and custom, in general, and law and cultural diversity, in particular, is hardly new in social scientific studies of law. Eugen Ehrlich, one of the founders of the sociology of law, developed his notion of "living law" partly as a response to the cultural diversity in Czernowitz in the Bukowina, where he worked and lived most of his life. There, Ehrlich could observe "nine tribes: Armenians, Germans, Jews, Romanians, Russians (Lipowanians), Ruthenians, Slovaks (often taken for Poles), Hungarians, and Gypsies" living side-by-side.[51] Being a jurist, he was also curious as to how this cultural plurality interacted with the legal order of the Austro-Hungarian Empire. He saw the attempts of politicians in Vienna to

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1977).

49 See Banakar, Reza, *Merging Law and Society: Beyond the Dichotomies in Socio-Legal Research* (Berlin, Galda + Wilch, 2003).

50 For a discussion *see* Banakar, Reza, *Whose Experience is the Measure of Justice* in 10 (2008) Legal Ethics.

51 Ehrlich, Eugen, *Das lebende Recht der Völker in der Bukowina* in 1 (1912) Recht und Wirtschaft quoted by Ziegert (*see* Ziegert, Klaus A. *The Sociology behind Eugen Ehrlich's Sociology of Law*, 7 (1979) International Journal of Sociology of Law 225-273. at 229).

enforce their laws on the functioning normative orders of these culturally diverse, yet harmonious, ethnocultural groups as socially detrimental. Also, being a Roman Catholic of Jewish descent with an interest in the Jewish question in Eastern central Europe, Ehrlich had probably experienced at first hand the tensions entailed in living at the intersection of cultures, religions and ethnic identities. In this sense, Ehrlich's sociology of law is a theory of legal pluralism sensitive to legal cultural diversity.

A similar approach to law also grew out of legal anthropology's preoccupation with social control and how the imposition of centralised colonial laws were received and experienced by the indigenous people of the colonised countries. Sociologists, such as Ehrlich, and social anthropologists, such as Malinowski, were amongst the first scholars to develop pluralistic theories of law.[52] Although the aims and the contexts of their research were different, they both defined law and legal order in broad terms that included not only the traditional legal institutions, but also the "non-legal forms of normative ordering".[53]

In *Fundamental Principles of the Sociology of Law*,[54] Ehrlich distinguished between law created by the state and law produced by the organisational imperatives of non-state social associations. The state law (*Staatsrecht*) was, in turn, differentiated into statutes (*Gesetze*) and juristic law, i.e. legal norms for decision-making (*Entscheidungsnormen*) which are developed by jurists through a process of universalisation and the "reduction of unity" of legal norms.[55] However, according to Ehrlich, it was not the state law, but "living law" that dominated life itself. Living law did not need to be expressed in legal propositions and emerged independently of the state law out of the inner order of associations. Ehrlich calls norms which emerge in this way "facts of the law" (consisting of custom and usages, relations of domination and subjugation, property relations and declarations of will as in contract and testaments) and argues that they have a considerably greater impact on social structure and organisation of society than any law posited by the state.

Living law and theories of legal pluralism in general are often criticised for failing to distinguish between certain social and cultural norms, on the one hand, and legal norms on the other. The requirement to sharply differentiate between legal and extra-legal norms is a normative standard belonging to legal positivism and state law. It is, therefore, not a benchmark for measuring the social scientific validity of legal pluralism, which does not recognise the state as the primary source of law. The criterion for assessing the assumptions made by

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52 Malinowski, Bronislaw, *Crime and Custom in Savage Society* (London Routledge, 1961, orig publ. 1926).

53 Ziegert, Klaus A. *The Sociology behind Eugen Ehrlich's Sociology of Law*, 7 (1979) International Journal of Sociology of Law 225-273. at 229. Also see, Banakar, Reza *Sociological Jurisprudence* in Banakar, Reza and Travers, Max, An Introduction to Law and Social Theory (Oxford, Hart, 2002).

54 Ehrlich, Eugen, *Fundamental Principles of the Sociology of Law* (London, Transaction Publishers, 2002 [original pub. 1913]).

55 Ibid. at 253.

legal pluralism are in the first place *empirical*, i.e. whether or not ordinary men and women use certain rules and norms which are not posited by the state or other official institutions to resolve their disputes and organise their relationships.[56] For both Ehrlich and Malinowski, the decisive factor for distinguishing between legal norms and social or cultural norms were to be found neither in relation to the legal *sources* of norms nor to their institutional *form*. That is to say, for a norm to be regarded as legal, it neither had to have been posited by the state, nor did it necessarily require some formal executive institutions, such as the courts or police, to ensure its enforcement. A norm gained legal status if it fulfilled other socially functional conditions, such as inducing social control and order. Ehrlich used the concept of *opinion necessitatis* for distinguishing legal norms from other types of normative statements and behaviours.[57] He meant that a socio-cultural norm became legal when the group which had introduced it as a standard of conduct, attached great importance to its application. This concept of law is fundamentally different from definitions found in Max Weber's and Hans Kelsen's works, where the existence of sanctions, administered by a special staff, against the violation of legal rules play a decisive role in identifying legal from extra-legal norms.[58]

Clearly, there are significant overlaps between state law and living law. Among norms of decision, which are applied by courts, we find many that dominate social life and function as the inner order of certain associations. In fact, Ehrlich meant that living law, being the foundation of most forms of law, *ought* to be treated as the law proper and should be regarded as the foundation for legislation or legal decision-making. But this amounted, according to Hans Kelsen, to confusing *Sein* ("is") and *Sollen* ("ought").

4.2 Kelsen's Critique of Ehrlich

Kelsen criticised Ehrlich on several points, arguing, for example, that the concept of "fact of the law", defined by Ehrlich as "usage, domination, possession, and dispassion (usually by contract or by testimony disposition)",[59] was a contradiction in terms because law is intrinsically normative.[60] More importantly, Kelsen argued that it was one thing to argue that living law *is* the

56 For a critique of this position *see* Tamanaha, Brian Z., *The Folly of the 'Social Scientific' Concept of Legal Pluralism* in 20 (1993) Journal of Law and Society.

57 Ehrlich 2002, above n. 56 at 165.

58 Weber, Max, *On Law in Economy and Society*, Max Rheinstein (ed.) (New York, Simon and Schuster, 1954) and Kelsen, Hans, *The Pure Theory of Law* (Berkeley and Los Angeles, California University Press. 1967).

59 Ehrlich 2002, above n. 56 at 118.

60 Kelsen, Hans, *Eine Grundlegung der Rechtssoziologie* (1915) 39 Archiv für soziale Gesetzgebung und Statistik. Kelsen, Hans and Ehrlich, Eugen, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)*. Baden-Baden, Nomos Verlags-gesellschaft, 2003). For a discussion see: van Klink, Bart, *Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen* (28.8.2006). Available at SSRN: "ssrn.com/abstract=980957".

origin of all forms of law (a statement which Kelsen incidentally did not agree with) and quite another thing to argue, as Ehrlich did, that living law *ought* to be the basis of legislation and legal policy. Kelsen meant that sociology was an *empirical* science which could describe and explain law's operations, such as the decisions made by courts, but such descriptions cannot lay the basis for assessing the normative soundness of these decisions.[61]

Although Ehrlich was offended by Kelsen's suggestion that he had confused *is* and *ought*, he nonetheless refused to defend himself against Kelsen's critique.[62] Whatever the reason for his refusal to engage in direct debate with Kelsen, to accuse Ehrlich of confusing *is* and *ought* misses the main point of the theory of "living law". By *the main point*, I am not here referring to Ehrlich's systematic attempt to create a "science" of law as a branch of social sciences which explores law as a social phenomenon. Nor am I referring to his novel argument that a body of rules does not necessarily require the threat of sanctions or the likelihood of being enforced by an especially authorised staff, before it is recognised as law.[63] Nor am I referring to his critique of the state-centred concept of law,[64] upon which rests legal positivism, and his insight into the practical workings of law which shows that the state is not the sole, or even the primary, source of law. Here, I am referring to living law's ability to bridge the gap between facts and norms, reason and belief, law and morality. Ehrlich's concept of law does not "confuse" *is* and *ought*, but by observing law that, de facto, lives and operates in society, reveals how the prescriptive and the descriptive properties of legal norms are *conflated* when people use law.

Law, as Ehrlich discovered it, refused to be neatly conceptualised in terms of *is* and *ought*, as two sharply defined opposites. This law could be *is* and *ought* at the same time, containing more than a grain of what probably appeared to Kelsen as "irrationality". Kelsen was, arguably, right in pointing out that Ehrlich's concept of law was contradictory, but the contradictions were paradoxes generated by social operations of law rather than by Ehrlich's analysis.[65] Unlike Kelsen, whose formal theory of law provided an account of how law ought to be identified and how a legal system ought to be constructed, Ehrlich was simply describing the social operations which generated forms of social control and organisation. Kelsen was unable to acknowledge Ehrlich's

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61 This demonstrates that sociology of law has from inception a normative, a descriptive and an analytical dimension. See van Klink, above, n. 62.

62 Ehrlich, Eugen, *Entgegnung* in Kelsen, Hans and Ehrlich, Eugen, Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse *(1915/1917)*. Baden-Baden, Nomos Verlagsgesellschaft, 2003).

63 Ehrlich explains that to "a person… whose conception of law is that of a rule of conduct, compulsion by threat of penalty as well as compulsory execution becomes a secondary matter… [A]s a rule, the thought of compulsion by the courts does not even enter the minds of men". Ehrlich, 2002, above, n. 56 at 21.

64 In *Die juristische Logik* (Aalenm Scientia Verlag, 1996, orig print 1925, at 25) he calls it "die vulgäre staatliche Rechetsauffassung".

65 For a discussion on legal paradoxes and contradictions see Perez, Oren and Gunther, Teubner (eds.) *Paradoxes and Inconsistencies in the Law* (Oxford, Hart Publishing, 2006.

theory because living law represents a type of rationality which was incompatible with Kelsen's understanding of a rationally constructed legal system. Living law is the foundation of social organisation. It captures how certain categories of norms which are generated within "lifeworld" (*Lebenswelt*) become intersubjective within a group of people and how these norms regulate the behaviour of the members of this group. Thus, its form of rationality is closer to what Jürgen Habermas described as "communicative rationality" than Kelsen's formal rationality.[66]

From a sociological standpoint, it follows that living law, which emerges out of the functional needs of social organisation and is symbiotically related to mores, customs and social organisational reality of the people who have produced it, should provide a sound basis for law, legislation and legal decision-making. This does not, however, mean that living law is necessarily humane or democratic. The unofficial legal system of the Muslim communities of the Soviet Central Asia (*adat*) and the unofficial forms of dispute resolution used by immigrant Muslim communities living in Britain are two cases in point. Both these systems can, to different degrees, be regarded as living law and both deny equal rights to women. As the colonial experiences demonstrate, the recognition of the social organisational significance of these forms of laws, undemocratic as they might be, is now, to use the Archbishop's word, "unavoidable". The Bolsheviks could have avoided the great harm they inflicted upon the Central Asian societies, in general, and women, in particular, had they recognised the fundamental significance of forms of social control which were embedded in Asian people's customs and traditions. My argument here is that, even though this was most probably not Ehrlich's intention, the concept of living law, in addition to capturing the diversity of forms of law, also helps us to make sense of what might appear as the contradictory (or the "irrational") elements which constitute law.

5 Epilogue: *Steppenwolf*

Steppenwolf, one of Hermann Hesse's novels,[67] is about a middle-aged man named Harry Haller who is, outwardly, a spiritually refined intellectual and an artist, a cultivated man of high moral standing who seeks and enjoys the rational orderliness that a bourgeois life has to offer. Inwardly, however, Harry is a "wolf of the Steppes", a wild animal of low moral standing, who cannot help challenging and violating the everyday conventions and what he regards to be the artificial limits of ordinary men and bourgeois life. Not only does Harry experience himself as consisting of two parts – part man and part animal – he also feels torn apart by the ongoing struggle between the "human" part, which is a creature of rational thoughts and habits and enjoys the middle-class order of

66 Habermas, Jürgen, *The Theory of Communicative Action: Reason and the Rationalization of Society*, Vol. One, Cambridge, Polity Press, 1984.

67 Hesse, Hermann, *Steppenwolf*, Penguin Books, 1965, first published in Germany by S. Fischer Verlag A.G. in 1927.

things, and the "wolf", which is a wild animal of irrational instincts and behaviour. This novel is the story of Harry's discovery that what he has experienced as his dual existence represents an oversimplification of the state of affairs. As the story unravels, Harry comes to realise that he does not consist of two souls, one human and one wolf, but of hundreds of souls. Even the wolf does not have one single soul and consists of fragments of identities.

Despite their fragmentation of souls, even the most intelligent of humans seem to have a deeply rooted inborn need that makes them see the world and themselves through "delusive formulas and artless simplifications" which ultimately rest upon a false analogy.[68] No matter how often the illusion that every person is a single soul is shattered, it is somehow restored again:

> And if ever the suspicion of their manifold being dawns upon men of unusual powers and unusually delicate perceptions, so that, as all genius must, they break through the illusion of unity of the personality and perception that the self is made of a bundle of selves, they have only to say so and at once the majority puts them under lock and key, calls science to aid, establishes schizophrenia and protects humanity from the necessity of hearing the cry of truth from the lips of these unfortunate persons. Why then waste words, why utter a thing that every thinking man accepts as self-evident, when the mere utterance of it is a breach of taste? A man, therefore, who gets so far as making the supposed unity of the self two-fold is already almost a genius, in any case a most exceptional and interesting person. In reality, however, every ego, so far from being a unity, is in the highest degree a manifold world, a constellated heaven, a chaos of forms, of states and stages, of inheritances and potentialities. It appears to be a necessity as imperative as eating and breathing for everyone to be forced to regard this chaos as a unity and to speak of his ego as though it were one-fold and a clearly detached and fixed phenomenon. Even the best of us share the delusion.[69]

This novel concludes by Harry being led by a mysterious saxophonist to a "magic theatre" where Harry's soul disintegrates and he takes part in several unbelievable events which end in him killing (or hallucinating to kill) a young prostitute. It is, however, not the ending of Steppenwolf which provides us with the beginning of our account of law and legal discourse, but the struggle between the wolf and the ideal of rational order and, by extension, legal positivism's denial of the wolf and its imperative need to conceptualise its fragmentary and contradictory bundle of rules, decisions and practices as a coherent whole, to see and present the manifold as the one-fold. Those who distinguish between the internal and external properties of law (such as Hart)[70] or internal and external legal cultures (such as Friedman),[71] or try to acknowledge the indivisibility of law and justice (such as Alexy),[72] only

68 Hesse, ibid. at 70.

69 Hesse, ibid. at 70-72.

70 Hart, Hebert, *The Concept of Law* (Oxford, Clarendon Press, 1969).

71 Friedman, L. M. *Law and Society: An Introduction* (Englewood Cliffs: Prentice-Hall, 1977).

72 Alexy, Robert, *The Arguments from Injustice: A Reply to Legal Positivism* (Oxford, Clarendon Press, 2002).

succeed in distinguishing the wolf *from* man or recognising the wolf *in* man. What they neglect is that both wolf and man are in turn made of fragments of identities.

Steppenwolf, which is to some extent Hesse's autobiographical masterpiece, is influenced by Nietzsche, on the one hand, and Freud, on the other. Harry Heller (referring to Hermann Hesse) finds himself, admittedly, in what appears to be an ahistorical setting, not only isolated from the past, from the old morality (a distinctly Nietzschean theme), but also from the post-war atmosphere of 1920s Europe. It is only by reference to Hesse's personal life that we can place the narrative in time and place, i.e. in the Weimer Republic. Although the novel is a product of 1920s Europe, it nonetheless possesses a timeless quality in so far as it reflects modern humanity's efforts to come to terms with its fragmented identity. It captures not only much of the tension in the European cultural tradition which started with the Enlightenment, but also reflects the inner intellectual demons of a generation which includes Max Weber, Hans Kelsen, Eugen Ehrlich, Brasilow Malinowski, to mention a few, who set the scene for the debate on law and society. It is perhaps these men's concerns, their awareness of the limits of rationality as in the case of Weber's "iron cage," and the potential of the wolf in the case of Ehrlich's "living law", or their systematic attempts to deny the role of the wolf in modernity, as in the case of Kelsen's "pure theory of law", which is transferred to law. In short, I suggest here that the conceptual duality of law masks two important and interrelated characteristics of law; 1) its "irrational" qualities - "irrational" only in so far as they do not fit into the model adopted by legal positivism; and 2) its diversity - the acknowledgement that law is a collection of normative, factual, social, cultural, moral, regulatory, symbolic, educational and professional fragments. All these characteristics are reflected in Ehrlich's "living law".

In the previous sections, I argued that forms of law, culture and religion interact as part of an ongoing public discourse, the parameters of which are determined by the ideological concerns and political objectives of the time and the setting in which the discourse is realised. I also tried to demonstrate that both Western public opinion and Islamic extremist groups depict themselves and the culture of the "other" as homogeneous entities. This is politically and psychologically functional, for by disregarding the plural characteristics of their own and other groups' cultural identities, they free themselves from the need to deal with the moral complexity of the social reality which confronts them. This in turn allows them to act with conviction and the belief that they represent the good and the rational. Similarly, by regarding the Western legal culture as democratically uniform, Western commentators and legal scholars can turn a blind eye to its otherwise contradictory and fragmented nature. This enables them to dismiss the "wolf" as incompatible with the rational architecture of Western legal systems.

This paper has tried to capture different discussions, expressed in different voices, from different times and places, on the relationship between law and culture. The only way to summarise these discussions is by asking two new questions: Firstly, is it possible that the legal cultural identity of Muslim immigrant communities is part of the "wolf of the Steppes" of Western legal cultures; a wolf which as mentioned above consists not of one single but of

numerous identities? Secondly, is it realistic to expect the Western legal cultures of the type we find in Britain or in Sweden to engage with the "wolf" constructively, whilst they have not as yet discovered and acknowledged their own plurality of forms?