International Journal of Law in Context, 4,4 pp. 407–410 (2009) Cambridge University Press
doi: 10.1017/S174455230900408 Printed in the United Kingdom

Culture, power and the human animal: a reply

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I am very grateful to Naomi Mezey, John Mikhail and Robin West for their thought-provoking comments on my paper. Since each of the comments has a different orientation, this reply will address them in turn, but picking up especially one theme – the place (or absence) of power in my picture of law's engagement with multiculturalism – that recurs in all of them.

Professors Mezey and West raise major issues about my general approach, but it may be appropriate to begin with Professor Mikhail because his comment is focused very precisely on the *Shabina Begum* case. Discussing what he has written gives me a chance to clarify what I did and did not intend to do in the paper, before I try to address some larger themes that West and Mezey highlight.

I used the House of Lords' opinions in *Shabina Begum* as an illustration, but no more than that. The arguments in my paper would remain the same had I not mentioned the case, and they could have been made without it. The paper's concern was not with the merits of this decision, but with strategies and techniques of communication, and of management of communication, used by the judges and by the litigants. I thought that the case could illustrate some of my arguments, but none of those arguments depends on its outcome. The paper's discussion of the case is not normative (arguing whether the court's resolution of the legal issues was good or bad) but sociological (examining certain strategies and techniques used in communication in and through legal processes).

Professor Mikhail assumes wrongly that I am in the same business as him: that of deciding whether *Shabina Begum* was rightly decided. So he and I are ships passing in the night without making much contact. Unfortunately, however, he incidentally attributes to me views that I do not hold. Process jurisprudence, which defends 'virtues of judicial competence and reasoned elaboration', has no relevance to the paper's discussions; and I do not 'endorse the court's distinction' between the school's approach and that of Shabina Begum and her family; nor do I find 'much to admire in the messages communicated by the House of Lords in this case'. Professor Mikhail does not seem to recognise that a sociological approach to studying legal ideas might help to explain how messages are being shaped, structured and delivered without necessarily endorsing them.

For what it is worth, however, I do think that the court used its management of communications relatively well in some respects. That is only to say that the case produced and relayed communications that, for the moment at least, seem to have been accepted at some level, rather than greeted with outrage, in Britain's diverse population groups (not just those identified as Muslim or non-Muslim). More than that, to the extent that the court's communicative strategies hint at a need to understand complex networks of community as a key to fostering social cohesion, I think they have some merit. But all of that can be a matter for argument. It does not affect what the paper seeks to do, i.e.: (1) to suggest general tasks for law in conditions of multiculturalism; and (2) to argue for reorienting legal thinking to allow adequate recognition of these conditions.

Nevertheless, some statements in Professor Mikhail's comment suggest a very different outlook from mine. He sees communication depicted in my paper 'in a highly unrealistic and idealised manner' and considers that I do not confront cultural hegemony. He wants to ask of this case: 'what

are its politics?' and to see how the real reasons for the decision are 'masked by judicial rhetoric'. But I think that, after travelling this critical legal studies route, it may now be time to ask: once we have unmasked law, how do we get unmasked law to regulate a multicultural society? An approach focusing on where sovereign power lies is very necessary, and these may be dark times in which some judicial decisions are hard to see as more than nakedly partisan displays of *voluntas*.[1] But law squanders its legitimacy unless it also has *ratio* – widely morally intelligible principle – and, in addressing cultural conflicts, that element of principle can only be effectively imported into courts by their responding to, as well as employing, a wide range of communicative strategies and techniques.

In any case, it is very easy to slip into cultural hegemony mode. Professor Mikhail himself thinks he knows why some British Muslim women decide on the clothes they wear; that the House of Lords has 'apparent multicultural anxieties'; that the school policy in *Shabina Begum* targets religious clothing 'because of the particular belief system it represents'; and that there is a single identifiable 'broader Islamic community in Great Britain'. But the 'enduring reality of cultural hegemony' that he rightly emphasises can probably only be confronted by listening carefully to voices talking to each other in their local cultural contexts. Courts have limited abilities to do this. But that is no reason why they should not try. For this reason I agree with Professor Mikhail that the House of Lords' deference to the opinions of particular religious authorities is open to criticism.[2] But there are practical limits to the amount of communication that can be heard in one time and place, especially if the object is to listen to as wide a range of voices as possible and to address many constituencies. The process will surely be flawed, but that does not make it unimportant, or necessarily a sham.

The theme of power is discussed further by Professors Mezey and West. Both writers offer helpful critiques of my paper, arguing for different emphases on some matters, or attention to important questions that the paper neglects or does not develop. However, Naomi Mezey suggests that I imply that the 'invasion' of law by culture is recent, and that prior to modern multiculturalism law 'was once culture-free'. This is not at all what my paper seeks to argue: like Professor Mezey, I think any such view of the past would be entirely mythical. Law never was or could be culture-free. The paper's argument is, instead, that where, in the past, legal thought (wrongly) assumed a uniformity of culture, issues of culture could seem wholly irrelevant or unproblematic in *legal thinking*. Thus, 'culture' was not a juristic idea as such, but only a set of binding presumptions that could be invoked as self-evident (but would rarely need to be). The paper argues that that position in *juristic thought* has changed in the ways it describes. 'We, the people' is now as complex and contested an idea as that of the national 'community' of English common-law thought.

So I agree wholeheartedly with Professor Mezey's claim that 'law has never existed outside the cultural'. Similarly, law's images of *imperium* and *communitas* are just that – juristic images; a kind of legal ideology (Cotterrell, 1995, chapter 11). As Mezey puts it, they are purely 'models rather than like anything remotely social'. But these juristic images remain powerful for the moment. Multiculturalism is an important development that is undermining them, or at least suggesting that they need much modification. Far from being nostalgic, I warmly welcome this development,

1 See generally Tamanaha (2006, especially chapter 13) on what he sees as a weakening of 'the rule-bound orientation of the judge'). Cf. Toobin (2007, p. 237), quoting US Supreme Court Chief Justice William Rehnquist in private conversation with an unnamed colleague in 2004: 'Don't worry about the analysis and the principles in the case. Just make sure the result is a good one this time around – because those principles you announce will be ignored in the next case.'

2 See also Ssenyonjo (2007, p. 681): '[I]t is questionable whether courts should base similar cases on the ground of "main stream Muslim opinion". The problem with this approach is that it does not take full account of the rights of the most marginalised individuals within religious communities who are subordinated to "main stream opinions" contrary to international human rights law.'

https://doi.org/10.1017/S174455230900408X Published online by Cambridge University Press

and the growing juristic and popular recognition of the inevitability and desirability of cultural pluralism.

I agree with much else that Naomi Mezey has written here and am grateful to her for making explicit ideas that, in some cases, are too weakly implied in my paper. I agree that law and culture have always been mutually constitutive; that elites have often used law to transform 'distinct vernacular cultures' (I would say types of community) into national identities (see also Cotterrell, 2006, pp. 165–67); that while culture is made 'invisible or even absent' for dominant groups, others are defined by their 'culture'. My only quarrel would be with the statement that 'law makes us what we are'. I think this is too strong a claim, perhaps reflecting law's special cultural status in the US. Law, in one sense, is certainly an aspect of culture, and law contributes to culture. But law can also be imposed on culture, and sometimes ineffectually so; so that law is resisted in the name of culture; law itself is an object of cultural struggle.

This point leads back to the issue of power. Professor Mezey properly notes that law is communicative 'in very coercive ways'. I think it is important to remember here Michel Foucault's approach to power. Power, Foucault reminds us, lies not just in the sovereign's sword. Power is present in all aspects of social life.[3] It is a feature of every type of community. Networks of community are always structured in ways that reflect distributions of power. Power is the means by which things get done, as well as the means by which constraint is exercised. So, when law's relations to power are being considered, it is surely important to think more broadly about the place of power in all community life, and then to think of law as part of the structuring of community life – life made up of patterns and networks of social relations. So power can be seen as negotiated and struggled with, in innumerable contexts. On this view, then, law does not in some direct way create cultural identities; nor is law produced in any straightforward way by culture. Instead, law is an aspect of culture that reflects particularly the power structures of culture. How then could courts be expected to do anything other than reflect dominant power structures? But, at the same time, there is no reason to suppose that these structures are immovable and permanent; any more than to assume that cultural phenomena stay fixed and unchanging rather than endlessly contested.

Robin West's valuable comment, like Mezey's and Mikhail's, criticises my paper for saying too little about power, but it also thoughtfully raises even broader themes. I hope the brief comments above, which summarise ideas expressed elsewhere,[4] may help to fill the 'power gap' in my paper. But the other themes noted by Professor West (she generously calls them 'friendly amendments') are harder to address here. They demand detailed analysis and fall outside the scope of what I aimed to discuss in the paper. But I cannot resist saying something about them.

The first is what she calls a 'political' worry, that even if courts could be transformed into conduits of respectful communication this would not address a growing divide between haves and have-nots; a deep economic divide. I agree: communication does not, in itself, redistribute material wealth. I would just say here that networks of community, the carriers and sustainers of culture, are possible only when people are able to participate in them; and individuals cannot engage in social relations of community when they are seen as having nothing to bring to them. If the elements of culture are important, and the relations of community that support them are to flourish, then what I have called elsewhere 'public altruism' (mutual responsibilities for welfare) and 'collective participation' (individual involvement in collective decisions) are needed (Cotterrell, 1995, chapter 12). Securing these conditions entails tasks for government, though governments often try hard to avoid recognising them.

3 For classic statements see Foucault (1980, pp. 92–108; 1979, pp. 85–90).

4 See, e.g., Cotterrell (1995, pp. 4–7; 2006, pp. 165–67; 2008, pp. 13–15).

https://doi.org/10.1017/S174455230900408X Published online by Cambridge University Press

Professor West's other theme is about the poverty of existing legal conceptions of personhood, which do not recognise the full 'animalistic' humanity of individuals. We need, she says, 'a jurisprudence for animals – including the human animal', and a jurisprudence that embraces culture won't do. It might allow a richer recognition of human diversity but it will not go far enough to 'thicken' law's concept of the person 'all the way to the ground'. Again, I agree. Breaking up culture into component parts, and then seeing these parts in terms of types of community, as I advocate, is a *juridical* device; a way of producing categories by which law can get closer to the social and see it in a more sociological way. But the result will still be law and legal thought, not a sociology or philosophy of human existence. Ultimately (except in some unstable varieties of equity), modern Western law cannot remain an affair of rules and doctrine and, at the same time, aim to see each individual human being as unique. Law has to carve the social up into categories that can make regulatory sense. It cannot offer empirical recognition of the inexhaustible variety of social life. But legal thinking might, at least, be made to address the social in better-informed ways.

References

COTTERRELL, Roger (1995) *Law's Community: Legal Theory in Sociological Perspective*. Oxford: Clarendon Press.

COTTERRELL, Roger (2006) *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. Aldershot: Ashgate.

COTTERRELL, Roger (2008) *Living Law: Studies in Legal and Social Theory* Aldershot: Ashgate.

FOUCAULT, Michel (1979/1990) *The History of Sexuality, Volume 1: An Introduction*, trans Robert Hurley. London: Penguin reprint.

FOUCAULT, Michel (1980) *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, trans Colin Gordon, Leo Marshall, John Mepham and Kate Soper. New York: Pantheon.

MEZEY, Naomi (2008) 'Law's Culture and Lived Culture: A Comment on Roger Cotterrell's "The Struggle for Law: Some Dilemmas of Cultural Legality" ', *International Journal of Law in Context* 4(4): 395–99.

MIKHAIL, John (2008) 'Dilemmas of Cultural Legality: A Comment on Roger Cotterrell's "The Struggle for Law" and a Criticism of the House of Lords' Opinions in *Begum*', *International Journal of Law in Context* 4(4): 385–93.

SSENYONJO, Manisuli (2007) 'The Islamic Veil and Freedom of Religion, the Rights to Education and Work: A Survey of Recent International and National Cases', *Chinese Journal of International Law* 6: 653–710.

TAMANAHA, Brian Z. (2006) *Law as a Means to an End: Threat to the Rule of Law*. New York: Cambridge University Press.

TOOBIN, Jeffrey (2007) *The Nine: Inside the Secret World of the Supreme Court*. New York: Doubleday.

WEST, Robin (2008) 'Comments on Roger Cotterrell's Essay, "The Struggle for Law: Some Dilemmas of Cultural Legality" ', *International Journal of Law in Context* 4(4): 401–405.

https://doi.org/10.1017/S174455230900408X Published online by Cambridge University Press