

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*

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In *Orientalism*, Edward Said's seminal critique of Western discourse on the Arab and Islamic world, Said begins with an epigram from Karl Marx: 'They cannot represent themselves; they must be represented' (Said, 1979, p. xiii, quoting Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*). Said then argues that Marx's statement captures a basic reality about Western representations of 'Oriental' societies, which is that they often rest on a pattern of *cultural hegemony*. The dominance of European colonial powers, primarily Great Britain and France, over their subjugated populations is what allowed the latter to be depicted in a way that reinforced 'the idea of European [superiority] in comparison with . . . non-European peoples and cultures' (p. 7). For example, in Gustave Flaubert's popular novels, 'Flaubert's encounter with an Egyptian courtesan produced a . . . model of the Oriental woman . . . [who] never spoke of herself . . . [and] never represented her emotions, presence or history. *He* spoke for and represented her . . . telling his readers in what way she was typically Oriental' (p. 6, emphasis original). Moreover, Flaubert's superiority in relation to her 'was not an isolated instance. It fairly stands for the pattern of relative strength between East and West, and the discourse about the Orient that it enabled' (p. 6).

Reading Professor Roger Cotterrell's stimulating essay, I found myself returning to Said's book, which I first read as an undergraduate. For if I were asked to identify my biggest concern with the essay, and the point at which Professor Cotterrell's sensitive and nuanced argument seems most vulnerable, it would be the essay's failure to confront the enduring reality of cultural hegemony and its impact on contemporary multicultural societies.

Building on an idea of Lon Fuller, Professor Cotterrell argues that the law's most distinctive aspiration in relating to multiculturalism is 'to facilitate and guide a permanent cross-cultural conversation by which mutual learning between groups takes place' (this issue, p. 379). The key concept here is communication: Professor Cotterrell thinks that the law's special purpose is to promote meaningful exchange of ideas between the different components of a pluralistic civil society. By effectively facilitating this conversation, the legal system can 'enable many kinds of cultural dialogue to occur' (p. 381). This dialogue, in turn, might make it possible to develop a routine method of structuring and resolving disputes – the 'relatively peaceful and passion-free ordering of affairs' (p. 381) that Weber identifies, unlike the passionate 'battle for rights' (p. 373), to which Jhering alludes.

Apart from a few passing remarks, however, such as his statement near the end of the essay that law 'does not regulate communication channels neutrally, but directs them in accordance with dominant cultural understandings' (p. 381), the concept of power as it is manifested in contemporary multicultural societies is largely missing from Professor Cotterrell's analysis. As a result, the dialogue to which he refers is often depicted in a highly unrealistic and idealised manner, which seems

unlikely to improve our understanding of the messages that the law does in fact frequently communicate to those it seeks to regulate.

To make these observations more concrete, consider the case of *Shabina Begum*, which Professor Cotterrell uses to illustrate the type of cultural dialogue he has in mind. In *Begum*, the House of Lords rejected a seventeen-year-old Muslim girl's challenge under Article 9 of the European Convention on Human Rights to her school's policy of forbidding her from wearing the *jilbab*, a long, shapeless garment that covers the entire body, except for hands, feet, face and head, and which is worn for religious reasons by some Muslim women.¹ Professor Cotterrell finds much to admire in the messages communicated by the House of Lords in this case, judging its handling of this complex issue to be 'a relatively successful contribution to the process by which battlefields of rights are turned into areas of routine structuring' (p. 382). I am less impressed by the Lords' opinions and find much to criticise in them, as I will endeavour to explain.

Article 9 protects religious freedom, including the freedom 'either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice, and observance'.² It also holds that religious freedom 'shall be subject only to such limitations as are . . . necessary in a democratic society . . . [for] public safety . . . the protection of public order, health or morals, or the protection of the rights and freedoms of others'.³ As it has been developed by European courts, Article 9 jurisprudence thus consists largely of a two-step analysis. First, the court asks whether an individual's religious freedom has been limited. Second, the court determines whether any such limitation can be justified because it is necessary to protect public safety or the rights and freedom of others.

In *Begum*, the Court of Appeal held that the school's policy had effectively excluded Begum from attending school, thereby violating her freedom to manifest her religious beliefs, and that this limitation was not clearly necessary. In a unanimous decision, the House of Lords reversed. Two of the five judges agreed with the lower court that Begum's right to religious freedom had been limited, but they held that this interference was justified. By contrast, three judges held that there was no need to consider the issue of justification because there was no limitation in the first place.

Professor Cotterrell says he is not concerned with the court's decision itself, but rather 'with the messages communicated by and through this case' (p. 381) to the broader public, particularly the various constituencies that appear most likely to be impacted by it. He describes the case in uniformly favourable terms, which evoke the tenets of 1950s-era legal process theorists:

'It communicated (as it was clearly intended to) the strength of the conviction of the respondent and her supporters about the importance of a particular kind of Islamic dress . . . [as well as] the needs of social cohesion, symbolised in the school's view of its uniform policy. One of the five judgments (given by the sole female judge) quotes extensively from academic literature on the significance of the *hijab* (Islamic headscarf) and other forms of female Islamic dress, and the religious, family, political and other reasons why they are worn. These important ideas are thus written into the judicial record, potentially communicating them to those who read the judgments, or other reports of the case. Communication here is not just about what is or is not lawful under UK law. It is also about the way problems such as those addressed by the case should

1 *R (on the application of Begum, by her litigation friend, Rahman) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

2 ECHR, Article 9(1).

3 ECHR, Article 9(2).

be reasoned out. The school's thoughtful approach to addressing multiculturalism is explained and approved, and implicitly contrasted with the threatening and intransigent behaviour directed against the school authorities . . . The methods of the judges are elaborate explanation and description, balancing of evidence, examination of motivations, attention to other case-law . . . and use of academic legal and other literature. The judges seek to make their communications as authoritative as possible but they rely not just on legal argument but on appeals to trans-cultural reasonableness and the persuasive power of a careful accumulation of factual detail.' (pp. 381–82)

In short, the opinions exhibit all of the virtues of judicial competence and reasoned elaboration that we typically associate with legal process theory. Yet whether they do so presumably is not what is most important here, particularly on Professor Cotterrell's own premises. The key issue, at least for his thesis, is not whether a Henry Hart or a Herbert Wechsler, or their contemporary counterparts in the legal academy, would approve of the Lords' opinions, but what their practical impact is likely to be on Shabina Begum and her family, and on the broader Islamic community in Great Britain and elsewhere. On this issue, I am less convinced than Professor Cotterrell seems to be that the House of Lords used the opportunity presented by this case to promote respectful and constructive trans-cultural dialogue. Let me make four brief points in this regard.

(1) If the critical jurisprudence, including feminism and critical race theory, of the last few decades has taught us anything, surely it includes the idea that what passes for reasoned elaboration in judicial opinions often manages to conceal an underlying political reality, which itself mainly consists of relations of power and subordination. At least in some quarters, it also includes the conviction that substantive justice and the protection of human rights are the ultimate touchstones of legal analysis, which must not be unduly sacrificed on the altar of procedure. In this light, the critical questions to ask of *Begum* and similar cases include the following: What are its politics? Is it just on the merits? What are the operative reasons why the case was decided in this manner, and how are these reasons masked by judicial rhetoric? How does the decision read if we 'look to the bottom', as my colleague Mari Matsuda puts it,⁴ and adopt the perspective of those subaltern peoples who might understandably have a rather different perception of Anglo-American legal values?

On these questions, I am more troubled than Professor Cotterrell appears to be by the Lords' opinions in *Begum*. In particular, I remain unconvinced that those opinions exhibit what he calls 'trans-cultural reasonableness' (p. 382). On the doctrinal level, the opinions simply elide both the crucial distinction between purpose and incidental effects and the careful scrutiny of necessary means, both of which are required for proper legal analysis in this area. It is not disputed that the precise objectives of the policy at issue included regulating the religious practice and expression of students by permitting them to wear the *hijab* or *shalwar kameeze*, but not the *jilbab*. That is, the policy clearly targeted a certain type of religious clothing *because of its character as religious clothing* and because of the particular belief system it represents.⁵ The conclusion of three judges that the policy does not even limit religious freedom therefore seems difficult to sustain. While justification under Article 9(2) admittedly presents a more complex issue, none of the Lords even attempted to show that this limitation on Begum's religious freedom was '*necessary* in a democratic

4 See generally Matsuda (1987).

5 See generally Davies (2006).

society',⁶ as required by the European Convention on Human Rights. Instead, the Lords focused their attention primarily on whether school officials had made a reasonable or proportional judgment about whether the dress code would best advance the school's general interests, thereby ignoring the critical question of whether a less restrictive means could have been used instead.⁷

(2) One of the key insights of critical race theory is that legal rights, and rights discourse generally, can often be uplifting for historically oppressed or marginalised populations, and that denying these individuals the chance to participate fully in that discourse, or to assert their rights, can be alienating or disempowering for such individuals, serving mainly to reinforce their subordinate status. Here I am reminded of the story Patricia Williams tells of hunting for an apartment in New York City alongside a white male colleague, Peter Gabel. To her surprise, Williams discovered that Gabel 'handed over a \$900 deposit, in cash, with no lease, no exchange of keys and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation' (Williams, 1987, p. 406). By contrast, Williams was unwilling to rely on a handshake and 'good vibes' in her own transaction, opting instead to sign 'a detailed, lengthily-negotiated, finely-printed lease firmly establishing me as the ideal arm's length transactor' (pp. 406–407). From Williams's perspective of 'black femaleness', showing that she could 'speak the language of lease' and thereby lay claim to her rights, was a way of enhancing trust, clarifying boundaries and strengthening her own sense of personal empowerment (p. 407).

In this light, one of the most troubling features of the Lords' opinions in *Begum* is the manner in which Shabina Begum and her family are implicitly chastised, scolded even, for approaching their dispute from a legal perspective and for vigorously asserting her perceived legal rights. The Lords accept without comment the school's portrayal of this behaviour as 'threatening' and add some unflattering characterisations of their own:

Lord Bingham: 'On 3 September 2002, the first day of the autumn term, the respondent (then aged nearly 14) went to the school with her brother and another young man. They asked to speak to the head teacher, who was not available, and they spoke to the assistant head teacher, Mr. Moore. They insisted that the respondent be allowed to attend school wearing the long garment she had on that day, which was a long coat-like garment known as a jilbab. *They talked of human rights and legal proceedings. Mr. Moore felt that their approach was unreasonable and he felt threatened.* He decided that the respondent should wear the correct uniform and told her to go home, change and return wearing the school uniform. His previous experience in such situations, with one exception, was that pupils always complied.'⁸

Lord Hoffmann: 'I accept that wearing a jilbab to a mixed school was, for her, a manifestation of her religion. . . . But her right was not in my opinion infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing. *Common civility also has a place in the religious life.* Shabina's discovery that her religion did not allow her to wear the uniform she had been wearing the past two years created a problem for her. . . . Instead, she and her brother decided it was the school's problem. *They sought a confrontation and claimed that she had a right to attend the school of her own choosing in the clothes she chose to wear.*'⁹

6 ECHR, Article 9(2) (emphasis added).

7 See, e.g., [2006] UKHL 15 at para. 26, 30, 32, 94, 98. See generally Finnis (2008).

8 [2006] UKHL 15 at para. 10 (emphasis added).

9 [2006] UKHL 15 at para. 50 (emphasis added).

Lord Hoffmann: '[I]n the present case there is nothing to show that Shabina would have even found it difficult to go to another school. Until after the failure of her application for judicial review . . . she did not seriously try because she and her family were intent on enforcing her "rights".'¹⁰

Lord Scott: 'The two men addressed their insistence to Mr. Moore, the assistant head teacher. *His evidence was that their insistence verged on the threatening. It is common ground that they supported their insistence by speaking of human rights and legal proceedings.* But Mr. Moore told Shabina to go home, change into the proper school uniform and return to school properly dressed. The agreed statement of facts records that "The three went away, with the young men saying that they were not prepared to compromise over the issue." *The unnecessarily confrontational character of the arrival at the school on 3 September 2002 of Shabina and the two men is evident.*'¹¹

Rather than welcoming or even celebrating the fact that Shabina Begum and her family, Muslim immigrants living in a potentially alien and intimidating world, had evidently done their homework before their first meeting with school officials, and had sought to empower themselves in their anticipated dispute with the school by familiarising themselves with, and being prepared to affirm, her perceived legal rights, the Lords took the opposite tack. They implicitly reprimanded Begum for injecting her rights into the dispute, characterising this approach as threatening, intransigent and confrontational. Lord Hoffmann even went so far as to put the word 'rights' in scare quotes! Professor Cotterrell does not consider the potentially dehumanising impact of this rhetoric, opting instead to endorse the court's distinction between the school's 'thoughtful approach to addressing multiculturalism' and the 'threatening and intransigent behaviour directed against the school authorities' (p. 382) exhibited by Begum and her family, but I am unclear why. What message is being sent here, and how does it convey 'respect for the autonomy and dignity of all other individuals' (p. 382)?

(3) If one seeks to privilege the idea of communication in legal theory, then one must recognise that genuine communication is, of course, a complex affair, and, at the very least, a two-way street. Each side must be prepared to listen as well as talk, even if doing so can be threatening or unsettling. Recalling Said, one must also recognise that the individual who, more than anyone, is silenced in *Begum*, and who is told that she cannot represent herself, but must be represented by others, is Shabina Begum herself.

As Professor Cotterrell perceptively observes, the decision in *Begum* effectively 'dilutes Shabina Begum's individual claim by implicitly portraying it as something else: perhaps a politically motivated group claim, for which she may serve merely as representative; even perhaps (but barely a hint here) an *insincere* claim abstracted from her personal circumstances (since she had apparently accepted the uniform policy for two years, and on deciding it was unacceptable, could, in the court's view, have moved schools without much difficulty)' (p. 382). Yet while the court is understandably wary of the fact that Begum's older brother and other male authority figures often appear to speak for her, the judges do not hesitate to speak for her themselves, and to represent her perceived interests, whenever it seems convenient to do so. In her concurring opinion, for instance, Baroness Hale observes that a woman who chooses to wear a veil 'may have chosen the garment as a mark of her defiant political identity'¹² and may be engaging in 'a highly

¹⁰ [2006] UKHL 15 at para. 52 (emphasis original).

¹¹ [2006] UKHL 15 at para. 79–80 (emphasis added).

¹² [2006] UKHL 15 at para. 94 (quoting Yasmin Alibhai-Brown, *Who Do We Think We Are?* (2000)).

complex autonomous act intended to use the resources of the tradition both to change and preserve it'.¹³ I agree with Professor Cotterrell that Baroness Hale should be commended for including these important ideas in her opinion, but I would point out that her effort might not go far enough. Consider the following statement, taken from the website of an Islamic educational organisation:

'A Muslim woman who covers her head is making a statement about her identity. Anyone who sees her will know that she is a Muslim and has a good moral character . . . (She is) filled with dignity and self esteem . . . (and is) pleased to be identified as a Muslim woman. As a chaste, modest, pure woman, she does not want her sexuality to enter into interactions with men in the smallest degree. A woman who covers herself is concealing her sexuality but allowing her femininity to be brought out.'¹⁴

On the same website, an Iranian girl explains her reasons for wearing traditional religious clothing as follows:

'We want to stop men from treating us like sex objects, as they have always done. We want them to ignore our appearance and to be attentive to our personalities and mind. We want them to take us seriously and treat us as equals and not just chase us around for our bodies and physical looks.'¹⁵

Without knowing more, one cannot tell whether these sentiments capture at least some of what motivated Begum to wear the *jilbab*. In any case, it seems clear that the content of *these* purportedly feminist messages is *not* adequately represented in any of the opinions in *Begum*. Whether one likes it or not, some women simply do not want others to be able to discern the shape of their bodies and to objectify them on that basis. So they decide to wear shapeless garments and to embrace the teachings of their religion in this regard. The Lords do not squarely confront this complex cultural reality. Rather, at least as far as Begum is concerned, they tend to suppress the basic facts of human biological development that presumably informed her decision to wear the *jilbab* in the first place.

For example, as Professor Cotterrell points out, the Lords repeatedly emphasise that Begum wore the more revealing *shalwar kameeze* without complaint for two years prior to the onset of her dispute with the school in September 2002. Oddly, several of the judges imply that the school thereby obtained some kind of reliance interest in this behaviour, as if an individual were not entitled to change her mind about what clothes to wear, and thereafter to modify her behaviour accordingly.¹⁶

13 [2006] UKHL 15 at para. 94 (quoting Bhikhu Parekh (1997) 'A Varied Moral World: A Response to Susan Okin's "Is Multiculturalism Bad for Women?"', *Boston Review*, October/November, 1997).

14 See Mikhail (2006) (quoting Mari Ali, 'The Question of Hijab', *The Institute of Islamic Information and Education*, at <http://www.iiie.net/Brochures/Brochure-23.html> [last accessed 31 March 2006].

15 Ibid.

16 See, e.g., [2006] UKHL 15 at para. 9 (Lord Bingham) ('For two years . . . the respondent wore the shalwar kameeze happily and without complaint.');

para. 25 (Lord Bingham) ('The shalwar kameeze, and not the jilbab, was worn by the respondent's elder sister throughout her time at the school, and by the respondent for her first two years, without objection. It was of course open to the respondent, as she grew older, to modify her beliefs, but she did so against a background of free and informed consent by her and her family');

para. 45 (Lord Hoffmann) ('For her first two years at the school, Shabina wore the shalwar kameeze without complaint.');

para. 78 (Lord Scott) ('For two years after her entry to the school . . . Shabina wore the shalwar kameeze school uniform. So too, it may be assumed, did her sister . . . There is no evidence of any complaint to the school being made by either of them about the uniform.').

Yet, at the same time, the Lords pass right over the rather obvious differences between the ages of twelve and fourteen in the typical course of female adolescent development. Apart from a brief mention by Baroness Hale,¹⁷ one searches in vain for any serious recognition or analysis in these opinions of the fact that, over the course of those two years, Begum presumably had undergone *puberty*, crossing the threshold from girl to young woman, at least in her own eyes, and developing breasts, hips and other adult characteristics, which she now wished to conceal, as a matter of sincere religious belief or otherwise. A more sympathetic decision might have considered these facts and Begum's physical, cognitive and emotional development more generally from the perspective of familiar rites-of-passage like the Christian confirmation or Jewish bat mitzvah. Instead, the Lords often fall into the dismal pattern of exoticising Begum and of viewing her largely unremarkable manifestation of adolescent independence through the prism of their own apparent multicultural anxieties.

(4) Paradoxically, one final indication that the House of Lords may have missed a valuable opportunity to promote constructive trans-cultural dialogue in *Begum* is the deference it gives to the opinions of Islamic religious authorities. The Lords repeatedly rely on the approval of the school's dress code by certain designated leaders in the Muslim community as a persuasive reason to uphold its legality. Some illustrations:

'In 1993 the school . . . re-examine[d] its dress code. The governors consulted parents, students, staff, and the Imams of three local mosques. There was no objection to the shalwar kameeze, and no suggestion that it failed to satisfy Islamic requirements. The governors approved a garment specifically designed to ensure that it satisfied the requirement of modest dress for Muslim girls.'¹⁸

'In December 2002 the [school] . . . sought independent advice on whether the school uniform offended against the Islamic dress code. Two mosques in Luton, the London Central Mosque Trust and the Islamic Cultural Centre advised that it did not.'¹⁹

'In [September 2003] there was forwarded to the school a statement made by the Muslim Council of Britain on the "Dress code for women in Islam": there was no recommended style; modesty must be observed at all times; trousers with long tops or shirts for school wear were "*absolutely fine*".'²⁰

'The school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion.'²¹

'In criticizing the school's decision, [Begum's counsel] said that the uniform policy was undermined by Muslim girls being allowed to wear headscarves . . . But that takes no account of the school's wish to avoid clothes that were perceived by some Muslims (rightly or wrongly) as signifying adherence to an extremist version of the Muslim religion.'²²

17 [2006] UKHL 15 at para. 93 (Baroness Hale).

18 [2006] UKHL 15 at para. 7 (Lord Bingham).

19 [2006] UKHL 15 at para. 13 (Lord Bingham).

20 [2006] UKHL 15 at para. 15 (Lord Bingham) (emphasis original).

21 [2006] UKHL 15 at para. 33 (Lord Bingham).

22 [2006] UKHL 15 at para. 65 (Lord Hoffmann).

'The head teacher's background confirms she well understands the Moslem dress code for women.'²³

'The specific design of the . . . school uniform was approved by the school governors after consultation with . . . the Imams of three local mosques. There was no suggestion that the uniform did not conform to the Islamic dress code.'²⁴

I find these appeals to religious authority to be deeply ironic. They seem emblematic of what appears so incongruous about at least one aspect of Europe's increasing anxiety toward the growth of Islamic fundamentalism in its midst. We too quickly forget that what may be *the* most significant event in modern European cultural history – the Reformation of the sixteenth century – which eventually paved the way for such dramatic secular developments as the Scientific Revolution and the Enlightenment 'was above all else a *revival* of religion', as historian Roland Bainton observes (Bainton, 1963, p. 3, emphasis added). Luther's brief against the Church advocated a *more* fervent religiosity, not less; and his famous, if perhaps apocryphal, declaration of autonomy, 'Here I stand, I can do no other', has long been held to mean that no one should be compelled to accept the authority of intermediaries in matters of individual conscience. Doesn't this celebrated principle apply to Muslims like Shabina Begum? Isn't she entitled to decide *for herself* which if any religious authorities to accept, without being forced to comply with the edicts of local Imams or 'mainstream' Muslim opinion?

Unlike Professor Cotterrell, therefore, I fear in light of these observations that the ultimate message communicated by cases like *Begum* to Muslims in Great Britain and elsewhere is less one of respectful dialogue or reasoned elaboration than of evasion and double standards. The message is that Reformation and Enlightenment ideals of individualism, autonomy and the sanctity of the individual conscience are for people like *us* – not for people like *you*. We celebrate human rights, heroic individualism and the stubborn vindication of self-determination against established legal, political or religious authorities. You, meanwhile, should avoid making unnecessary assertions of your so-called 'rights', and you must conform to the beliefs of whatever religious authorities of yours we choose to recognise. We are distinct individuals, while you are an indistinct collective. You cannot represent yourself; you must be represented.

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23 [2006] UKHL 15 at para. 75 (Lord Scott).

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