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The struggle for law: some dilemmas of cultural legality

Roger Cotterrell*
FBA, Anniversary Professor of Legal Theory, Queen Mary,
University of London

1 Introduction

My title 'The Struggle for Law' is that of a book by the nineteenth-century German jurist Rudolf von Jhering (1915). In fact a better translation of Jhering's original German title (*Der Kampf ums Recht*) might be 'the struggle around law' or 'the battle for rights'. He argued that citizens owe a moral duty to themselves and their society to assert legal rights vigorously. But law itself is above the fray, not subservient to their conflicting interests. So the struggle for law is not to control it but to invigorate it – to be involved in the legal order, an active citizen living under law. Jhering presupposed a cultural unity – 'our whole culture' (Jhering, 1913, pp. 59, 62). Given this unity, law can respond not only to citizens' claims but to their feelings – feelings that are understandable in the shared culture law inhabits.[1]

Without the energetic defence of private interests through law, Jhering suggests, a society might lapse into a dull torpor, its citizens passively adjusting to soulless routine, a kind of 'moral suicide' (Jhering, 1915, p. 32). In fact his book is full of references to law's moral significance. The use of law for private purposes has a vitalising function in a society that already has sufficient social unity to be able to cope with private conflicts and order them legally. Law reflects emotions and aspirations, and can enable people to express their moral identity – to be who they truly are. It links them in to 'our whole culture', as Jhering calls it.

A generation after he wrote, his compatriot, the sociologist Max Weber, saw modern law in more mundane terms. Weber also emphasised the pursuit of interests – purpose–rational or means–ends calculation – through law. But he did not tie legal theory to ideas about culture. He thought that modern law is sufficiently justified by appearing obviously useful in the everyday transactions of social life. For Weber, it provides the routine, often largely passionless, structuring of a 'disenchanted' existence (Weber, 1948, p. 139), not the vibrant, rich moral life that Jhering apparently thought it might facilitate. Weber notes that modern law has lost its 'metaphysical dignity'; for the most part it is just 'the technical means of a compromise between conflicting interests' (Weber, 1968/1978, pp. 874–75).

This idea of routine structuring is surely a familiar contemporary image of law, yet legal disputes have not necessarily been drained of passion; nor are they always matters of private interests that reflect cultural preconceptions without challenging them. If Jhering's assumption of cultural unity is replaced by current ideas of a significant cultural *pluralism* seeking expression through law, how does this affect the idea of battles of rights, or of law as routine structuring? My

* This is the revised text of the Second Annual International Journal of Law in Context Lecture, Georgetown University, Washington DC, 17 January 2008.

1 See Duxbury (2007), emphasising the importance, in Jhering's legal theory, of citizens' feelings of what is right and just.

paper relates to this question. Its focus is on legal theory facing *multiculturalism* – a situation in which self-defined cultural groups make widespread and (at least to some extent) successful efforts to assert and preserve what they see as their cultural distinctiveness in a political society, and to achieve public recognition and validation of this distinctiveness. I want to ask here what general challenges are posed for legal theory – theory seeking to explain the nature and functions of law in general – by multiculturalism in complex Western societies today. How might legal theory address these challenges?

I shall argue that it is helpful, in this context, to link ideas of 'community' and 'communication' to contemporary legal theory. The concept of 'community' is often invoked in discussing culturally defined groups, but I shall use it differently to conceptualise more generally relatively stable types of social relations that law has to regulate. The related idea of 'communication', I think, highlights aspects of law that are particularly significant as it attempts to relate to the conditions of multiculturalism.

2 Juristic images of society

Sociologists and anthropologists of law have had no doubt that culture is a relevant idea in considering generally the nature and functions of law. My concern here, however, is with juristic scholarship, which has been more wary of the idea. Yet, in many ways, this scholarship explicitly addresses culture today. If it rarely defines 'culture', it usually takes it to include such matters as shared beliefs or values, customs, traditions or inheritances, and allegiances, attachments and outlooks.

Examples of these references to culture include: discussions of the idea of 'legal culture' in comparative law; legal definitions of cultural statuses such as tribal identity[2] or membership of ethnic or religious groups; the invocation of cultural defences or excuses in criminal law and other legal fields; the work of critical race scholars interpreting law through the experience of cultural minorities; and the use of law to protect cultural heritage in various forms (Cotterrell, 2006, pp. 97–102). Cultural rights now feature in international and human rights law. In Britain, courts have often had to judge the significance of marriages and divorces conducted according to the particular religious practices of minority groups, and have sometimes tried to give official effect to legally unofficial arrangements through 'presumptions of marriage' (Shah, 2007). In other cases it has been necessary to confront the issue of providing redress for otherwise legally unprotected wives and children of polygamous marriages (Shah, 2005, chapter 5). In many European countries, as is well known, controversies over Muslim female dress have produced legal questions spawning a huge literature. In Britain, legal issues have arisen prominently about the wearing of religious dress in schools and workplaces (see, e.g., Poulter, 1998, chapter 8; and the *Shabina Begum* case, discussed below). Examples could be multiplied easily. If culture was once largely invisible to law insofar as law assumed a monocultural jurisdiction, it now becomes, ever more, an issue influencing regulatory choices in many legal fields.

The legal theory developed by jurists – juristic legal theory – has not caught up with this state of affairs. The issue here is how this theory has viewed *the social* – the realm of social life or society that law regulates. Modern juristic legal theories have usually conceptualised law's regulated population as an undifferentiated social field made up of citizens or subjects assumed to be treated equally by law. In this social totality, according to the modern tenets of liberalism, the legal situation of individuals should, as far as possible, vary only in consequence of their own voluntary

2 See *Mashpee Tribe v. Town of Mashpee* 447 F Supp. 940 (D Mass 1978), affd, 592 F 2d 575 (1st Cir), cert denied, 444 US 866 (1979).

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acts (e.g. duties acquired through their contracts, torts or crimes) or the right-conferring acts of others (e.g. under wills or contracts, or as a result of wrongdoing against them). As Will Kymlicka (1995, p. 26) notes, 'In all liberal democracies, one of the major mechanisms for accommodating cultural difference is the protection of the civil and political rights of individuals.' By focusing on these rights, which usually make no reference to culture, law has enabled population groups to organise themselves in culturally distinctive ways, but without explicit legal recognition of this situation.

Anglo-American juristic legal theory presents two contrasting images of the social (Cotterrell, 1995, chapter 11). One is an image of *imperium*. This portrays society as a collectivity of individual subjects or citizens united only by their common subjection to a superior power. For Jeremy Bentham and John Austin, an independent political society is characterised by the habit of obedience of the bulk of the population (an undifferentiated mass for this purpose) to a single sovereign. For H. L. A. Hart, by contrast, a society regulated by law is made up of citizens and officials whose relationships are fixed by the operation of social rules, of which the most important are legal. Citizens must at least obey primary rules of law, and officials must accept from an internal point of view the rules that make possible the operation of the legal system (Hart, 1994, pp. 116–17). So, social life is subject to the rule of law. But in both the theory of sovereignty and Hart's 'model of rules' the image of society is that of legally undifferentiated individuals united by being subject to a hierarchical order – the authority either of a sovereign person or body, or of the rule-structures of the legal order.

Superior, 'vertically structured' authority provides the unity of the social as viewed through the prism of this kind of legal theory. The image is of individuals subject to official power which controls them, but – in a responsive, well organised legal system – this power also lends support to their individual purposes, and protects their valued conditions of life.

The converse image is that of *communitas*.[3] It underlies much of classical common law thought (see, e.g., Postema, 1986, pp. 19, 23, 66–76) and is present in such non-positivist theories of law as those of Roscoe Pound and Lon Fuller. But this image appears most clearly in Ronald Dworkin's (1986) explicit theory of a political community as the author of its law.

In Dworkin's view, the community consists of interacting, legally empowered, rights-possessing individuals. Law derives from an active community that, in some sense, owns and creates it, and in any case provides law's ultimate meaning and moral authority. Law's roots are in a social group conceived as a unified entity whose values, beliefs, common interests, allegiances or traditions (we might say its culture) provide its foundation. The community source of law is seen theoretically as a single unified entity. Each nation-state legal system has one political community that it belongs to; indeed, Dworkin (1989, p. 496) equates the political community with the nation or the state. He does not assume that such a community is morally homogeneous but does see it as supporting a common culture and language (pp. 488–89). No resources are offered for considering possible cultural variation – the matter is not seen as theoretically significant. The political community that makes and owns law is seen for the purposes of legal theory as a cultural unity (see also Kymlicka, 1995, p. 77), a single, united source of law.

In contrast to the image of *imperium*, that of *communitas* suggests a 'horizontal' rather than 'vertical' structure of law's authority – an authority conferred through the interaction of individuals in community, rather than through the imposition of power. In the *imperium* image, law and the state power that supports it unify the social; in the *communitas* image the social is already unified through interaction and consensus, and that unity is expressed through law.

3 I gratefully adopt here Willem Witteveen's modification of my original terminology for this concept; see Witteveen (2005).

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All of the most influential modern legal theories, I think, tend towards one or other of these two opposing images of society. They portray the social as unified, insofar as this issue is relevant in conceptualising the nature of law. And they portray the social as composed, for the most part, of *individuals* – legally identical citizens or subjects (corporations being, for many purposes, assimilated to the legal position of individuals as regards legal capacities). In the *imperium* conception, the social consists not of communities but of citizens or subjects. Even where the idea of community is made central, as in the *communitas* conception, the community is typically seen, under the influence of liberalism, as made up of individuals, rather than groups. By this means it remains possible to conceptualise the social as a single political community, rather than one fractured into different groups. This community (or its lawyer representatives) establishes law in a process of collective interpretation. In Dworkin's legal philosophy, the question of whether debate to find a 'best' meaning of law is possible between different cultural groups is not a theoretical issue. A common language and culture are assumed.

3 Legal theory and the differentiation of the social

Surely this theoretical state of affairs is highly unstable. In fact, the idea of the unity of the social has been challenged within legal theory in three main ways.

(a) The jurisprudence of difference

The first of these has been the emergence in juristic legal theory of approaches that base themselves explicitly on an idea of the patterned differentiation of the social. Marxist legal theory pioneered this orientation with its emphasis on the fundamental division of the social by class. If it had little real impact on mainstream juristic thought, more inroads were made – at least for a time – by feminist legal theory, emphasising the significance of gender divisions and insisting that the very meaning of legal ideas becomes contested and destabilised in the face of feminist reinterpretations. More recently, critical race theory and other minority jurisprudences have invaded legal philosophy. The result has been the establishment of a new *jurisprudence of difference*, which builds its insights directly from claims about the differentiation of the social (Cotterrell, 2003, chapter 8).

Ultimately, these critical approaches to juristic legal theory point to the idea that law can no longer be analysed as an object, but must be understood as a form of experience. When jurists were recruited from a single stratum of the social their subjective views of the meaning and character of law could appear objective. Now, the jurisprudence of difference shows that what law is 'in reality' depends on the standpoint from which it is seen, and the way it is experienced. The sense of social differentiation has invaded juristic thought – carried into it through the work of feminist lawyers, critical legal scholars and lawyers linked to minorities of many kinds. They experience law in different ways, so its meaning differs for them.

How much impact has all this had on juristic legal theory? It is still, for the moment, possible to marginalise the jurisprudence of difference; to quarantine it in distinct chapters in textbooks or see it as addressing special constituencies. The edifice of mainstream legal thought survives, but cracks are beginning to show. Legal philosophy that ignores these developments seems out of touch with sociolegal reality. If the jurisprudence of difference were to succeed in reshaping juristic thought where would that lead? A recognition of the patterned differentiation of the social must demand attention to the categories used to conceptualise that differentiation – categories of gender, ethnicity, race, etc. How meaningful or restrictive are these categories for the purposes of legal analysis? How far do they really capture the identity of individuals? Essentialism – the false assumption that essential characteristics of individuals or their experience can be deduced merely from their categorisation by gender, class, race, ethnic group, etc. – is a problem for the jurisprudence of difference, one

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that is well recognised in, for example, feminist literature. It suggests that ultimately the categories (of race, ethnicity, etc.) of this new jurisprudence are not adequate. Insofar as the recognition of cultural differentiation is part of what is at stake here, new ways of understanding the complexity of culture are needed.

(b) Culture inside law

A second challenge to juristic assumptions about the unity of the social arises from the fact that, as noted earlier, legal scholarship already addresses many issues of cultural diversity and yet the scope of the concept of culture is unclear. For juristic purposes culture needs to be broken down into component parts, and in practice often is. In one aspect it relates to shared beliefs or ultimate values; in another, to matters of tradition, including common language, environment or historical experience. In a third sense it refers to shared allegiances and emotions. In a fourth, it reflects levels of technological and productive development (material culture) and instrumental (especially economic) social relationships. Law may not relate to these contrasting matters in similar ways. The legal issues they raise – how law should express and protect social relations of community based on beliefs or values, on tradition, on affective or emotional bonds, or on common instrumental (primarily economic) projects – may be radically distinct. Society is made up of fluctuating, continually reshaped networks of social relations of community, which combine aspects of all of these different components of culture. As Samuel Scheffler (2007, p. 119) notes, 'cultures are not . . . sources of normative authority, for they are not explicitly justificatory structures at all'. Culture is not a definable unity that can in itself justify legal decisions and strategies. People relate to its different aspects identified above rather than to some amorphous cultural aggregate. Scheffler (p. 124) advocates 'the elimination of the language of culture' from arguments about political and legal claims.

But in multicultural societies, different elements of culture readily become *superimposed* on each other. The development of multiculturalism can threaten to turn the normal plurality of modern societies – the different interests, value commitments, traditions and allegiances that are combined in networks of community – into rigid, unbridgeable social divisions. This will occur when particular social groups appear to be separated from other groups along *all or most* of the four distinct cultural dimensions of (economic) interests, traditions, beliefs/values and allegiances. It is easy to see how this can occur. Instrumental (economic) relations of trade and employment can become relatively self-sufficient and closed. For example, employment practices may tend to exclude members of other racial or religious groups, or those having different languages or customs. Trade and commerce networks may become discriminatory, exclusive and self-enclosed. Thus, the boundaries of networks of community that exist primarily for instrumental (especially economic) purposes may come to mirror those of networks defined primarily by religious or other beliefs, or those shaped mainly by affective allegiances based on racial or other preferences and attachments, or those defined by shared customary practices, languages or environments of co-existence. All of these boundaries may merge into one. Social divisions based on divergent beliefs/ultimate values, affective allegiances/rejections, conflicting group interests and contrasting traditions, may reinforce each other, so that they create rigid, almost total separations between networks of community, which can then easily be seen as impenetrable, monolithic cultures or subcultures confronting each other.[4]

Confronted by these problems, legal theory's task is surely not to develop a legal concept of culture, but to explore how far the regulation of social relations of community based on shared beliefs and values, on aspects of tradition and common experience or environment, on affective or

4 For further discussion see Cotterrell and Arnaud (2007).

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emotional relationships and on instrumental (primarily economic) relationships pose fundamentally different technical problems for law; problems which sometimes converge dramatically and urgently in the particular conditions of multiculturalism.

(c) What does unify the social?

A third challenge for legal theory follows from what has just been said. If culture is a problematic idea when invoked to explain differences between social groups and their legal demands and aspirations, it must be no less problematic when invoked – as by Jhering – to presuppose the unity of the social: 'our whole culture'. The question is not whether culture unifies the social, but how far any of its component parts can contribute to this. Without overarching societal beliefs or values, common projects or convergent interests, elements of tradition, or emotional allegiances that sufficiently underpin law, Jhering's battle of rights might become an unlimited free-for-all (cf. Tamanaha, 2006). In multicultural societies, tradition may divide as much as unify populations that consist of diverse immigrant groups who carry their own traditions in such forms as common language, historical experience and collective memory. Emotional ties (including the unifying feelings of patriotism) can be strong but volatile; it can be difficult to approach them rationally or to predict their effects. Purely instrumental ties of common interest focused on mutually beneficial projects can be transient, ephemeral and changeable – providing social bonds only as long as advantage continues to be gained from them.

Something more fundamental, however, may come from the individualistic value systems that both American and European scholars have seen as underpinning, in different ways, law and the social in their societies. Utilitarian and expressive forms of individualism (supplemented with republican and other ideas), proclaimed as unifying 'habits of the heart' in the American context (Bellah, Madsen, Sullivan, Swidler and Tipton, 1996), run parallel with a European moral individualism, expressed, for example, in Emile Durkheim's sociology (Cotterrell, 1999, part 3) or in Jürgen Habermas's claims about European values.[5] In both contexts, an ideology that demands universal respect for the human dignity and autonomy of others as individuals, whatever their gender, race, ethnicity, sexual orientation, etc., might seem to offer the only *universal* value system that can help to unite contemporary Western multicultural societies, in which beliefs and values are otherwise very diverse. It is broadly consistent, in many respects, with the liberal individualism that informs most contemporary Anglo-American juristic legal theory. But it needs not merely to be assumed, as in this theory, but argued for theoretically as a necessary underpinning of cultural pluralism.

It might be suggested that it is enough to continue to appeal to liberalism to unify the social in conditions of multiculturalism. Will Kymlicka claims that liberalism can, indeed, address multiculturalism's challenges. In Western societies, he argues, there is a normal process of integration into the larger social unity of ethnic groups that have arisen from immigration, but not of national groups such as those whose homelands were originally incorporated by conquest. Kymlicka sees the difference in terms of how far minority populations possess what he calls societal (self-sufficient, all-embracing) cultures providing 'meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life' (Kymlicka, 1995, p. 76). In his view, national groups can have such a culture but immigrant groups tend not to. They link in many ways into the larger society, and some of their elements of cultural differentiation soften in a few generations.

Thus, different kinds of rights are appropriate to meet the aspirations of these diverse groups. Self-government rights might be necessary to allow national groups to affirm their own societal

5 Cotterrell (2007) compares Durkheim's and Habermas' formulations of the value system of moral individualism.

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culture, while 'polyethnic rights' of immigrant groups, which support their cultures and may exempt them from some laws of the wider society that are fundamentally inconsistent with their particular cultural practices, might be warranted as a way of easing their integration into this wider society (Kymlicka, 1995, pp. 27–31). Kymlicka does not suggest that cultural differentiation will, or should, disappear but merely that it might be appropriate to relate it legally to different kinds of social unity. He sees these kinds of legal strategies as compatible with liberal individualism, as long as individuals retain essential liberal freedoms in their cultural group, including the freedom to leave it.

If, however, an overall value system is needed to allow diversity in a structure of social unity, there may be problems with this approach. First, it is clear that many claims of cultural difference challenge liberal principles. They often demand ways of understanding individual dignity and autonomy that differ from liberalism's understandings, but nonetheless place great emphasis on these values, and may see liberalism as, to some extent, inconsistent with them. Consequently, what may be sought in practice is X's recognition of the dignity and autonomy of Y, which, however, incorporates a further recognition that the way that Y may wish to express that dignity and autonomy may be different from and even inconsistent with the way X would do so. So, a value system focused on individualism might need to recognise that the meaning of the value system itself will be developed in a process of communication between cultural groups – a continuous effort of these groups to learn from each other. So it is necessary to hold firmly to values that can unify across cultural divides, while being prepared to reflect on and revise one's interpretations of those values in the process of seeking to understand the other.[6]

Second, Kymlicka's characterisation of ethnic groups originating with immigration may not be convincing. The implication is that in these groups cultural difference is unstable and law's task is to integrate them into the larger society. But, in Europe at least, including the UK, demands on law from these groups are not merely for special support or for concessions – 'opt-outs' from general rules. Often, the demand is that law should represent cultural diversity generally as one of its major purposes. It should not treat cultural differences as exceptions to the norm but should evolve towards becoming a law appropriate for a society of permanent cultural diversity. This is a considerable challenge. It may involve more than legal exceptions (for example, exceptions for elements of religious dress as modifications to uniforms in the school or workplace). A process of collective reinterpretation of legal concepts might be entailed – involving new understandings of familiar common law ideas, such as 'reasonableness'. The unity of the social, in these circumstances, is not, then, something to be presupposed, like Jhering's 'our whole culture', nor something to be engineered through specific exceptional legal changes. It seems best to see it as an aspiration for law – a special purpose set for law in the context of multiculturalism – to facilitate and guide a permanent cross-cultural conversation by which mutual learning between groups takes place.

How can legal theory embrace this conversation, given its established outlooks? An *imperium* outlook would imply the promotion of unity between citizens through law's coercive authority (*voluntas*). Any cross-cultural conversation will appear, in this image, as strongly shaped and directed by hierarchies of legal officialdom. Legal authority being seen as a 'vertical' structuring of the social, the tendency may be to emphasise 'deep conflicts between the state-centred assumptions of official law . . . and the postulates governing ethnic minority communities with their own kinship networks and religious spheres' (Shah, 2005, p. 10). Communication across cultural divides may be subject to official or state legal control. A *communitas* orientation, by contrast, would more easily see law

6 Cf. Raz (1998, pp. 204–205), emphasising that multiculturalism involves the recognition that 'universal values' can be realised in different ways in different cultural contexts, and that, in the effort to understand such values, these different ways are worthy of respect, and not merely toleration.

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reflecting or expressing cultural conditions, but would need to be adjusted to recognise explicitly the diversity of legal interpretive communities. The Dworkinian search for the 'best' meaning of law to be derived through interpretation would now appear as a search for the best mutual understandings, as to how society should be governed, that can be derived from cross-cultural conversation.

4 Law as communication

Focusing on these challenges to legal theory, it seems natural to use words such as 'conversation' and 'communication'. Legal ideas are changing in the face of the challenges of multiculturalism, but my emphasis has been on processes of communication by which these changes are brought about; not on the substance of the changes themselves. Indeed, it is hard to generalise about this substance because legal changes do not, in the main, relate to unified ideas of culture or cultural pluralism, but to changes in the networks of social relations of community aggregated in the vague notion of culture. As noted earlier, these relations are based on beliefs or ultimate values (especially derived from religious sources); on tradition and inherited ways, environments and experiences; on emotional ties or allegiances; and on instrumental (often economic) purposes related to common or convergent projects. If law's most distinctive tasks in relating to multiculturalism are tasks of *communication* and of *facilitating communication*, it follows that the main re-orientation of legal theory required by multiculturalism is a new emphasis on these communicative purposes of law.

Jhering's legal theory was fiercely attacked, soon after its first publication, because it is a theory of law's purposes. The concept of purpose cannot define the nature of law, wrote one critic, because it represents nothing objective (Berolzheimer, 1912, p. 350). It is necessary to know *whose* purposes are being considered; otherwise the attribution of purpose to law is arbitrary.[7] Similar criticisms have often been made of Lon Fuller's purposive theory of law, which identifies communication as law's key purpose (Fuller, 1969, p. 186). These criticisms are unanswerable. Yet the idea of law as communication, and as a facilitator of communication, has a special significance for multiculturalism. Cultural groups must communicate with each other to obtain the benefits of co-existence. And the jurisprudence of difference can be understood, in part, as an effort to communicate minority experiences and interpretations of law in the forums of juristic debate. If, in legal theory's *communitas* conception, communication among law's interpreters creates law's meaning, then in multicultural societies this involves communication across cultural difference. In an *imperium* conception, failure of communication by courts and legislatures is a hurdle that law must overcome to carry its authority and commands to groups that appear deaf or resistant to it. Communication cannot be the basis of a comprehensive theory of law, but it is an aspect of law that is central to its engagement with cultural pluralism.

Legal communications, Koen Raes writes, '*make possible* a dialogue between different views of life' (Raes, 1996, p. 38; italics in original). For Mark van Hoecke (2002, pp. 7, 8), reflecting ideas of Habermas and others, law gives 'a framework for human communication . . . the taking into account of differing points of view and . . . some dialectical exchange of viewpoints'. James Boyd White (1990, p. 261) sees law as mediating among virtually all discourses, but creating a new one in the process; it is a means of translation. Raes (1996, pp. 38–39) emphasises the 'emptiness' of legal subjectivity (its abstractness) which facilitates legal communication by simplifying the contexts law must communicate between, and about. Post-modernist writers see law as a form of knowledge without foundations (e.g. Goodrich, 1990), which might fit it for the task of mediating between different cultural understandings. For White (1990, p. 267), law 'partakes of the radical uncertainty of the rest of life, the want of firm external standards'.

7 Cf. Kohler (1914, pp. 25–26), seeing law's purposes as given by culture, and fiercely critical of Jhering for failing to examine this dependence.

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But law is not an empty vessel. It carries cultural presuppositions, as Jhering understood. So it does not regulate communication channels neutrally, but directs them in accordance with dominant cultural understandings. Law is a prism through which particular cultural claims are refracted in predictable ways. But this does not make law incapable of being a facilitator of communication. Because culture is not a single thing, but only an aggregate of different types of social relations of community as discussed earlier, each component of the aggregate is a site of communication; a point at which the negotiation of new understandings can be attempted when these social relations are addressed by law. Invocation of law can thus enable many kinds of cultural dialogue to occur.

Once that dialogue has occurred in some area it may be possible for law to provide routine structuring for that area; a relatively peaceful and passion-free ordering of affairs. That will depend on how far law has addressed in a plausible way the diverse aspects of cultural relations – instrumental, belief/values-based, affective and traditional – that bear on it. Much will depend on the sensitivity with which courts or legislatures communicate their understanding of the issues involved; and on the way information about the law is conveyed (for example by reporting in mass media) to those it purports to regulate. But where this dialogue has not occurred or is not completed satisfactorily, legal processes may remain a site of furious, often passionate, conflicting communications; efforts to influence, persuade, demand or threaten – not just battles of rights but battles of interests, ideas, allegiances or traditions.

One recent case may serve as a final illustration of the potential complexity and richness of law's role as a medium and site of communication in relation to multiculturalism. In March 2006, the House of Lords, Britain's highest court, decided Shabina Begum's case.[8] The respondent, aged 17, argued, inter alia, that, contrary to Article 9 of the European Convention on Human Rights, which guaranteed her right to manifest her religion or beliefs, she had been excluded from her school because she had insisted on wearing a *jilbab*, 'a long coat-like garment' (case report, para. 10) covering her head but not her face – a form of Islamic dress which she considered her faith required her to wear. The court noted that the issue was not about the rights and wrongs of schoolchildren wearing Islamic female dress (very many UK schools permit this), but about the school's right to maintain its policy on school uniform. After much consultation with parents and with Muslim advisers, a variable uniform (including optional Islamic headscarves) had been devised, intended to satisfy the religious requirements and traditions of all sections of the school's multicultural student population, and parents.

The court dismissed the respondent's claim that her Article 9 rights had been infringed. When, after wearing the school uniform for two years, she had decided to wear the *jilbab*, she could in the court's view have moved, without 'any real difficulty' (para. 25), to another school that allowed this attire. The court held the school uniform policy to be justified and proportionate given the perceived needs of the school. The school saw a uniform as important to promote 'a positive sense of communal identity', to avoid 'manifest disparities of wealth and style' in students' dress that could be divisive (para. 6), and 'to promote inclusion and social cohesion' (para. 18). 'It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way' (para. 34). The court noted evidence that Muslim girls at the school feared pressure to wear the *jilbab* if some were allowed to do so. Lord Hoffmann noted that compromise solutions had been rejected by the respondent and by her elder brother who often spoke for her; he thought that they had 'sought a confrontation' (para. 50).

My concern here is not with the law, but with the messages communicated by and through this case. 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 (in one interpretation,

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

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not supported by all Muslim groups) for the faith it represented. Also communicated were messages about 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 be reasoned out. The school's thoughtful approach to addressing multiculturalism is explained and approved, and implicitly contrasted with threatening and intransigent behaviour directed against the school authorities.

How does the court manage communication in this case? It might not be effective to pit the school as an institution (and, still less, the local authority, or the state as an entity) against the individual respondent. Communication depends, I think, on maintaining a focus on respect for the autonomy and dignity – here, the personal claims (including claims of belief and ultimate values, tradition, interest and emotional attachments) – of *individuals*, whether these are before the court, or are evoked by the court as actually or potentially concerned with the issues raised by the case. So the school's uniform policy is to be portrayed not in an abstract, bureaucratic manner but as a symbol of the balancing of social relations of community among individuals in a multicultural environment – hence the emphasis on consultation with parents and with representative religious authorities, and on the views of other girls at the school; hence also a stress on social cohesion as a main concern of the school's uniform policy.

It is equally significant that this individualising strategy is sometimes put into reverse, so to speak. The court, in effect, 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). In general, these matters are touched on only through the reporting of facts in the opinions, with little, if any, comment. The court leaves it to readers of the law report to draw conclusions.

Of course, messages communicated by the case were not necessarily well received in all quarters. But the judicial opinions are clearly designed to communicate to the various cultural constituencies concerned with these issues. The methods of the judges are elaborate explanation and description, balancing of evidence, examination of motivations, attention to other case-law (of UK courts and of the European Court of Human Rights) 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.

In general this case has had the effect (at least for the time being) of defusing controversy around its particular issues. Perhaps it can be judged a relatively successful contribution to the process by which battlefields of rights are turned into areas of routine structuring. Yet, here, it is because of the undeniably passionate (even intransigent) battle of rights in the case that the opportunity is presented for all of these varied communications to occur.

5 Conclusion

Law's essential purpose in addressing the conditions of multiculturalism is to facilitate communication. What law itself must communicate is a need for adequate respect for the autonomy and dignity of all other individuals. In appropriate circumstances it must firmly enforce this respect. Without such a value system of individualism, stable trans-cultural communication is impossible. And this is no less

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true once it is recognised that certain aspects of this value system may be themselves matters of ongoing negotiation within the forums of law. As Jhering saw a century ago, the struggle for law can be healthy if it is a struggle to make law living and vibrant, linking people morally and emotionally to culture. But this depends on the skill and vision of those who develop, expound and apply law. It also requires that those who invoke law do so in a way consistent with values mandating universal respect for others as individuals. Where legal communications around culture take the form of battles of rights, it is important that the eventual outcome of these battles – and the aim in processing them legally – should be to produce routine structuring that explicitly recognises cultural differences, while facilitating everyday social interaction that makes possible communication across them.

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