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Law's culture and lived culture: a comment on Roger Cotterrell's 'The struggle for law: some dilemmas of cultural legality'

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I want to thank Roger Cotterrell for his stimulating lecture, and thank especially Carrie Menkel-Meadow and the *International Journal of Law in Context* for the opportunity to participate in this important conversation. I admire Professor Cotterrell's choice of topic; he has taken up a really hard and pressing question for many pluralist societies right now, which is how law and legal theory might make sense of the legal demands of cultural pluralism. Kwame Anthony Appiah has nicely articulated a similar version of this problem: 'The challenge, then, is to take minds and hearts formed over the long millennia of living in local troops and equip them with ideas and institutions that will allow us to live together as the global tribe we have become' (Appiah, 2006, p. xiii). Even if you do not share Appiah's exuberant cosmopolitanism, the issue remains that conflict between human groups based on small differences often unrecognisable to outsiders is probably the norm in human history, and each society (however defined) continues to negotiate that problem of boundaries, membership and codes of conduct, of who can be included and whose practices can and cannot be tolerated.

Because I agree with the general importance of the topic and with much of what Professor Cotterrell says, I will focus my remarks on two interrelated issues that continue to vex legal discussions of culture, including this one. The first point is how we ought to think about the larger relationship between the domains of law and culture. The second related point takes up the specific issue of culture as it is lived rather than as it is theorised, of when and how law recognises people as having culture, of culture's visibility to law.

Law and culture: culture's invasion of law

I am in complete agreement with Professor Cotterell's conviction that the issue we tend to call 'cultural pluralism' or 'multiculturalism' requires law and legal theorists to take better account of culture and the 'social relations that law has to regulate' (this issue, p. 374). Where I think Professor Cotterrell and I begin to disagree, or where I would like to argue for a different emphasis, is in thinking that multiculturalism has primarily necessitated this inquiry. I would like to offer an argument that I have made more extensively elsewhere (Mezey, 2001), that culture has always been at the heart of law and vice versa and that it matters how we think about the relationship of law and culture. Even without multiculturalism, law and culture work together to codify our codes of conduct. To put it simplistically, we might think of culture as the implicit rules that govern how we live together in a particular community, and law as the explicit rules that govern how we live together in a particular community, even where those rules are in tension with each other. That is an overly neat way of thinking of it, but it is certainly true that cultural and legal rules inform each other. In fact, I would go further and say they are inextricable from each other and always have been, even when law was made by and for local troops.

Professor Cotterrell says at various points in his paper that culture, in the form of identity politics (or to use his terminology, 'social differentiation' or 'minority jurisprudences'), has invaded law (p. 376). The implication is that the struggle he addresses is a recent one, produced by the rise of multiculturalism and the politics of difference, that legal theory is now challenged by cultural groups seeking legal recognition or legal exceptions. So his examples of this new relevance of culture to law are things like legal definitions of tribal or ethnic identity, the cultural defence in criminal cases, legal protection of cultural heritage or cultural property. My disagreement with this characterisation of the problem is simply that it strongly suggests that law was once culture-free, that prior to the rise of cultural pluralism, prior to a world in which people of different colours and religions live cheek by jowl, that law could unproblematically express peoples' moral convictions and social aspirations because cultural homogeneity made the pursuit of private interests somehow invigorating and frictionless (to go back to von Jhering) (p. 373).

I find this past overly mythical and hard to imagine and I want to resist the idea that modern versions of cultural pluralism have significantly changed the nature of the challenges we face or that law faces. I think the problem of forging unity out of difference, of learning to live together, is age-old. I do not mean to say that modern cultural pluralism does not pose real challenges for law and liberalism; it can and it does. But I think these challenges are different in degree, not in kind, from the sorts of challenges to which law has always addressed itself.

I want also to resist the idea that culture can invade law, because I believe that law has never existed outside of the cultural. Thus my different emphasis: I want to admonish legal scholars and law-makers to think not about how culture has come to law, but about the ways in which law is culture, how law and culture have always been mutually constitutive. By this I mean that law is one of the signifying practices that constitute culture at the same time that it is a product of culture and culture is likewise partly produced by law. Law dictates culture in the sense that legal rules are in force in the most intimate aspects of our lives, they structure the very baseline from which we negotiate our lives and identities (Mezey, 2001, p. 48). For example, Philomila Tsoukala has shown in her work on family law and Greek national identity how legal rules were reinvented and renegotiated in order to imagine and create a modern Greek national character, where one had not existed before (Tsoukala, 2008). As in countless cases throughout the eighteenth and nineteenth centuries, elites mobilised law in the service of nationalism, helping to transform distinct vernacular cultures into new national identities that then claimed to pre-exist the law itself (Gellner, 1983, pp. 55–62).[1] Culture also dictates law. This was evident during Prohibition in the United States, where people's social behaviour and habits, as well as the larger economy they supported, were mostly impervious to draconian legal rules,[2] and it was the rules that finally yielded.[3]

In truth, law and culture are wildly dynamic. Legal and cultural practices and meanings recycle, reinforce and reinvent in relation to each other. Which is partly why the social models of legal theory seem so much like models rather than like anything remotely social. For example, the *imperium* image of Anglo-American law that Professor Cotterrell invokes begins with formal legal power (the

1 'Admittedly, nationalism uses the pre-existing, historically inherited proliferation of cultures or cultural wealth, though it uses them very selectively, and it most transforms them radically' (according to Gellner).

2 U.S. Const., Amend. XVIII, Sec. 1 (1919) ('the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited').

3 U.S. Const., Amend. XXI (1933) (repealing the eighteenth amendment).

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sovereign) and culture derives from that basic fact (p. 375). Likewise, in the *communitas* image, we begin with culture (individuals in a community) and legal power derives from that fundamental starting point (p. 375). Yet, both seem rather crude in their chicken-and-egg assumption that they know which came first. There is no law without culture and community and no culture or community without some law.

Lived culture: culture's invisibility to law

As I argue above, one of the problems with posing the challenge that cultural difference creates for law as one introduced by the advent of identity politics, as Professor Cotterrell does, is that it suggests that culture's 'invasion' of law is a modern one, that prior to claims for inclusion, recognition or exception by minority groups, we lived in homogeneous societies untroubled by the conflicts of cultural difference. This relates to the second point I would like to make, which is that virtually all complex cultures as they are actually lived, as opposed to how they mythologise themselves, contain difference and hierarchy within them, and that law is used to regulate that difference and hierarchy.

Professor Cotterrell writes, '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' (p. 374). I think this is to buy law's story about culture: that it was invisible until it began to make demands on law. But even in merry old England, when one might have spoken non-ironically of an 'English people', if one were a woman, a slave, a peasant, working class or non-Christian, if one did not have access to law and power, culture was not invisible, nor was the role that law played in forging one's identities and the boundaries of one's communities. If anything, culture was inaccessible rather than invisible, since it was a term primarily used to describe social cultivation and civilisation, in contrast to barbarism (Williams, 1988, pp. 87–89).

By framing the problem culture now presents for law as one about multiculturalism, headscarves and tribal recognition, one gets the idea that culture and the problems it creates for law adhere primarily in communities of colour. The trajectory of the concept of culture has been such that culture, once reserved for the elite, is made invisible or even absent for dominant groups while minority groups and social 'others' are rigidly defined by their culture (Volpp, 2000; Gilroy, 1993; Ford, 2005). In other words, minorities now have culture and Whites don't. I don't think for an instant that Professor Cotterrell believes this, but there is a sense in the lecture, and in legal discourse more generally, that culture becomes visible to law only when law must adjudicate the rights and claims of these recent cultural others.

We tend to think this way, I suspect, because one of the ill-effects of a strong version of multiculturalism is the way it seems to enforce a correlation between communities and culture, such that each group is thought to form 'a community' that in turn possesses 'a culture'. Professor Cotterrell clearly recognises this potential for reification, worrying that multiculturalism 'can threaten to turn the normal plurality of modern societies . . . into rigid, unbridgeable social divisions' (p. 377). Indeed, it is this concern which motivates his paper in the first instance. And yet, his examples and his language suggest nostalgia for cultural unity that has been disrupted by cultural pluralism. To my mind, cultural unity is neither real nor desirable. For those who live within a culture, that 'culture presents itself as a set of competing as well as cohering accounts. In fact, when the accounts of tradition are not contested, it is because they are ossified and have already become meaningless even when they are adhered to' (Benhabib, 2002, p. 103).

Law has always had to confront cultural variety and conflict, to confer and adjudicate identity. To paraphrase Ronald Dworkin, law makes us what we are: immigrants, citizens, married, divorced,

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employers, employees, Black, White, Christian or Muslim (Dworkin, 1986, p. vii). And each of the groups to which law assigns us as it enumerates our rights and obligations, and the identities we claim when we appeal to law, can be thought of as cultural or subcultural. It is Professor Cotterrell's hope that law will function as a facilitator of 'communication across cultural difference' (p. 380). While he certainly recognises that law brings its own 'dominant cultural understandings' to its task of communication (p. 381), Professor Cotterrell is ultimately sanguine about its abilities to create an arrangement of peaceful cultural cohabitation.

To think about law as I have been suggesting, as an active participant in the production of meaning within the semiotic system of culture, links up easily with Professor Cotterrell's idea that law's most distinctive role and promise with respect to multiculturalism is its communicative power (p. 380). I think there is a lot to be said for communication, and even more for conversation which is more personal and interactive, to help negotiate cultural difference. But I think there is also reason to be cautious about law's communicative power, since it communicates not just through what it says but also through what it does. Law, to state the obvious, is communicative in very coercive ways as well as very positive ways.[4]

In addition, as law continues to adjudicate and legislate cultural claims, I am less optimistic that law will be an effective communicator or mediator and am more concerned that in the interests of social stability it will favour status quo positions. Thus, as between minority and majority cultural disputes, law is more likely to support dominant cultural claims, and between disputes within a given community, it is more likely to support the traditionalists as against the dissenters.[5] Indeed, one sees this potential in the most unexceptional reading of the *Shabina Begum* case. In its coercive and communicative modes, the House of Lords enforced the dominant cultural rules of the school as against the claims of the Muslim schoolgirl. The problem to which this comment addresses itself is the widespread and unfortunate tendency to think of Shabina Begum's claim as cultural but not the school's. To think about culture as distinct from law and as primarily belonging to minorities can mask the quite pervasive and mundane ways that law tends to reproduce the culture of the dominant group.

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4 Professor West's comments elaborate on this point; West (this issue, pp. 401–405).

5 Madhavi Sunder (2001) (arguing that the appeal to law often enforces the status quo within a community and suppresses internal efforts to contest cultural meanings).

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