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In pursuit of the pagans: Muslim law in the English context

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A reconfiguration of law is taking place in the contact between Western and Muslim law. While Muslim law is itself a complex, pluralistic amalgam of different legal 'bricks,' in the context of the struggle for Islam to be acknowledged as a legitimate source of value pluralism in the Western context, the religious aspects of Muslim law, with their doctrinal justifications, are brought into sharper relief. The English case shows that customs among Muslims are suppressed in this process of 'shariatization.' Beyond that, even Muslim doctrines are being placed under the spotlight in various ways. These changes are taking place not simply because Muslims are living as non-dominant communities in Europe, where they are under the gaze of the dominant culture and seen as potential or actual violators of human rights and the rule of law. Relying on the 'dynamic of religion' as theorized by Balagangadhara (*'The heathen in his blindness. . .' Asia, the West, and the dynamic of religion*, 1994, Leiden, E. J. Brill), these processes are seen as outcomes of the collision between two religious cultures, the Islamic and the Western, and they tell us more about the nature of religion itself.

Keywords: Islamic law; Western law; Christianity; shariatization; religious minorities; Islam and the West; secularization

Introduction: the return of the pagans

There is much emphasis on religion now in Europe and elsewhere, and this is also where the minor resurgence in the academic research on unofficial law is focused. American research still seems very preoccupied by the constitutional wall of separation erected in the country's early years. While the Muslim factor is changing this somewhat (Moore 2010), the very religious freedom that was to be enjoyed behind the constitutional wall is now questioned as being impossible, constraining legal decision-makers to doing a form of protestant theology (Sullivan 2007). Although differently arranged in various European states, the freedom of religion guaranteed in, say, the European Convention of Human Rights also carries with it similar problems for legal decision-makers. European concerns with respect to religious freedom certainly have been generated by the Muslim factor but that has sparked off a competitive assertion of religious rights among others. Modood (2012, 132) points to this when he says, "Insofar as the dominant religion, Christianity, exhibits a new political assertiveness, it is primarily in reaction to the minority presence and politics and in a context of continuing decline in Christian religiosity and church membership." This brings back to European minds some of the old, and often fierce, intra-Christian struggles about religion that the Americans wanted to avoid, but also the historical hatred and fear of Muslims whose current manifestation has been given its own 'phobia.'[1]

In this scenario, with millions of Muslim immigrants and their offspring (some 18 million in 17 West European countries, about 4.5% of the population in 2010: Pew Research

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Centre 2011), not yet as many as in India though (Indian Muslims number nearly 10 times that at 180 million, about 15% of the population: Pew Research Centre 2011), the legal and other apple carts were bound to be upset. Having proclaimed the "disenchantment of the world" (Gauchet 1999) or the arrival of "a secular age" (Taylor 2007), some prominent non-legal commentators have not helped much in the analysis, effectively universalizing Christian theological presuppositions and Euro-American experiences. Some European commentators now comment that the activists in the 'Arab Spring' are indicating their wish to become part of 'universal history,' reflecting a classic Eurocentric "appropriation of the multiple pasts and histories of peoples on earth within the framework of one past of one people" (Balagangadhara 1994, 56). Still, the dogma of unidirectional progress toward secularity and uniformity of law are being challenged by the large-scale presence of Muslims, and a fight-back now seems in play at many levels, most radically demonstrated by the massacre by Anders Breivik in Norway in July 2011.

For understanding the quality of contemporary intercultural and interlegal encounters between the West and its Muslim diaspora, I have drawn assistance from the work of Balagangadhara (1994) and the research program he established on the Comparative Science of Cultures (see also de Roover, Claerhout, and Balagangadhara 2011; de Roover 2011). While not yet used much within circles of legal scholarship, I have preferred Balagangadhara's work in comparison to Asad's much acclaimed account of the 'secular,' 'secularism,' and 'secularization,' which is partly useful and yet somewhat unsatisfactory (Asad 2003). In particular, Asad's discussion of European identity and the place of Muslims in relation to it is very useful, especially as he underlines the fact that European identity is very much tied up with Christianity, as is the concept of 'minority' (Asad 2003, 159–180). However, he discusses all three terms primarily in relation to 'modernity.' Asad also overlooks Balagangadhara's work, which could have provided a challenge for Asad's framework, especially as Asad does not make sufficiently clear whether he refers to the above three terms or to 'religion' (also Asad 1993) in definitional or theoretical terms.[2] Balagangadhara (1994) examines religion as a phenomenon in the world and proceeds to provide an original theory of what religion is (which Asad does not), and he shows that the distinction between 'religion' and the 'secular' is made by and within a religion. Going further, Balagangadhara shows that Western culture has experienced various phases of 'secularization,' which is one of two ways in which Christianity has spread, the other being proselytization.

Building on Balagangadhara's earlier insights, de Roover, Claerhout, and Balagangadhara (2011) have recently argued that 'secularization' can be seen as the extension of Christian ideas into the general or commonplace attitudinal framework of a society, which then function as heuristic tools (*topoi*) for the development of theories. As those ideas spread, they lose their specific and ostensible Christian character, and mix in various ways. The Christian theology that informed them moves more to the background and becomes invisible. Christian commonplace attitudes are also extended to other societies according to what is assumed to be a universal framework. While there may be a number of agencies for effecting secularization in this manner, legal mechanisms appear to provide key tools for generalizing Christian *topoi* in a secular guise. Secularized concepts within Christian theology such as the freedom of religion, secularism, and *laïcité* are encoded into legal instruments, used for building legal theories, or taken up by academics, law reformers, and others to argue for legal change.

It may be observed that such processes of secularization, despite their source in Christian teachings, also affect the status of *specific* religions, including the Christian churches and believers, because of the demand of universalization that the specific rules of any particular religion must give way to general secular rules. While secularization predates the

Reformation, Protestant critiques of Catholicism and mutual Protestant accusations of idolatry gave a major fillip to secularization (de Roover 2011, 46–51). Roy (2010, 143) refers to Protestant thinkers according to whom "secularization was not only inevitable, but positive, to the point where religion must merge with the secular; in a post-secular world values are no longer conveyed by religion in itself. In this theology of secularization the religious marker was obliterated."[3] The religious conflicts debated in European courts and other legal fora are often rooted in this dynamic and can range from banning Christian prayers at formal local authority meetings[4] and obliging Christian employees to provide official services to homosexual couples[5] to seeking the cleansing of schools of Christian insignia,[6] and so on.

Christian battles for religious rights can also be set against the prominent attention to Muslim concerns. This was recently revealed sharply in the aftermath of the lecture given at the Royal Courts of Justice in February 2008 by Dr Rowan Williams, the Archbishop of Canterbury, in which he highlighted the question of Islamic law and the prospects for the recognition of a Muslim supplementary jurisdiction within English law (Williams 2008).[7] Dr Williams' own explanation for taking this position was that it is part of the responsibility of his office to speak out on behalf of all faiths in Britain and that it is theologically right to think in pan-religious terms (Milbank 2010, 54–55).[8] Dr Williams' speech was greeted by a mixed and sometimes hostile reaction by commentators in Britain (Milbank 2010, 43–46).[9] As Roy (2010, 157–158) points out, within the Anglican Church, Dr Williams' approach was criticized by leading Asian and African bishops on the ground that it was too tolerant of Islam.[10] Governments and politicians took a somewhat backseat position and publicly distanced themselves from any institutionalization of legal pluralism, and in 2011, the British government decided not to publish a study on the operation of *shari'a* councils that had been commissioned by the Ministry of Justice under the previous Labour Government. A campaign group, One Law for All, has been particularly vocal about the negative effects of *shari'a* councils. It is dead against any formal recognition of *shari'a* principles, argues for a cessation of the councils' activities, and has supported the introduction of a Bill in the British parliament to curb the activities of *shari'a* councils.[11]

Some exceptions should also be noted. Views published in journals catering to legal practitioners were fairly moderate and even supportive in their reaction (Shah 2009, 79). Lord Phillips, now President of the UK Supreme Court, gave a widely reported lecture at the East London Muslim Centre a few weeks afterward on 3 July 2008 (Lord Phillips of Worth Matravers 2008). He ostensibly spoke in support of the Archbishop, but was rather more emphatic in highlighting the tolerant history of the United Kingdom and, in a minor passage, the possibility of religious dispute resolution subject to civil law. More recently, the British Academy's Policy Centre commissioned Prof. Maleiha Malik to write a report *Minority Legal Orders in the UK* (Malik 2012). Also, since 2008, a number of lower profile closed-session discussions have been taking place in select academic and legal practitioner circles about how to actualize any accommodation for Islamic law *within* English law. The general tenor of all these relatively milder responses has nevertheless been to advocate only a limited scope for concessions within official English law and to emphasize the possibility of *shari'a*-based dispute resolution *outside* of the official legal order. The discussions have carefully steered away from any substantial concessions to, for example, the recognition of unregistered marriages. Dr Williams' rather more open invitation therefore subsequently collapsed into a more conventional exclusion of explicit legal concessions to *shari'a*.

There is, without doubt, a multiplicity of voices taking differing positions with respect to the legal integration of Muslims in the United Kingdom. In the process, we see a number of views as to how Muslims should be positioned within the prevailing dominant legal

order, and which parts of their cultures they should carry on with, transform, or reject. In this article, I want to make a number of claims with respect to unofficial dispute resolution carried on by Muslims.[12] With the English case as the main focus, I argue that a reconfiguration of unofficial law is taking place in the contact between Western and Muslim law, with two distinct elements. First, Islamic doctrines are being placed under the spotlight in various ways and pushed into conformity with the dominant Western culture. These changes are taking place where Muslims are living as nondominant communities in Europe, under the gaze of the dominant culture and judged as potential or actual violators of human rights and the rule of law. Second, taking as a given that Muslim law is itself a complex, plural amalgam of different legal 'bricks' (Menski 2006, 279–379; Hallaq 2009), I argue that in the context of the struggle for Islam to be acknowledged as a legitimate source of value pluralism in the Western context, the *religious* aspects of Muslim law, with their doctrinal justifications, are foregrounded and, conversely, that customs among Muslims are suppressed because they are seen as remnants of paganism within a religion. I refer to this process as 'shariatization.'

Relying on Balagangadhara's explanation of the 'dynamic of religion,' I present these processes as an outcome of the collision of two religious cultures, the Islamic and the Western. The image of a Huntingdonian sort of clash is inadequate because the important thing here is the manner in which the structuring of legal experience results in changes and distortions when contact is made with another religious legal culture.[13] We thus need to draw upon certain features of Christianity and Islam to explain the trajectory of Muslim law in Europe. To that end, I have picked on a key insight offered by Balagangadhara's reading of the role of the 'secular' within the West. As he explains, the 'secular,' as a theological construct, marks the absorption of the pagan world by early Christianity through the purging of the former's idolatrous practices:

> As western Christianity expanded, so did the Christian-religious world. The earlier civic, pagan world contracted and marginalised in this process. 'Idolatry', a theological concept, drew the boundaries. After having gone through purgatory and neutralised of its sin, once a practice was admitted into the Christian world, it could find a place in this world. It is thus that a 'secular' world was to emerge later, but within the Christian world. It is a Christian-secular world that came into being, as generated within a religious world. That is why the secular world is in the grips of a religious world. (Balagangadhara 1994, 444)

Coming to the contemporary picture, Balagangadhara (1994, 445) writes:

> In other words, I suggest to you, the western experience of other cultures . . . is no different from that of the early Christians. It is not called 'idolatrous', to be sure, but that is because the 'secular' world of ours is also a de-Christianised religious world.

According to this reading, Christianity preserves a space for the secular that is the realm of false, pagan religions cleansed of their idolatrous elements.[14] Customs or ancestral practices became a key battleground for the identification and elimination of idolatrous elements within a culture since the early period of Christianity.[15] With the elaboration and spread of the canon law especially after the Gregorian reforms, the effects of which have been described elaborately by Berman (1983), customs began to be subordinated to other sources of law in Christendom.[16] Modern, post-Protestant Western law takes the realm of the secular as a vastly expanded space, as reconfigured through the rhetorical arsenal of human rights and the rule of law, thereby losing its character as belonging to a specific religion, and becoming universal in character. Islam has been considered a pagan and false

religion in the sense described here and its fate is to be cleansed of those elements.[17] The cleansing process continues apace, and is renewed with respect to the diasporic communities in multicultural Europe. There is consequently a recurrent struggle to identify and root out the pagan practices seen as embodiments of false religions; only that they are not now referred to as pagan, idolatrous, or false but, in secularized form, as violators of human rights, individual autonomy, gender equality, the rule of law, and so on.

Islam shares some of these tendencies of Western culture as it also conceptualizes a framework of heathendom and idolatry outside the true religion.[18] While some space is preserved for the revelation-based religious cultures – Judaism and Christianity – which are nevertheless regarded as deficient (see Waardenburg 1999, 2003), its mission is yet to cleanse all cultures of their idolatrous elements. Islam has not, however, created a realm of the secular in the way that Western Christianity identified, even though there are some undertheorized conceptual contenders for that role. In a recent contribution, An-Na'im (2008) attempts to consider the place of Islamic law in a secular state context, arguing that Muslims can, within the terms of their own doctrines, accept a secular state. With particular reference to Turkey, Indonesia, and India, An-Na'im assumes that something like a 'secular state' is intelligible to Muslims, and indeed argues that it is necessary for contemporary Muslims. However, in failing to account for the fact that the secular state emerged within Christian theology, he misses a crucial step in his argument. He does not take into account Asad's observation that words in Arabic for the 'secular' – notably *almaniyy* and *dunyawiyy* among others (as well as their derivatives) – only began to appear in lexicons from the nineteenth century with deeper Western contact, and notably in legal contexts. Although both Asad (2003, 208) and Roy (2007, ix) locate secularism within Europe and Western culture, they nevertheless suggest that such a lack is not conclusive as to whether the 'secular' or 'secularism' do not exist within Islam. Asad's and Roy's accounts suggest that they assume that the 'secular' should be intelligible to Muslims and ask to be convinced that it is not. A different position is taken by de Roover, Claerhout, and Balagangadhara (2011), who argue that Christian theology provided 'conditions of intelligibility' for ideas such as the 'secular state'; when such constructs are transplanted into a country like India, the lack of such conditions presents fundamental obstacles to their interpretation and elaboration, and they get distorted in the process.[19]

As with the examples of reconfiguration being discussed in this article, Asad links the appearance of the neologisms he identifies to a reconfiguration of legal bricks in Egypt produced by Western influence. The reconfiguration being discussed here is therefore hardly unique and has precursors elsewhere at points of Muslim and Western contact. Apart from the example of Egypt discussed by Asad, one can refer to the passing of the Muslim Personal Law (Shariat) Application Act 1937, of which Pearl and Menski (1998, 41) remark:

> We have seen that there was a desire by the religious leadership of the Muslim community to reduce the role of local, Hindu-influenced custom. As a direct result of appeals by the Muslim community, the Muslim Personal Law (Shariat) Application Act 1937 was enacted in British India in order to reduce the instances where custom would become the rule of decision.

Whether or not we agree with Asad, Roy, or An-Na'im about the intelligibility of the 'secular' within Islam, these examples demonstrate that contact between Western and Islamic ideas provokes reconfiguration in the latter. In the diasporic context, the pressure upon Muslim cultures grows in the shadow of Western culture and law. As we see, Muslims remain identified as followers of a deficient culture, their *doctrines* being liable to contestation within a dominant Western context. Even when their *practices* are opened

to examination, it is done with the assumption that they are founded on an aspect of Islamic doctrine. This is consonant with the general tendency within Western culture of assuming that belief or doctrine founds practices within a culture, and that the study of a practice will yield its 'meaning.' In the process, Muslims are compelled to declare the doctrinal justifications for their practices and, where that is not possible or acceptable, are obliged to expunge their cultures of idolatrous elements embodied in customs, exacerbating a tendency that is already latent within Islam.

Aspects of Muslim legal reconstruction in diaspora

When the Archbishop of Canterbury, Dr Rowan Williams, made his speech in February 2008, it was already becoming known more widely that alternative Muslim institutional structures for dispute resolution had been operating across Britain at least since the early 1980s (Pearl and Menski 1998, 74–80; Shah 2010). Since their emergence, their work has tended to concentrate on matrimonial issues and, notably, the issuance of divorces for Muslim women (Badawi 1995; Shah-Kazemi 2001; Bano 2007). Such bodies are established according to the various segments of Islam represented in Britain, including Barelwi, Deobandhi or Salafi, Ahmadiyya,[20] and various Shia groups,[21] and are often linked to mosques that may refer questions to those bodies which mosque personnel do not feel able to handle. Not all such bodies may refer to themselves as *shari'a* councils, although that is the most generally used designation in the literature (the more popular press has tended to use *shari'a* law courts, *shari'a* courts, or Islamic courts). Some have taken on a more formalized structure with established and evolving procedures, websites, record-keeping, form-filling, and a panel of *ulema* (learned men, scholars) who can consult each other, sometimes across *maddhab* (school of law) lines, before making decisions.

Research at Cardiff University, led by Prof. Gillian Douglas, studying the procedures of case handling and decision-making by the Birmingham Shari'a Council, the London Beth Din and the Catholic Tribunal for Wales was reported in 2011 (Douglas et al. 2011). It confirms the above observations, although the findings cannot necessarily be generalized for other Muslim bodies (see, e.g., Bowen 2010). *Shari'a* councils tend to be run on a voluntary basis and charge minimal fees, especially when compared with the costs involved in going to official courts. Besides lawyers and official courts being seen as too expensive, they may also not necessarily be regarded by the clients as capable of understanding or responding to their problems. This is particularly so if a marriage is not registered or it is a case of enforcing the terms of a *nikah* (Islamic marriage contract) that the English courts do not regard as binding. Similar reasons are reported by Bunting (2009, 84–89) for Canadian Muslims opting out of official family law.

The establishment of a network known as the Muslim Arbitration Tribunal (MAT), just some months prior to Dr Williams' speech, excited some additional interest. Some reporting in the European press has mentioned that the MAT is recognized as capable of delivering *shari'a*-compliant decisions enforceable in English law,[22] while some legal scholars have also received the same impression. In a recent article, American scholars, Witte and Nichols (2010, 123), provide a similarly exaggerated reading of the accommodation of unofficial tribunals under English law:

> English courts have regularly upheld the arbitration awards of Muslim tribunals in marriage and family disputes, so long as all parties consent to participate and so long as all arbitration takes place without physical coercion or threat. The same deference is accorded to the marital arbitrations of Jewish, Christian, Hindu, and other peaceable religious authorities.

According to English law, if the parties to a dispute want to agree to a binding arbitration, it could be enforceable under the Arbitration Act 1996. This practice is already well established among the Jewish *Batei Din*, and appears to be in use among the Ahmadiyyas and Ismailis.[23] However, such agreements only apply to nonfamily disputes (the exception being inheritance[24]) and is better known in business rather than family practice. So, in fact, English law mirrors the situation in Ontario *since* its passing of the Family Statute Law Amendment Act, 2006, requiring that only family arbitration decisions that are made in accordance with Ontario and Canadian laws be enforced in courts (Bunting 2009, 80–84).[25] Meanwhile, anecdotal evidence suggests that the MAT is largely consulted on family casework, and its bid to become a hub for settling business disputes has not yet borne much fruit. In practice, therefore, in terms of the types of cases it mainly refers on to its network, it appears to be not so different to the other *shari'a* bodies. However, press and academic reporting to the effect that *shari'a* dispute resolution is now recognized in English law could be explained by the fact that the MAT's own website announces that "any determination reached by MAT can be enforced through existing means of enforcement open to normal litigants."[26]

The emergence of *shari'a* councils is seen by Menski (in Pearl and Menski 1998, 74–80) as part of the rise of *angrezi shariat*, which is a wider concept incorporating the whole range of unofficial legal practices among British Muslims, and which has even been taken note of in the British parliament.[27] Since previous demands for the official recognition of *shari'a*, made as far back as the early 1970s (Nielsen 1993), had been met with rejection by the government,

> [l]ike the communities themselves, these semi-official Muslim bodies are pursuing a strategy of operating *angrezi shariat*, aspiring for its eventual official recognition without claiming this as a definite right at the present time and lobbying vigorously for it. In other words, by the creation of social facts, a quiet process of legal restructuring is being achieved from within the community. . .. (Pearl and Menski 1998, 80)[28]

While there is little doubt that, as in Britain, elsewhere in Europe too there have been individual processes of reconstruction and adjustment, a problem that remains difficult to assess is why the pattern of institution-building has occurred in Britain to the extent that it has. A possible explanation is provided by Bowen (2010, 417–418), who distinguishes French and British postcolonial arrangements, influenced by the backdrop of their respective colonial settings. In the French case, the civil law tradition has remained influential among postcolonial North Africans.[29] The British case, notably in India but also elsewhere, was characterized by a policy of recognition of religion and personal status law, and this finds echoes in the British post-colonial diasporic context (also Rohe 2007, 93).

A possible extension of this argument can be made with respect to migrants originating in Turkey, and their descendants, who constitute a substantial proportion of the ethnic minority and Muslim population in Western Europe today. As is well known, Turkey already has a fairly long history of living with civil law in family matters, once *shari'a* was officially 'abolished,' and that may mean that *shari'a* is seen as an ethical issue to be dealt with by oneself or within one's social circle, but which one does not expect to be recognized in the courts of the state. Further, political parties in Turkey running on a platform for the resurrection of personal law have been closed down, which has probably meant a much more cautious strategy being followed by the proponents of reform along Islamic lines. The decision of the European Court of Human Rights in the *Refah Partisi case*[30] is well known and much discussed in European legal circles. It followed the closure of the

political party by Turkey's Constitutional Court on the ground that the party's program of establishing a plurality of legal systems in which each group would be governed by a system in conformity with its members' religious beliefs was in conflict with the constitutional principle of secularism (*laiklik*). The less widely known case of *Fazilet Partisi*,[31] in which that party had been closed down by the Turkish Constitutional Court on the ground that it offended against the secular nature of the Turkish Constitution, was formally struck out by the European Court after the party withdrew the case alleging bias of the Court in *Refah*. Meanwhile, Rohe (2007, 93–94) has noted: "The Turkish Republic, being the state of origin of the Muslim majority in many parts of Europe completely abolished the *Shari'a* rules, and the vast majority among Turks would reject the re-introduction of such rules in European countries." Admittedly, Turkey plays a crucial role in the affairs of its European diaspora, but for other Muslim populations, politically led secularization in countries of origin may not prove to be as strong a factor.[32]

An additional explanation for why other European countries remain relatively shielded from the kind of semi-public profile of *shari'a* in Britain is provided by Rohe (2007, 19), who says:

> As it comes to the areas of family law and the law of succession, the application of legal norms in Germany and in other European countries are often determined on the basis of nationality of the persons involved rather than by their domicile. In this respect it may generally be stated that Islamic law has a strong position especially within these areas.[33]

And Rohe (2007, 19) immediately thereafter notes, "Furthermore, a powerful lobby obviously tries to preserve this area as a stronghold due to religious convictions as well as for reasons of income and exercise of power." Therefore, the maintenance, through the principles of private international law, of the rule that the law of one's nationality is to be applied in court cases, which often means a version of *shari'a*, could have meant a more diminished perception of the necessity for *shari'a* fora than in Britain. In that sense, the assumptions of courts in many continental European countries may effectively be more legally pluralistic than the British application of the *lex loci* or the Swiss application of the law of residence.[34] As Rohe (2007, 115) notes further, "the application of Islamic family law – within the limits of public policy – has become everyday business in German courts." I do not mean to suggest that there are no other considerations playing on the minds of European judges to avoid the application of *shari'a* or other 'foreign' rules. In fact, European courts regularly have recourse to rules of public policy/*ordre public*, e.g., to avoid recognizing the effects of the *talaq* (unilateral Islamic divorce issued by a man: Fulchiron (2010) for France; Rohe (2007, 115–125) for Germany). Since the 1970s, British private international law rules have also moved steadily to prevent reliance on overseas laws (Pearl and Menski 1998, 86–104), often creating havoc for the recognition of transnational family relations with confusions among lawyers, judges, and the individuals caught up between laws (e.g. Menski 2011; Shah 2011).

Pursuing the pagans

The formal gap between *shari'a* fora, and *shari'a* principles in general, on the one hand, and English law, on the other, does not mean that there is no interaction and mutual accommodation in practice. The resulting complexity defies easy theorization. Aina Khan, a London-based solicitor specializing in advising Muslim clients on family law issues, suggests some measure of success in getting courts to enforce *mahr* agreements, and this

is the kind of claim that the official courts might find even more difficult to resist in future, given that the UK Supreme Court has accepted that pre- and postnuptial contracts are enforceable.[35] A further gap opens up, however, when marriages are not registered officially and the courts do not want to generously apply the presumption of marriage to afford recognition to such marriages, with a wide range of potential implications.[36] As noted, it is in such kinds of cases where the practice of *shari'a* councils comes into its own; unwittingly or otherwise, English law has been ceding ground to Muslim fora in such cases. At the same time, subtle and not so subtle processes of reform are taking place to bring Muslim law and dispute resolution fora within the framework of 'secular' English law. We can take two examples of such processes to illustrate the ways in which reform through secularization takes place. The first instance is a more explicit process of reform taking place through 'external' legislative proposals aimed directly at curbing the activities of *shari'a* councils so that they cannot operate without heed to Western secular law and its principles. The other could be described as 'internal' reform but instigated under the influence of Western secular law and its principles.

An important recent development is the proposal to legislate against certain activities of *shari'a* councils and similar bodies by the introduction of a Private Member's Bill by Baroness Cox in the House of Lords. The Arbitration and Mediation Services (Equality) Bill had its second reading in the House of Lords on 19 October 2012. As is the fate of many private members Bills, it may not eventually pass into legislation. Although the title of the Bill is not specific to *shari'a*, the fact that *shari'a* councils, the MAT, and similar bodies are the targets of such legislation is evident from the surrounding debates and public statements made on behalf of those who support the Bill, including members of the campaign groups One Law for All and the National Secular Society, as well as by Baroness Cox.[37] Among the things the Bill seeks to do is to amend the Equality Act 2010 (general antidiscrimination legislation) so as to make unlawful, in the provision of arbitration services, discrimination, harassment, or victimization on grounds of sex, and it includes within that

(a) treating the evidence of a man as worth more than the evidence of a woman, or vice versa,
(b) proceeding on the assumption that the division of an estate between male and female children on intestacy must be unequal, or
(c) proceeding on the assumption that a woman has fewer property rights than a man, or vice versa.

Another relevant provision of the Bill, seeking to amend the Arbitration Act 1996 with respect to similar concerns, states that:

No part of an arbitration agreement or process shall expressly or implicitly provide –

(a) that the evidence of a man is worth more than the evidence of a woman, or vice versa,
(b) that the division of an estate between male and female children on intestacy must be unequal,
(c) that women should have fewer property rights than men, or vice versa, or
(d) for any other term that constitutes discrimination on the grounds of sex.

The Bill also aims at making it a criminal offence where a person "(a) falsely purports to be exercising a judicial function or to be able to make legally binding rulings, or

(b) otherwise falsely purports to adjudicate on any matter which that person knows or ought to know is within the jurisdiction of the criminal or family courts."

These provisions amply demonstrate that the target is *shari'a*-based dispute resolution now widely practiced in the United Kingdom, and covers any dispute resolution conducted under the Arbitration Act 1996. If it is passed into law, *shari'a* councils will be subject to legal action on the basis that they have breached one or another provision (of which the above are illustrations) of the legislation. It could bear down further on their activities or drive them out altogether, which seems to be the intended aim of at least some of the proponents of the legislation. At a broader level, this development signals the fact that while *shari'a* dispute resolution takes place in parallel to the framework of the official English law, there is further pressure to bring English law to bear upon it. The kind of step we see in the Bill is far from being a unique development in Western legal systems. Mention has been made of the Ontario legislation passed in 2006 that sought to remove official imprimatur from family arbitrations which were based on religious law. In Oklahoma, an initiative seeking to amend that state's constitution stated in part: "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law." On 10 January 2012, a Federal Appeals Court concluded that by singling out Islam for unfavorable treatment in state courts, the law was likely to violate the Establishment Clause of the First Amendment, and it upheld a preliminary injunction against the bringing into force of the amendment.[38] The Oklahoma initiative is, however, part of a wider campaign also being pursued in several other states to prevent *shari'a* rules from being considered by courts in the United States.[39] Although these efforts by countries in the 'Anglosphere' limit *shari'a* from being invoked within official legal contexts, they cannot eliminate the existence of Muslim law or disputes about it altogether. As Balagangadhara (1994, 371–373) shows, the transmission of world views, which are best exemplified by religions, requires doctrinal and organizational authorities to constrain such transmission and to resolve interpretive disputes. Indeed, the efforts in these countries could be interpreted as countermeasures designed to preserve the domain of 'secular' Western law in the manner Balagangadhara describes, also seeking to constrain transmission and limit interpretive possibilities.

The Arbitration and Mediation Services (Equality) Bill is notable in the present context because of the manner in which it attempts to reform or eliminate *shari'a* dispute resolution practices. It is like the Ontario and Oklahoma legislation in that it attempts to do away with practices that do not conform to principles upheld within Western jurisprudence generally or upheld within a particular Western country. However, it is notable how the proponents of the legislation do not appear very much interested in the details of the practice within *shari'a* councils, and to the extent that they are, their various statements and publications usually provide stereotyped impressions of practice.[40] Rather, a reading of the Bill demonstrates that it is concerned primarily with making practices unlawful in so far as they are assumed to be founded on offending principles. Typically, it is presupposed that (religious) principles, and the beliefs to which they give rise, provide a foundation to practices. The 'battleground,' so to speak, shifts very much to principles, while practice shifts to the background: English courts therefore may routinely grant residence orders to mothers, but since they are presumed to act on the basis of legal equality or the best interests of the child principles, the practice is not regarded as morally deficient. Among the other effects the pressure generated by such (semi-) official nudging has is to persuade Muslims to abjure from endorsing those very same principles on the grounds that they are 'not Islamic,' to attribute errant practices to ignorance and a lack of Islamic education, and to advocate reform of those practices.[41]

Another illustration of the reconfiguration occurring within Muslim law in England, and one that more sharply illustrates the marginalization of custom and practice within Muslim communities, is provided by the case of *Uddin v. Choudhury*.[42] This case reached the Court of Appeal from the Islamic Shariah Council, in Leyton, East London, via the county court. It concerned a very short-lived unregistered and unconsummated marriage between two British Bangladeshis. The groom's father wanted back mainly some jewellery said to be worth over £25,500 that the bride and her mother had taken from the groom's family. The *shari'a* council dissolved the marriage at the instigation of the bride. The groom had agreed to the *shari'a* council being asked to do so on the condition that the jewellery and portion of the *mahr* (dower) already paid be returned, although the bride claimed that none of the promised £15,000 *mahr* had been paid. But the *shari'a* council made no decision as to the return of either. Then, at the county court, a single joint expert, Faiz ul Aqtab Siddiqi, one of the scholars behind the establishment of the MAT (also an English barrister), was appointed by the court to advise on the position in *shari'a* law, but significantly not on the customary practices followed in the community of the parties. Sheikh Siddiqi stated, and the court accepted, that unless mentioned in the contract, the gifts were just that – gifts – and, further, that the *mahr* was due, given that the marriage had been broken off at the groom's instigation. The court ruled that the contract was enforceable and that the wife was also due *mahr* of £15,000. When the groom's father, representing himself, applied to the Court of Appeal for permission to appeal and an extension of time for preparation, the court refused and said that it accepted the county court's findings.

For present purposes, an important feature is that the proceedings went ahead on the assumption, at least on the part of the bride, the *shari'a* council, and the expert, Sheikh Siddiqi, that the principles of *shari'a* were applicable and, conversely, that customary practices and understandings were of no relevance. Bowen (2010, 430) cites an interview with Sheikh Siddiqi where the latter states, "*Nikah* is a contract and should be entered into through education and not based on cultural background, for example on Pakistani or Indian ideas." The *Uddin* case therefore illustrates a more or less consistent thread running through the discourse around Muslim law – the prioritization of the doctrines of *shari'a* and, conversely, the marginalization of or lack of attention to customary practices and conventional understandings. One could take the view of the conduct of the legal proceedings that at least the *nikahnama* (or *kabinama*, a written marriage contract) was given effect by the courts. Marriage is, after all, understood as a contractual arrangement in Islamic law and that sits well with a Western 'secular' understanding of contract. On such a reading, one may say that there is a 'conversion' of the Islamic norm to the Western norm on the basis of similitude.[43] On a different reading, however, it could be said that the wife's family were unjustly enriched by having gone through a short, unconsummated marriage, but how can such arguments obtain a fair hearing in the current trend to *shariatization* in the context of flirtation between official law and British Muslim law? What has happened to custom, *adat*, *riwaj*, and *urf*?[44]

The relative lack of academic analysis of the fate of this type of unofficial law (see however Ballard (2006) strongly arguing for the importance of custom) typifies other discussions of Muslim legalities, whether we are speaking of a rethinking of Muslim law with respect to recent initiatives to provide *fatwa* guidance to European Muslims (Rohe 2007, 137–165; Caeiro 2010) or the manner in which inter-*maddhab* surfing occurs in cyberspace (Yilmaz 2005b; Ali 2010). Part of the reason may lie in the rather reluctant manner in which Islamic jurisprudence has historically acknowledged custom (Libson 1997). As Roy (2010, 29) puts it: "In Islam, the existence of the secular is illustrated by the autonomy of

politics and of customary law, even if legal scholars tend to deny or restrict this autonomy which they are forced nevertheless to accept . . .”[45] However, in addition to this limited theoretical recognition of custom within Islam, there is also the, often implicit, assumption in Western contexts that Muslim law is governed by texts, the doctrines they contain, and the beliefs based on them, all of which are assumed to found practices. As many Muslims are also no doubt tempted to theorize; therefore, practices are (or should be) a reflection of (religious) belief and do not stand on their own ground. The Western approach, shaped and honed by Christian anthropology, endorses and pushes this attitude further by encouraging the identification and elimination of practices *implicitly* considered pagan from within a Muslim culture.[46] On a wider canvass, while this case can also be seen as benchmarking the struggle among Muslims in Western societies, which extends to the legal sphere, about working out the ethics of being a Muslim (Ramadan 1999, 2008), we can underline the fact that in this struggle, elevating the doctrinal elements of Islam tends to have the effect of suffocating an understanding of other legal elements.

Concluding remarks

The evidence discussed here, primarily in relation to the English case, bears out the merits of assessing the realm of unofficial law as introduced by diasporic minorities in Europe with reference to the pervasive cognitive influence of the Western Christian heritage. Secularization has entailed the spreading of Christian theological concepts and attitudes into the common sense of European (and North American) societies and legal orders. Within Western legal systems, non-Western cultures are resultantly viewed through a secularized form of the older distinction based on true and false religion and the secular. The identification of false, ‘pagan’ practices is therefore now done implicitly, before they are admitted as acceptable to the realm of secular Western law. The case of Muslim law in England demonstrates that this dynamic provokes an internal reconfiguration of legal bricks under the gaze of Western culture and law. This results in the suffocation or marginalization of custom, which is regarded as something that should be specifically cleansed of idolatry. Meanwhile, doctrinal elements come to the fore and claim a space that they may not otherwise have had. These combined processes have been referred to here as ‘shariatization,’ an exacerbation of the inherent priority given within Islamic law theory to doctrine. The processes described in this article therefore point to the nature of religions in their legal aspects and what occurs to the structuring of legal experience when two religious cultures meet. That there is a situation of legal pluralism seems like a trivial observation in this context. Rather more important to understanding is the kind of restructuring of legal experience that is introduced such that practice is increasingly justified by doctrine, even as doctrines come under criticism from the dominant legal order. More work certainly needs to be done to study under what conditions and in what directions such restructuring and distortion occurs.

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Notes

1. Among the rising number of publications on 'Islamophobia,' see Runnymede Trust (1997), Gottschalk and Greenberg (2008), Allen (2010), and Sayyid and Vakil (2010).
2. I make no claim that the shortcomings in Asad's account, evident after a reading of Balagangadhara's work, are unique. However, I highlight Asad's work because it was referred to me by several interlocutors, including one of the referees of this article, who held it up as "one of the best contributions to this topic." Frustratingly, in an otherwise important account, Roy (in particular, 2007) refers to neither Asad nor Balagangadhara.
3. Specifically, Roy cites Friedrich Schleiermacher, Dietrich Bonheoffer, and Harvey Cox.
4. *R (on the application of the National Secular Society and another) v. Bideford Town Council* [2012] EWHC 175 (Admin), where a local authority was found to have been acting *ultra vires* when prayers were said as an integral part of the formal meetings of the council.
5. Inter alia, *Lillian Ladele and Gary McFarlane v the United Kingdom*, application nos. 51671/10 and 36516/10, judgment of 15 January 2013.
6. *Case of Lautsi and Others v. Italy*, application no. 30814/06, judgment of 18 March 2011.
7. Dr Williams thereby opened a series of lectures on 'Islam and English Law' mounted by the Temple Church and the School of Oriental and African Studies, University of London.
8. On interfaith respect supported by the Church of England, see Modood (2012, 138–139), who also notes that "local and national consultations with Muslim groups have continued to grow and probably now exceed consultations with any Christian body and certainly any minority group. Inevitably, this has caused occasional friction between Christians and Muslims" (138–139).
9. In a good-natured response to his critics, the Archbishop subsequently gave an explanation before the General Synod of the Church, paraphrasing Ronald Knox with the opening remarks: "The prevailing attitude . . . was one of heavy disagreement with a number of things which the [speaker] had not said!" See for transcript and video, Presidential Address to the Opening of General Synod, 11 February 2008, http://www.archbishopofcanterbury.org/articles.php/1326/presidential-address-to-the-opening-of-general-synod-february-2008 (accessed July 24, 2012).
10. Roy (2010, 157–158) interestingly links these responses to a discussion of 'inculturation,' about which there are also hard and soft positions within the churches, the more hard-line views arguing against the approach because of its invitation to paganism.
11. The group's website www.onelawforall.org.uk provides more information and the criticisms made by the group can also be read in their report, One Law for All (2010). Interestingly, the group's name reflects a secularized version of the biblical injunction in Leviticus 24:22 (twenty-first-century King James' version): "Ye shall have one manner of law, as well for the stranger as for one of your own country; for I am the LORD your God."
12. In earlier drafts of this article, I had used the terminology of 'nonstate law' but have replaced it with the term 'unofficial' as used by Chiba (1986, 6): as "that legal system not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country." The reason for this change is that the notion of 'state law,' and therefore 'nonstate law,' seems rather more culture specific, and see also note 19 herein.
13. It is also important to note that according to Balagangadhara (1994), maximally, the Semitic religions are what religions are, and Asian cultures do not have religion.
14. For a brief description of Christian positions on 'culture' and, in particular, pagan culture, see McGrath (2011, 115–118). He notes at page 115: "A study of church history strongly suggests that the Christian church is engaged in a perennial struggle to clarify its relationship with culture." For a sustained discussion of the contemporary tensions experienced within religions because of culture, see Roy (2010).
15. See Balagangadhara (1994, 31–53) on the debate in Rome among Christians, Jews, and pagans on the necessity, insisted upon by Christians, of providing justification for ancestral practices. This was an early demonstration of the way in which Christianity had begun to frame practices as expressing or embodying the beliefs that human beings entertain and how paganism became an expression of a set of false or corrupt beliefs. This rehearsal was then re-enacted against Catholics by Protestants, who charged the former with idolatry. The argument continues today.
16. See, specifically, Berman (1983, 112–113) on the effect of the Gregorian reforms of the eleventh century: "Faced with an obnoxious custom, the Gregorian reformers would appeal over it to truth, quoting the aphorism of Tertullian and St. Cyprian, Christ said, 'I am the truth.' He

did not say 'I am the custom.'" Further, see especially his account (144–145) of the work of Gratian and his fellow canonists and the authority they assigned to natural law, as found in reason and conscience, over custom. See similarly Brague (2007, 219).

17. This statement is of course a broad-brush characterization of the view of Islam in Western Christian discourse. In the period of the Crusades, when Western Christians were learning more about Islam, Muslims were often referred to as pagans, i.e., the unbaptized (Hamilton 1997). Later, characterizations of Islam changed somewhat. Masuzawa (2005, 59) writes: "Thus four seemingly well-marked categories – Christianity, Judaism, Mohammedanism, idolatry (or heathenism, paganism, or polytheism) – recur in book after book with little variation from at least the seventeenth century up to the first half of the nineteenth century." For a summary of Christian approaches to other religions generally, see McGrath (2011, 435–443).
18. In striking parallels to how Christian theologians thought, medieval Muslim comparativists, reflecting on knowledge of Indian and other traditions, took the view that pagans had 'deviated' from the true religion and practiced idolatry, also placing much emphasis on the distinction between book and nonbook traditions (Lawrence 1976, Latief 2006). See also Alam (2004) on the status of pagans under theories of *shari'a*.
19. Admittedly, the discussion here does not take into account the views of well-studied 'Islamists' like Sayyid Qutb and Mawdudi who saw secularization as a means of Westernization that had to be resisted as an enemy of Islam (Waardenburg 2003, 251–254). Also, we should take note of the observation by Schmitt (1985 [1922]), articulated in the first quarter of the twentieth century: "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts." From this perspective, it would seem impossible for devout Muslims to accept the idea of the secular state, as they could not accept the secularized vision of sovereignty that is so widely accepted in the West.
20. See the case, *Bhatti v. Bhatti* [2009] EWHC 3506 (Ch) for a reported instance of the Ahmadiyya dispute resolution mechanism, which has a transnational dimension linking Pakistan and the United Kingdom. Ahmadiyyas are regarded by other Muslims groups as being outside the fold of Islam and being an Ahmadiyya is unlawful in many Muslim-dominated countries.
21. *Jivraj v Hashwani* [2011] UKSC 40 is a case involving the Ismaili Conciliation and Arbitration Boards, which also have a transnational dimension. The case of Masuma Jariwala discussed in the House of Commons, 10 June 2009, cols. 255WH-261WH, concerned the Shia Dawoodi Bohra community where a former husband apparently withheld the pronouncement of *talaq* (divorce) for some 14 years after they had been divorced officially, while the leaders of that Bohra community could not do anything about it. The case shows that the general appeal to *shari'a* councils for the issuance of Islamic divorces does not hold in all cases.
22. See, e.g., Katja Gelinsky, 'Deutsche Gerichte wenden die Scharia an,' *Frankfrter Allgemeine*, 29 December 2012, who notes, "The arbitrations of MAT are enforceable in court, unlike the decisions of the informal Sharia councils, which conduct mediations on Islamic marriage contracts or settle family disputes." Translation by this writer. For another case of misreporting, see, Abul Taher, 'Revealed: UK's first official sharia courts,' *The Sunday Times*, September 14, 2008.
23. See *Bhatti v. Bhatti* [2009] EWHC 3506 (Ch) (for Ahmadiyyas) and *Jivraj v Hashwani* [2011] UKSC 40 (for Ismailis).
24. *Al-Midani v. Al-Midani* [1999] C.L.C 904, [1999] 1 Lloyd's Rep. 923 concerning what was described by the judge as the division of the deceased's 'great estate.'
25. In detail, see Korteweg and Selby (2012).
26. http://www.matribunal.com/ (accessed November 10, 2012).
27. See Lord Lester, House of Lords Debates, 30 June 2000, cols. 1246–1247.
28. Ahmad Hajj Thomson, a barrister, is quoted (in Ameli et al 2006, 81) as saying: "In fact the various UK Shari'a Councils are the precursors of what will eventually become Shari'a courts, insh'Allah – but they need to be improved and unified."
29. In nineteenth-century colonial Algeria, French citizenship became linked with giving up claims on Islamic jurisdiction. In other words, claims to live under Islamic personal law and citizenship were regarded as incompatible. On the colonial backdrop in Algeria, see Brett (1988).

30. *Refah Partisi (Welfare Party) and others v Turkey*, application nos. 41340/98, 41342/98, 41343/98 and 41344/98, judgment of 13 February 2003.
31. *Fazilet Partisi and anor v Turkey* [2006] ECtHR 488, application no. 1444/02, 27 April 2006.
32. For the contrasting socio-legal developments in Turkey, Pakistan, and England, see Yilmaz (2005a).
33. See, similarly, Rohe (2007, 90) and Büchler (2011, 27–34).
34. The Archbishop's message for the closer examination of a possible accommodation of *shari'a* in English law was echoed by social anthropologist Christian Giordano at the University of Fribourg, who argued for the official acknowledgment of legal pluralism. See http://www.swissinfo.ch/eng/politics/Theres_no_place_for_Sharia_in_Switzerland.html?cid=7147982 (accessed November 10, 2012).
35. *Radmacher v. Granatino* [2010] UKSC 42.
36. For example, *AAA v ASH* [2009] EWHC 636 (Fam), involving a father's loss of child custody. As with some others, this case also illustrates that men can suffer a gender penalty in official legal contexts and that could also be part of the explanation for the numerical significance of unregistered marriages as a way of de-linking from official English law. For a recent judicial confirmation that Islamic marriages taking place in England without registration are 'nonmarriages,' see *El Gamal v. HRH Sheikh Ahmed Bin Saeed al-Maktoum* [2011] EWHC B27 (Fam).
37. For audio links or the texts of speeches given at one such interesting debate held at the Houses of Parliament on 28 June 2011, see http://www.onelawforall.org.uk/successful-debate-on-sharia-law-in-britain-at-house-of-commons/. See also the debate in the second reading of the Bill, House of Lords Debates, 19 October 2012, cols. 1682–1715, and for the televised version: http://www.parliamentlive.tv/Main/Player.aspx?meetingId=11486&st=12:01:30.
38. *Muneer Awad v. Paul Ziriax, Oklahoma State Board of Elections, et al*. 670 F.3d 1111; 2012 U.S. App. LEXIS 475; see http://journalrecord.com/23rd-and-Lincoln/files/2012/01/Awad10thcir011012.pdf (accessed November 17, 2012).
39. See Elsayed (forthcoming) for a breakdown of the types of enactments in different US jurisdictions that seek to prevent reliance on *shari'a* rules.
40. A report, MacEoin (2009), published by the think-tank Civitas preceded the Bill. It is widely cited in the context of discussions about the Bill. Using questionable methodology, it reported on examples of unacceptable practice from the allegedly 85 or more *sharia* courts in the United Kingdom. The press release accompanying the report states: "sharia courts operating in Britain may be handing down rulings that are inappropriate to this country because they are linked to elements in Islamic law that are seriously out of step with trends in Western legislation that derive from the values of the Enlightenment and are inherent in modern codes of human rights." See http://www.civitas.org.uk/press/prcs91.php (accessed November 17, 2012).
41. See Glenn (2010, 224–225) summarizing such 'reformed' arguments used by Muslims.
42. [2009] EWCA Civ 1205; see also Bowen (2010).
43. Using many examples of cases on dower, Fournier (2010) sees such conversions as forms of distortion by Western law.
44. See further the fascinating evidence produced by Bowen (2010, 430–433) on custom (*urf*) in the context of marriage gifts and *shari'a* council decision-making, again demonstrating the ambiguity toward custom among *ulema* in Britain.
45. Glenn (2010, 212–213) describes custom as 'tolerated' and as not being an independent source of Islamic law.
46. I follow de Roover (2011) here in his suggestion that a secularized counterpart to the mechanism filtering idolatry was developed in the post-Reformation period and *implicitly* applied, as he shows, to reform Hindu law in the colonial period.

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