EUROPEAN LEGAL ENCOUNTERS BETWEEN MINORITY AND MAJORITY CULTURE: CASES OF INTERLEGALITY

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> Rather than simply discussing conflicts between culturally different justice/legal sensibilities or orders, we must also look at how justice/law is translated to, and appropriated by, others and how these resources are used in reciprocal cultural production. (Proulx below: 83)

1. Introduction

In the Netherlands judges regularly have to decide cases in which a party follows practices of a distinct minority and claims that living according to these practices is (part of) his personal identity.[1] These practices, then, are supposed to be 'identity-related' (a nice expression I have found in Tully 1995: 172). A man of Moroccan

[1] "part of..." because normally people adhere to and know how to manipulate more than one identity, and also may be members of fairly distinct communities. Sometimes, e.g. in court, instead of the complicated wording I have just used, one hears the misleading but happily short answer to the question why did you do it? (or: why do you claim this?): *because of my culture*. This is misleading as it suggests a kind of imprisonment of a person within some abstract thing called culture.

origin who had already lived for 17 years in the Netherlands[2] divorced his Dutch-born wife and entered a second marriage with a woman living in Morocco. Following local Moroccan practices, which orient his life in the Netherlands too, he endows his new wife with expensive jewellery and enters into a huge debt. This diminishes his capacity to pay alimony to the children of his first marriage. In the final verdict over the amount of alimony to be paid, the Dutch Supreme Court in 1992[3] quashed the appeal court's refusal to take these costs into account when fixing the alimony. The Supreme Court reasons that it is not at all clear why such outlay of money, typical for such a Moroccan community although higher than the costs of a 'Dutch' wedding, would not legally count as 'reasonable costs' which allow for a lower alimony. The case is hereupon referred to another court of appeal. Practically the challenge of a minority culture is hereby met – under specific circumstances - by formally allowing (a restricted form of) legal diversity in an individual case.

In this case the broad framing of the relevant alimony rule offered the judges room to interpret the concept of reasonable costs in an intercultural way. In cases where the rules are much stricter judges are not keen on interpreting these away too openly[4]. Perhaps that is why in another example such judge-made incorporation of a 'foreign' legal institution failed.[5] In the Moluccan islands in Indonesia, a former Dutch colony from where many families immigrated to the Netherlands after the forced decolonisation around 1949, local law (*adat*) functions next to shari'a and national Indonesian state law. There is an *adat* institution of solemnly transferring a child from one Moluccan family to another, kindred, family. On one occasion in the 1980s such a transfer was executed in the Moluccas, regarding a child from a local family who was to be admitted by a Moluccan family living in the Netherlands. The Dutch Ministry of Foreign Affairs refused this child a permit to

[2] He must have had double nationality but the case from which I quote does not give this information.

[3] To be found in NJ (*Nederlandse Jurisprudentie*) 1992, # 338. (A periodical publication of legal decisions in civil and criminal law).

[4] The qualification in this remark stems from the following point. If a need is felt, judges have various devices which enable them, notwithstanding rather clear text, to circumvent even such strict regulations.

[5] See AB (*Administratiefrechtelijke Beslissingen*) 1988, # 135. (A periodical publication of legal decisions in public law).

come to the Netherlands to live with the new parents. Because this 'child transfer' in Moluccan adat did not fall within any of the few categories like adoption or step-child which under the relevant regulation qualified for an entry permit, the refusal was upheld in court. We can speculate on how the decision would have been if such a transfer had been made between two Holland-based Moluccan families with Dutch nationality.[6] What we at least know is that in matters of (change of) personal status of people, judges tend to be loyal to the apparent meaning of the law, invoking the principle of legal certainty. This tendency is to be observed in the domain of social security law too. Once the highest court in these matters held that a gypsy marriage could not justify the claim of the wife of the deceased to a widow's allowance, which is a general right for 'official' widows only, as the law expresses it.[7]

As the examples show, the pragmatic Dutch judiciary occasionally resorts to a restricted or *weak* form of official recognition of minority legal perceptions, by making an incidental exception to the general validity of a legal rule or to the usual interpretation of broad standards and legal principles. Sometimes the legislator makes such an exception the general rule, as when Islamic burial ceremonies are exempt from the relevant Dutch requirements or minority members are allowed to opt for another way to conduct a valid marriage (a hypothetical case). In these examples a category of individuals is legally entitled to specific exceptions. An extended or *strong* form of such official pluralism would imply a grant to a minority community, such as an indigenous people, of a collective right e.g. to have rights over a territory and to manage it according to their own practices, or even a collective right to live by their own rules and practices on a much broader scale, a right to self-rule. This strong form, which by the way is usually not claimed by immigrant communities, is a most contested issue as it shifts power from the majority to the minority, the more so the broader the territorial rights are (not to speak of regimes of self-rule). But also the weak form of provision for legal diversity raises many socio-political debates about the (de)merits of multiculturalism in law and the public domain. At stake are interests of parties,

[6] I stress this Dutch nationality to concentrate on legal encounters between minority and majority cultural nationals and avoid the field of private international law and its rules as to when foreign law is applied in cases brought before a Dutch judge.

[7] See RSV (*Rechtspraak sociale verzekering*) 2001, # 54 (A periodical publications of legal decisions in social security law).

including third parties, such as the interests of the first wife and the children in the alimony case. But symbolically the case is even more sensitive when we think of the emotions concentrated in the French notion of *laicité*.

The challenge, however, is clear. European States are no exception to other states in the world: they grow, or often continue to be, multicultural, mostly in the form of a handful of minority cultures and a majority culture. Such multiculturalism tends to manifest itself in what is commonly called social or *empirical* legal pluralism, meaning the factual existing together of state law and local law (more on the concept of local law below). Nowadays members of minorities want their legal sensibilities to be recognized not just as private property but as part of the official set-up of state and national law too. They come out, and speak up louder and louder in favour of redress of historical injustices and repression (like the Gypsies or Travellers or Roma and Sinte, and like the Sámi indigenous people in the Nordic countries) and/or in favour of respect for a specific collective identity to be recognized - within limits - in the set up of the public domain, as various immigrant communities as well as national minorities do. They claim the right to be different, while at the same time being acknowledged to be part of the broader host society.[8] While not all members of such communities share this view - some are pleading for rapid assimilation - generally speaking there is a mounting pressure for some form of recognition of the right to be different. This tendency warrants attention to ways how legally to organize such a cross-cultural project of living apart together. In the wake of recent socio-political turmoil and a general stiffening of majority-minority relations compulsory assimilation politics have surfaced again as in the UK (see Acton below) and the Netherlands. However, I venture to predict that the quest for a more equal partnership between minority and majority communities will persist.

This is the background of the challenge of diversity, particularly the challenge whether, and how to reflect this factual legal pluralism in national law, thereby

[8] Hervieu-Léger 1998: 39, writing about one of the most decisive changes in France since the beginning of the 1980s, viz., the transformation of a supposedly culturally homogeneous society into a multicultural society. The same goes for the Netherlands and many other European societies.

producing, or refusing, *official* or formal legal pluralism.[9]

If state politicians and the national legal professionals for whatever motives are willing to "overcome the monocultural impermeability of most European state legal systems", as Acton (below: 45) puts it, and institute some form of official legal pluralism, the fight for a more pluriform law is certainly not over. It is just beginning. The Dutch examples already dimly show the struggle for the location of the boundaries between legally acceptable local practices, underlying principles and world views, and non-acceptable ones. Related questions arise as to the way judges feel they have to guard the unity and integrity of the dominant legal system. To what extent can minority legal concepts even deviate from strict rules? I have come to call these boundaries on the official validity of minority law the product of *conflict rules* using an analogy from international private law. They may be judge-made, stem from a legislature, or from international treaties, or arise in public administrative decisions. Conflict rules have two faces. Firstly, they delineate the specific material and personal competence for non-state law within state law, and use an implicit concept of *ordre publique* laying down limits to distinct legal perceptions. Secondly, such conflict rules convey a message from the dominant culture as to what way of organising a society is 'the natural' and 'civilized' way, not unlike the way colonial *repugnancy clauses* in the official colonial pluralistic legal order did. The road between an unbound (official) pluralism and assimilative ('one size fits all') legal practice passes through the narrow pass of conflict rules.

To prevent misunderstandings, I want to add the following. Often there is now talk about multiculturalism as a 'lost' ideology, a non-starter, a project that must fail, because obviously 'we do not want separate worlds within our borders', 'we have to live together, don't we'? This is fairly exaggerated and sometimes defeatist speech as hardly anybody, either minority or majority member, is seeking such 'secession'. But the grain of truth is that fundamental rules of the national game have to be developed and maintained as a uniting and common element. There is to be no pluralism, and certainly not the official legal one type, without unity (expressed in conflict rules). I have no doubt that the need for unity is very well understood also in minority circles. This however leaves us the question where to draw the line. I can see the risk that the usual outcry about unacceptable practices

[9] International and transnational law become ever more relevant also for persons and organizations within a state. This means we are heading towards a global legal pluralism (Snyder 1999).

among some minorities functions as a mechanism of exclusion of these others and does not prepare fertile ground for serious intercultural consideration of the matter of the conflict rules.

For someone like myself who co-edited a volume *The Challenge of Diversity* (Hoekema et al. 1999) dealing with socio-cultural and legal pluralism in Latin America and the ways to accommodate such pluralism and yet keep sufficient common loyalty to fundamental rules of the all-societal game, it is fascinating to ask the question: how do the European nations organize the socio-cultural and legal pluralism in their own backyard? Is interculturality a serious issue for Europe as it is for Canada, Latin America and many more states? Are we, the peoples of European States, going to accept the presence of distinct collective identities within the institutions of the state and its law? Are we willing to accept these even as part of a new identity of the Dutch, or of the French respectively? Are we in the process of constructing a new image of the social contract which holds all of the Dutch (or French) together? Will *laicité* in France as the leading value/principle of the organisation of public life come slowly to be amended or replaced by *interculturalité*?

Within this rather broad framework of ideas, I invited experts each to reflect on the present state and development of the legal position of a specific minority community within national boundaries. How is empirical legal pluralism of the minority kind officially dealt with in the national legal orders of various European countries?

My leading question for these studies has been framed in terms of *interlegality*. National law and local law do not exist the one next to the other as self-contained entities or like billiard balls that perhaps hit each other but in itself are closed, massive entities. On the contrary, as Svensson (below) shows, there has been and there is a constant interpenetration between, for instance national Norwegian law and the legal sensibilities of the original Nordic inhabitants, the Sámi. Certainly this often seems to be a one-way penetration only, from the powerful top to the bottom, but the minorities are not just helpless victims. They appropriate majority concepts and build these actively into their own legal outlook. Sometimes there is such penetration in the reverse direction, when elements of minority law are accepted within the dominant legal order and perhaps even leave an imprint on the dominant legal concepts, procedures and practices. The blending of different world views, principles, perceptions, definitions and norms might work the other way round as well, for instance when Aboriginal legal practice in Canada “has affected

non-Aboriginal justice philosophy and practice" (Proulx below: 80). This I call interlegality *in reverse*. Particularly this latter interlegality is my main concern for this collection of papers. Can we or can we not observe some shift in the usual dominant interpretation of concepts like 'family', relations within the family, 'marriage', obligations of the various members of a family, and the best interests of a child, but also of reasonableness (in civil law), and of goals and procedures of the administration of criminal justice?[10] Does national majority law become slightly intercultural? This question has to be understood well. I am not just thinking of an *incidenta*l deviation from a standard interpretation of a principle or from the obvious wording of a rule or a precedent, but I am thinking of a *lasting* change of some key legal concepts and institutions also outside the context of 'multicultural cases'.[11] This question is not often studied but it merits more attention.[12] The spirit of this approach is well captured in the quotation from Proulx' paper at the head of this article.

Connected with this interest in bottom up (or reverse) interlegality, is my concern for the exploration of conditions that favour or discourage such a reverse current. Think of the attitude with which majority political and legal professionals react to this challenge of diversity. Think of populist stereotyping of the minority culture. In this range of concerns a specific question is how the official recognition of

[10] Compare Proulx' formulation: " ... Aboriginal ideas about formal equality, proportionality, deterrence and punishment gradually change the interpretative repertoires of judges and lawyers" (Proulx below: 95)

[11] I am approaching these questions with a rather practical mind. That is why I do not want to explore further a far more fundamental case of reverse interlegality. This is the case brought forward by Fitzpatrick, in which it can be said that for instance the colonial powers while stigmatising non-European peoples as being at a lower stage in evolution or even as living in the heart of darkness, also define and determine themselves as the contrast of all that and thereby change themselves (Fitzpatrick 1992).

[12] Smandych and Linden describe the impact of white justice - private justice this time, enforced by the Hudson's Bay Company - on the institutions of the Cree and other Indian inhabitants of that area and conclude by raising a question not addressed in this particular study, about "the impact indigenous people had on the thinking of Europeans" which "likely extended to their rethinking their own preconceived ideas about law and justice" (Smandych and Linden 1995: 26).

minority legal sensibilities affects interlegality. On the one hand it is clear enough that any such official recognition will force minority law to live up to all sorts of written, bureaucratic, specialized ways of issuing and administering laws. Recognition might speed up the transformation of local law into the Western model (a tendency which was the main theme in Hoekema 2003). On the other hand we may expect an invigoration of minorities' leaders efforts to preserve forms of their own, and the spreading around of better knowledge of and interest in minority cultures. In the end perhaps the worst stereotypes start to crumble and mutual learning from each other results not only in new hybrid local law but also in new hybrid national law, at least in some aspects. So in Canada through newly created institutions aboriginal values are systematically introduced into ordinary criminal procedures and thereby also the ordinary system orients itself a little towards 'restorative justice', the notion of doing justice on the basis of group counselling, the notion of healing, sentencing circles, etc. Much will depend here on the way the conflict rules are developed. Providing for territorial minority rights for instance but restricting the exercise of these rights to 'traditional use' is a kind of forced traditionalism. This offers less scope for a locally controlled process of development and mixing of local and national law than does provision for a less conditioned right. (See the recent Marshall case in Canada, *R. v. Marshall,* S.C.R., 1999 (3))

I elaborate the concepts of interlegality and conflict rules in the next section, but let me firstly give some clues about the meaning of the concepts of distinct communities and of local law.

Almost every society is host to many socio-culturally different, or "institutionally distinct" (Moore 2001: 106) encompassing societies like 'first nations' (indigenous peoples), national minorities, immigrant communities[13] and the like. Clearly these communities cannot be just grouped under one heading, but for sake of brevity I use one term: *distinct communities,* sometimes switching to *local communities* as well.[14] Admittedly there are differences between immigrant communities on the

[13] Not all immigrant communities are "institutionally distinct" over the whole range of human endeavours.

[14] Practically I am dealing mostly with indigenous and with immigrant communities. National minorities pose similar questions as to the set-up of a multinational society as well as pluralist order of law and state. To one's mind come cases like the Catalan and Basques in Spain, the Scottish and Welsh in the

one hand and 'first nations' on the other, the latter term referring to original peoples of some territory conquered, bought off and shoved off to some marginal part of that territory by a dominant group of different socio-cultural and often ethnic composition. But in terms of the challenge for vested interests in national law and legal scholarship, we can group these cases together.[15]

A second term is 'local law'. As these local communities more often than not possess institutional provisions to solve internal conflicts, which embody their world view, and their view of decent life, the causes of social disruption and the ways to overcome it, it is common now to call this ensemble of legal sensibilities, procedures, concepts, rules and practices, law. Instead of using the term customary law, it is by far better to adopt another terminology like local law, already advanced long ago by Le Roy (1985)[16] and also promoted by F. von Benda-Beckmann et. al. (1996).[17]

UK , perhaps similar French examples (les Bretons?), as well as cases of national minorities such as we have (or had?) on the Balcan and in many other European countries (Russians in the Baltic States, Hungarian minorities in Romania).

[15] In this article I distinguish sharply between two constellations which are often taken together by the experts in legal pluralism. Often the reference is also to the coexistence of state law and the normative ordering capacity of functional groups like medical professions, the New York sweat shop business, street-level bureaucratic groups and other "semi-autonomous fields". The case of non-functional encompassing communities is different in that matters of identity, ethnicity, and socio-cultural diversity pose problems of their own. Let me follow here the footsteps of Moore, who calls these two situations "entirely different" (Moore 2001: 106).

[16] From Senegalese examples Le Roy shows how in matters of tenure the tendency is towards "an explosive mixture including traditional law, Islamic law, customary law and some aspects of modern law" (Le Roy 1985: 257).

[17] "Local law" is used (F. von Benda-Beckmann et al. 1996: 89) to indicate the typical melange of "traditional" and "modern" ways of organizing and ordering social life which is characteristic of the laws of many distinct, often indigenous, communities and nations. It is "the locally dominant mixture of interpretations and transformations of the surrounding universe of plural legal repertoires". This hybrid is the outcome of a process of interlegality. Local law, in itself hybrid, keeps changing all the time. In some states today it has got (or it may get shortly)

The advantage of this term is twofold: 'local', in contrast to 'customary', does not imply a claim about centuries-old and only very slowly changing customs, nor about the supposed 'purity' of these customs. These two elements are purely mythical. Local law is almost always the product of a constant albeit often very unbalanced encounter of local law and national law, as Le Roy also points out. Chanock (1985)[18] is a whole book dedicated to this matter of the hybrid character of local law, the intersections among legal systems (British colonial administration and law, indigenous law, missionaries law), and 'the making of customary law'. It should be obvious that by using the term (local) "law" I transcend the borders of what might be thought of as law within standard legal dogmatics of the western kind. On this basis I want to study the way local and national law blend or do not blend into each other. Once and for all I admit here that the inter- and transnational dimension of interlegality is not systematically studied in this collection. The cases are mostly of legal encounters within one state. But in every case we meet references to international law and its impact on the way the position of minorities is defined.

2. Interlegality and Conflict Rules

Interlegality

The term 'interlegality' was introduced by Santos (2002: 437, first in Santos 1987). *Internormativé* and *métissage* are the terms Le Roy uses (Le Roy 1999: 250, 271). As a phenomenon it has already been common in legal anthropology for

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an official status in the national legal order. Under these circumstances, one may expect the process of change to accelerate or at least to take another course. For instance, because of its newly conquered official status, local law partakes in the overwhelming tendency of the legal order in western states to rely on written documents, on specific legal reasoning, on legalisation and codification. This is perhaps not what indigenous leaders had hoped for.

[18] On the second print of this book in 1998 Merry wrote a comprehensive review drawing parallels between matters of law and colonialism and the legal interpenetrations that followed suit, and the present day law and globalization tendencies (Merry 2003).

more than 30 years, after the legal anthropologists parted with the concept of and the quest for 'pure' indigenous law, and after national (colonial and postcolonial) administrators quit structural and evolutionary thinking (Moore 2001; Merry 2003). The notion has become quite common[19] although the term interlegality is a newcomer. It can be defined as both a process and an outcome: *a process of adoption of elements of a dominant legal order, both national and international, and of the frames of meaning that constitute these orders, into the practices of a local legal orde*r and/or the other way round; or as the outcome of such process, a hybrid new legal order. De Sousa Santos stresses the very fact that such different legal orders, like local law and national law, but also international law, cannot be said to have a separate existence as if they are elements in different social communities which are more or less sealed off from each other. This means introducing a wholesome dynamism in the matter of legal pluralism. Although he uses the concept of a mixing of these orders "in our minds, as much as in our actions" and gives us interesting cases, I venture to say that my stress on the mixing process itself and the mixed outcome of this process takes the study of concrete cases of interpenetrating legal orders a step further.

Interlegality should not be perceived as a form of interpenetration which can only come about when local law is recognized as such officially. Also when state law completely ignores local law or even actively cracks down on it, a process of intermingling of distinct legal orders will still be underway.

The notion of interlegality gets its full vigour only if we firmly commit ourselves to an important change in epistemological outlook. This is the change towards the taking into account of the selective use of legal orders by concrete persons as a resource for the promotion of their interests. The concept of interlegality, while lending itself to a conception of interpenetration of legal orders as the product of general social laws, gets its full flavour when we adopt the so-called actor-oriented approach and avoid any notion of structural determination. It is as Acton says,

[19] Apart from the authors mentioned in the text, Reyntjens, writing about Belgian colonial history and after focussing on the relations between local and national law states: "this process of interaction is two-way" (Reyntjens 1999: 676); and without using the term, Poirier, writing about various systems of law in African countries, already in 1969 warned: "il n'y a pas un seul système, mais plusieurs ensembles interfèrent les uns les autres" (Poirier 1969: 104).

don't forget that there is no general social law that determines people's behaviour. Often "non-Gypsy discourse presents all Gypsy behaviour as cultural", and: "Gypsies, by contrast, often treat non-Gypsy oppression as though it were all the outcome of the nature of non-Gypsies acting according to general laws of non-Gypsy behaviour rather than ever being the outcome of personal decisions..." (Acton below: 35).[20]

Analytically, the stress on the relevance of individuals actors' definitions and behaviour allows us to put the case of the Kalderash Roma brought by Acton to illustrate a broader tendency. Kalderash Roma communities in the USA changed their 'family law' in the direction of dominant USA law, so as to prevent their women from going forum shopping and walking out on their own family law authorities. This example could be multiplied many times. Individuals are not the prisoners of their own supposedly integrated and homogeneous culture, but shop forums, choose among legal orders, pressure their own leaders and authorities to take other legal elements into consideration and also, the other way round, challenge national authorities to take local legal sensibilities in consideration. The way Gypsy leaders react to women's new stances, bolstered by a globalising feminism, is one of the ways in which leaders of local communities nowadays try to bolster and guard their specific collective identity by taking elements of global trends in majority law and blending these into their own, in the hope of maintaining themselves as distinct communities. This is often called a process of ethnic reconstruction.[21] Such reconstruction can be observed both in cases in which

[20] There is room to doubt whether it is wise to use the concept of interlegality also to indicate a very general process of change resulting from the confrontation of two or more social systems with each other, without resorting to the way such processes of change are mediated by individual actors.

[21] Nagel and Snipp tell us that "ethnic reorganization occurs when an ethnic minority undergoes a reorganization of its social structure, redefinition of ethnic group boundaries, or some other change in response to pressures or demands imposed by the dominant culture" (Nagel and Snipp 1993: 204). Proulx (below: 82-83) uses the term 'cultural appropriation' to denote the same process. Many examples are referred to in Collier (1998). I myself (Hoekema 2003) have related a nice case study of ethnic reconstruction to be found in the recent study by Orellena in a Quechua speaking territory in Cochabamba province, Bolivia (Orellana 2004).

local law does not exist formally (and by majority spokesmen is qualified as illegal exercise of force or pressure) and in cases of some form of official recognition.[22]

It is precisely this actor-oriented way of perceiving empirical legal pluralism, which opens room for the reverse view on interlegality. Even under strong (colonizers') pressure local people do not succumb completely to the new power but usually resist, either openly or, far more often, in their own hidden way. Even the might of the law of the dominant society, through its sanctions and its

[22] Orellana's case, concerning a Bolivian Quechua-speaking people, deals with their normative order and institutions which have no official legal standing in Bolivian national law whatsoever, but do their job anyway (Orellana 2004). I found a historical example of ethnic reconstruction by a local community whose local law is officially state-recognized in Twining's account of the old study by Llewellyn and Hoebel of the Pueblo Indians:

> The aims of this investigation were to be as much practical as scholarly; the Pueblos had retained a measure of internal self-government, but their leaders found themselves increasingly under pressure from several directions. There was uncertainty about the exact scope of their jurisdiction and about the extent to which actions of officials were open to challenges in state or federal courts, and a number of officials had in fact been gaoled for applying what were held to be harsh punishments in execution of Pueblo law. At the same time members of the younger generation were increasingly beginning to question traditional ways. It was felt by Brophy [special attorney for the United Pueblos Agency] and others that Pueblo autonomy could be more effectively be defended from within and without if the gist of their law and procedure was recorded and published. (Twining 1981: 20)

In this case we observe how ethnic reconstruction in such a situation of having official self-rule even goes to the point of wanting to codify the gist of their law and procedure. It is as if we are listening to the spokesmen of the Navajo (Dineh) nation which for exactly the same motives is in the same process of ethnic reconstruction and codification now. (Zion 2002a; also www.native-web.org/pages/legal/Navajo_law.htm and the items: fundamental laws+Navajo, accessed July 4, 2005).

definitions of what is proper and civilized living, cannot completely rule out resistance from members of this minority community. Through a variety of means such minority cultures maintain themselves, although often not without important adaptations. Their very existence and resilience leaves an imprint on the dominant society as well. One of the ways in which this reverse impact shows itself is through the contagiousness of some of their institutions. A well known example is the way in which non-western procedures geared towards reconciliation and mediation between parties, even between offenders and victims, are copied by politicians and legal professionals of the dominant order. Also conceptions of human guardianship of natural resources nowadays slowly start penetrating dominant discourses, challenging the relentless exploitation of such resources in a globalizing economy. So a dominant group learns to appreciate distinct institutions and views. The outcome of reverse interlegality is a hybrid product too, this time a (partly) intercultural national law which by this very fact loses its character as the repository of majority culture only. I think this is a very promising way of thinking which may seem a bit optimistic but avoids the rather common notion that minority peoples are only the victims of some absolute and overwhelming power and that majority officialdom only acts on the basis of general social laws.

In the same line of thinking (avoiding strong black and white oppositions as Proulx below: 83, also advises us) I want to stress the fact that minority groups like indigenous peoples do not necessarily see western-style influences and particularly legal precepts and procedures as wholly inimical to their own way of organizing life. Lively discussions are current within such groups as to the merits of some human rights. Those claiming these rights to be universal may be accused of ethnocentric provocation, their claims as the last and final attempt at completely undermining indigenous societies. But this is going too fast. Many first nations women would like to step out of their society and go forum shopping to liberate themselves from male dominated marriage arrangements, or to get a fair share of their fathers' estates. This is not to mention people accused of being witches and risking the death penalty and even its execution. In a written judgment of 1999 the highest authorities of a self-governing Indian nation in Colombia (Jambaló) overruled a village decision to punish very leniently someone who had killed another suspected to be a witch. "It is unacceptable that a community condones homicide on the single argument that the victim was a witch, since this violates the right to life and human rights" (Assies 2003). Indigenous leadership is well aware of pressures inside their own society to incorporate, to appropriate, many 'foreign' elements. Thus they mix the old and the new and produce interlegality.

Conflict rules

I now move to the other important concept. As said, the moment local law is recognized formally as partner in the national legal order, conditions for interlegality may change, even drastically. But this is a two-edged sword. One often hears comments like this: official recognition will automatically provide better chances for local legal perceptions to resist assimilation and they will even be respected by and blended into majority law. Such conclusions are not warranted at all. Legalizing local law may well deal a final and fatal blow to its (semi-) autonomous existence.

To tackle this question I elsewhere developed a distinction between ways to officially legalize legal pluralism: incorporation and recognition (Hoekema 2003). The first relates to a restricted taking into account of local law, by the judge or by the legislator, as in the case of weak legal pluralism, as in the Netherlands. This Dutch treat does not elevate a minority community to the position of a legal partner in a collective enterprise, that of learning to live together in a multinational society. In the earlier article I tried to defend the thesis that such incorporation usually does not offer favourable conditions for more understanding of, dialogue with and legal acceptance of Moluccan or north African Islamic local legal institutions (Hoekema 2003). These local institutions tend to be transformed into dominant legal constructions. Recognition, however, in my view refers to the legalization of a whole complex of local law, which practically means granting some collective right to live under your own distinct law. Granting such a collective right to a local community is an act which might promote a serious intercultural dialogue. I write *might*, because much depends on the way the conflict rules are framed. Think of a grant of self-rule, including the official legal competence to make locally binding laws, administer proper forms of justice, and have exclusive jurisdiction. To study the effects of this arrangement on interlegality one has to study also the restrictions on these legislative and judicial competences, to begin with formally, for instance as regards competence over non-indigenous persons. Relevant too is the question whether or not national laws shall have concurring or even exclusive validity within a self-ruling territory. But then there are material restrictions or limits: what rules, procedures, values/principles and sanctions/punishments are acceptable to the majority, what use of resources is allowed, etc. Take the usual formula for a grant of self-rule that local authorities shall respect national laws and the constitution. The ‘respecting of national law’ formula if interpreted literally makes the grant of self-rule practically worthless.

Restricting the formula to 'respect for the national constitution' and by implication normally for the full human rights catalogue is a more complicated case to evaluate. We have seen already that such human rights are called upon by local members as well. Therefore, while in itself an appeal to human rights can be used to demonise the local culture and its laws as backwards and hopelessly bound to a 'pre-modern culture', not all human rights testing of local practices should be discarded as ethnocentric. Here I can only very briefly refer to the interesting way out indicated by the Constitutional Court of Colombia. This Court, while pondering over the scope of the Constitutional grant of self-rule to the indigenous peoples in that country, has rejected the constitutional formula of 'not violating national laws'. As to the human rights clause, the Court interprets this party away as well saying that in a multicultural and multiethnic society one culture cannot just impose its worldview on the other, but in their testing and reviewing of indigenous court decisions retains a hard core of very basic rights, like the right to life, the right not to be tortured and some more. (See Assies 2003)

This discussion becomes somewhat theoretical as regimes of self-rule in the European context, although not inconceivable, are still far away. The Sámis in Norway, although now in some specific territories having official herding and fishing rights and the regulating power that goes with that, do not as yet have a form of self-rule. This means that as yet no official recognition of Sámi law and customs as such throughout the Nordic territories is forthcoming. Nevertheless I venture to predict that such self-ruling regimes for some indigenous peoples in the North and in Russia will become part of the European legal order in the near future, perhaps copying the Greenland example. As to the minority communities, the future will be different. Strong official pluralism is not the course that immigrant communities will take. Here I expect a mixed development: in some respect assimilation will do its work, in other matters forms of official weak legal pluralism will come into existence, possibly by a step by step pragmatic approach.

3. The Contributions

One is tempted to order the contributions to this collection[23] and the cases they bring, in terms of a growing degree of reverse interlegality: from a zero-situation, an almost complete contempt for and exclusion of a Gypsy minority culture and its law (Acton), through a relatively important official opening up to an indigenous Sámi culture and law (Svensson) to a Canadian case in which national law in some of its parts gets really intercultural (Proulx). Written for this collection was also an analysis of the French struggle with the legitimacy of the wearing of a veil by Islamic girls and women in public schools and the crucial French concept of *laicité*. But to enable the authors of that article to have a direct bearing on the current discussion it was published on shorter notice elsewhere (Eberhard et al. 2005). I will draw on it anyway.

The Gypsies case

Acton, a British expert in the history and present fate of the Travellers (as the English term goes), shows how in the UK the majority politicians and the law of the state almost completely neglect the Gypsy communities and their law, even to the point of demonising and excluding them on the basis of disturbing stereotypes. He gives a discouraging story about the constant swinging of the political pendulum of which the Gypsies are the victim. "Change from one policy to another ... comes when those who have temporary control of the state apparatus perceive political advantage in switching from one strategy to another" (Acton below: 32). I would suppose that to a greater or lesser degree this is the general predicament of minorities under a majority culture, not only in the UK. I can see the parallels with the French political reactions to the wearing of a veil by Moslem women in public schools.

Also outside politics it is still relatively rare to find attention being paid to these peoples (Roma, Sinte) and their legal perceptions. Looking at various Gypsy communities all over Europe and in the USA Acton provides us with an overview of the rather varied nature of these communities. This in itself is a very welcome

[23] I had hoped to include an account of the legal situation of the so called small Nordic peoples living in the Russian Federation as well but this plan did not materialize.

contribution to a collection of papers on multiculturalism in Europe, and for that matter to legal sociology and anthropology as such. Particularly illuminating is the full and succinct documentation of the different institutions with which different Gypsy peoples keep order among themselves. These institutions range from tribunal systems through systems where conflicts are sorted out privately through avoidance, to feuding or fighting. There is definitely not one model of Gypsy law, Acton emphasizes in opposition to some current views. What we learn from this article in terms of interculturality is that Gypsy communities, certainly so in the UK, are still being excluded socio-politically, culturally, and of course legally. Caravan site laws and regulations are instruments to control them and have nothing to do with instituting some protected place to maintain proper ways of living. UK majority law does not take notice of Gypsy legal institutions (and neither do other national legal orders in Europe, I think). Interlegality from the host society to the minority culture obviously takes place: it is naive to think that Roma law could keep itself 'pure' in a situation of frequent and moreover oppressive interaction with the dominant community. I have already referred to Acton's interesting example from the USA Roma whose leaders revised their legal institutions toward a better regime of alimony for women to prevent 'their' women from going forum shopping in USA courts. Perhaps this was felt as the last stand before the final defeat, but I would view this move in the light of resistance and ethnic reconstruction: adapting yourself as a community to elements of the most powerful opponent so as to keep your own community alive and whole, to maintain its continuing autonomy, as Acton says. As to interlegality in reverse, it would have been a miracle, under the rather desperate conditions this people lives in, if dominant policy makers and lawyers had looked favourably on specific Gypsy institutions and had even adopted these values to correct or to revitalize majority law. There are however edifying examples in Gypsy law, such as the way the Kalderash Roma solve conflicts through the institution called the *kris,* roughly a kind of restorative justice administered in a meeting where 'everyone' can address the problem under the presidency of a well reputed conciliator. It might serve as inspiration for the present day conciliatory procedures that are in place in countries like South Africa and Perú.

The Norwegian Sámi case

From the Sámi, an indigenous people living in the North of Europe (including the Russian Kola peninsula), we get an account by Svensson who, like Acton with regard to Gypsy rights and law, has been engaged for many years in matters of

Sámi rights and law in Norway. This author gives us the centuries-long historical trajectory of the taking into official account of the Sámi way of life and their institutions of resource tenure (nomadic reindeer herding) and family and inheritance law, in national politics and law in Sweden and Norway. This process of officially letting in elements of local law has a long history here. Svensson refers to court records from 1620 to 1770 which clearly show how Sámi land rights and customs were recognized in national law. Another milestone here is the 1761 'Sámi codicil' (*Lappekodicillen*), part of a binding treaty between Sweden and Denmark-Norway confirming Sámi reindeer pasture rights across state borders. The remainder of the story, however, knows many ups and downs. The more white settlers proceeded to the north, the more Sámi life and law became marginalized in the 19th and 20th centuries, but in the course of the last century the tides have been changing again. Finally the Supreme Court of Norway has revised its anti-Sámi course and officially accepts the existence of a collective Sámi use right to nomadic land for reindeer herding as well as fishing rights, also against private land owners, and gives these rights a firm legal status culminating in the Svartskog and Selbu cases, 2001. This is going further than the weak form of official legal pluralism, introducing the collective, strong form. The Court decisions even imply a grant of some self-ruling capacity because having collective land rights means having an official say in the way of managing the land. Specific Sámi institutions like the *sii'da* (a concept of a corporate entity holding rights regarding reindeer herds), as well as Sámi conceptions of use and exploitation of territory are now part of official Norwegian law. New international law calling for recognition of these use rights was finally accepted as binding Norwegian law too. Moreover, the Supreme Court justification of the legal existence of such rights outflanked the usual (positivist) theory of legal sources as the Court said that the rights were in existence even before a formal Norwegian law like the Reindeer Pasturing Law said so.[24] While these Court decisions relate to specific Sámi groups in specific areas, on a wider scale a Sámi court has been set up as well as an agency for legal aid, in the areas most densely inhabited by Sámi. Although the conflict rules which determine the official position of these institutions are not very generous - neither of the two has a final decision making power and both are so to speak under the control of the ordinary courts, Norwegian law is applied

[24] Compare the formula in the *Delgamuukw* case before the Supreme Court of Canada. The Court recognizes aboriginal title to territories and justifies this partly from pre-existing systems of aboriginal law, i.e., systems pre-dating British sovereignty. (11 of Dec 1997, file 23799)

throughout - Sámi legal perceptions come to be drawn upon in criminal, civil and administrative matters and often justify 'deviant' decisions, for instance in cases of inheritance and the concept of family relations. But as yet apart from collective use rights of specific stretches of land and water and the regulatory capacity that goes with it, there is no regime of official self-rule and recognition of Sámi-controlled law making and adjudicating. Nevertheless, as the official Norwegian law gets intermixed with Sámi perceptions, concepts and procedures, it is becoming pluralistic. Moreover, the new institutions produce knowledge about local law, such as its institutions of family and inheritance, which is spreading around outside Sámi circles. Interlegality is coming already.

In view of this last remark I have to raise a theoretical point again. I can see the usefulness of using the concept of reverse interlegality in a case in which elements of the minority culture are adopted (incorporated, recognized) in national law. This in itself, even in cases where it is perceived by majority lawyers as a very incidental and restricted affair, might offer a platform for sharing of some knowledge of and occasionally even dialogue between cultures. While I discussed incorporation of distinct legal sensibilities as a mode of transforming local law into the dominant one, it would be unwise not to qualify such incorporation as interlegality. But in such a case possibly minority or indigenous law is perceived as so incidental an exception that it is not worth while to think about it. Local law might even be transformed into majority law. Svensson reminds us of recent changes in the Reindeer Pasturing Law which "incorporates Sámi customs and legal perceptions into its framework for legal regulations and administrative procedures", but adds that reindeer herding cannot be managed adequately "unless Sámi customs and normative orders guiding herding activities to some extent are framed according to Norwegian law standards, even with the use of formal bureaucratic language" (Svensson below: 59). Does this not at least suggest that in this domain not much 'reverse' blending or mixing would go on, at least not on the national level? Blending would imply the taking on board by national law of 'alien' elements, not transformed into a carbon copy of national legal institutions, which are then drawn upon also outside a specific minority- majority law encounter. Norwegian law gets pluralistic, as Svensson shows so well. But do Sámi conceptions already penetrate *general* legal concepts and legal thinking too? Is majority law taking on the character of a new hybrid order? In my view this will be the really interesting question.

The Sámi case offers yet another challenge for a theoretical digression. Svensson tells us the story about the Finnmark law. It is a law about the issue of land rights.

Who has what kind of rights over the land and resources of this northernmost territory? In the draft law, the product of more than ten years' long struggle about local rights, the name Sámi was not even mentioned. No distinctive rights are offered to them. Instead, a system of co-management of resources is instituted. This means disregarding the matter of rights and setting up a mixed Board to manage the resources and take decisions about the use of land. Although disappointing to the Sámis, in itself co-management is an interesting phenomenon to be observed all over the world. Under appropriate circumstances, it could serve as an indirect device to promote knowledge of and perhaps some respect for a minority way of perceiving and regulating natural resources. National top down resource management policies all over the world nowadays suffer from ineffectiveness and the only way out seems to be to share state power with local user groups, the 'stakeholders'. This is more a matter of regulating effective management than of recognizing the diversity of cultures and the collective rights of local communities, as Svensson rightly remarks. But in such regulatory policies local resource tenure institutions are taken more seriously, like the Sámi practices of use and management of the resource would be. After all, the state wants to take advantage of local knowledge, local experience and, most importantly, local participation so as to win the local inhabitants over for the loyal execution of jointly made management policies. Normally the stakeholders get some seats on a kind of board which rules over the resource, as was proposed in the Finnmark law too. Indirectly, then, minorities' practices are rehabilitated not as a basis for land rights but as an asset in regulatory endeavours. Even under these restrictions such co-management regimes could develop into laboratories for intercultural understanding and interlegality because the minority views on resource management and western style concepts and knowledge have to come to terms with each other. Perhaps there is a happy end to this story, as Svensson reports that recently, in the last parliamentary round, the draft Finnmark law was changed again to provide for better Sámi rights.

From this story we not only learn again about the political vicissitudes in any project of allowing for legal diversity, but also about indirect, roundabout ways along which interlegality outside official law may be promoted. Co-management regimes if well designed, might have, as I said, the potential to at least offer a platform for an admittedly long and tedious process of intercultural understanding.[25]

[25] It is possible to expand this argument to the actual attempts in many countries to discontinue western style legalisation of land rights and the concurring neglect of

The Canadian aboriginal case.

To provide us with a mirror for Europe, Craig Proulx from Canada was invited to share with us his experiences with a variety of ways in which nowadays, particularly in urban Canada, aboriginal practices and sensibilities of doing justice are recognized and officially established within the national justice system. The term 'aboriginal' refers to Indian, Inuit and Métis peoples, either rural or urban. The first landmark in this story is the 'Gladue Aboriginal Persons Court' in Toronto where matters are dealt with according to the aboriginal way of doing justice. 'Gladue' is the name of an urban Aboriginal women charged with manslaughter, whose case was eventually decided by the Canadian Supreme Court (1998). In this decision the Court for the first time addressed aboriginal suspects differently. The usual stereotype about Aboriginals being exotic rural people was corrected and urban 'non status' people were included. This decision also asks for different treatment of aboriginal suspects in view of the specific harsh situation they generally live in (following a recent change in the Criminal Code of Canada to that effect). "Gladue is crucial for non-Aboriginal and Aboriginal peoples to understand each others' legal sensibilities despite how our perception is predisposed by the cultures we are embedded within". (Proulx below: 87) The Gladue Aboriginal Persons Court is an ordinary court, the personnel of which are knowledgeable about aboriginal conditions. Special case workers prepare reports and the court tries to do justice to aboriginal sensibilities and circumstances. People can choose to have their case tried there, and then have to accept its decisions. As yet there is not enough empirical evidence about its effects, or whether it to some extent fulfils the lofty expectations mentioned in the quotation above.[26]

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local communal resource tenure, and instead try to find legal regimes in which statutory tenure and customary local tenure are integrated. See e.g.: Lavigne Delville 2000; Le Roy, 1999: 250, who rightly calls this "une approche métisse integrant la pluralité ".

[26] The court is an ordinary court, so appeal to a higher ordinary court is possible. This might result in restrictions on the scope and range of intercultural sentencing in the Gladue court, but the way cases are brought before this court and the implicit understanding to be bound by the court's decision, would make an appeal

Also mentioned is the institution of official interveners in court cases involving aboriginal parties or suspects, not unlike the legal aid agency Svensson describes for the Sámi people in their contacts with Norwegian justice. It is tempting to raise the matter of conflict rules here again. Institutions like those just mentioned open space for the consideration of local legal sensibilities, but their impact on the majority culture depends largely on the practices of the prosecutors and judges of the ordinary court systems who oversee them. In these practices conflict rules will be developed, perhaps implicitly, in which the limits of acceptance of aboriginal legal sensibilities will be laid down. As both Svensson and Proulx suggest or imply: there is a need for more study as to the broader impact of such (formally speaking) dependent institutions which are just part of the ordinary justice system. But in any case, the mere chance for local law to be itself heard and partly understood is already a blow in the face of the stereotypes which haunt not only the Canadian aboriginals but also the Gypsies in the UK and elsewhere.

Next to the examples given, Proulx mentions a (non-urban) Peacemaker Court for the Tsuu T'ina Dene. Through this court, provided offender and victim consent, a community peacemaker takes over and uses the ceremonial form of a circle of attendants that is circumnavigated four times. There is, he writes "a cross-pollination of non-aboriginal restorative justice and Tsuu Tína justice which produces a unique syncretic form of justice" (Proulx below: 97-98). This procedure reminds us of the Navajo Peacemaking procedure (Zion 1999, 2002b) as well as of other Canadian institutions, using the circle 'method' as well (analysed by Le Roy 1999: 354: 'community circle sentencing'; see also Green 1998). But conflict rules weigh heavily here. The Crown Prosecutor decides and serious offences are legally banned from this approach. The circle approach is also practised in British Columbia in an attempt to establish a culturally sensitive alternative justice approach for urban aboriginals in Vancouver. The mediators follow the lead of the Four Directions of the Medicine Wheel, as a guide to themselves and to the participants to achieve or recover a balance in the spiritual, emotional, physical and intellectual aspects of life. Not only do these new aboriginal minded institutions blend into national law and legal thinking, but they are even changing somewhat the general majority outlook on doing justice as well. "A nascent 'legal porosity' is developing as Aboriginal ideas about formal

a very rare event. However, Craig Proulx tells me that as yet there has been no empirical research into the general impact of this Toronto Gladue Court.

equality, proportionality, deterrence and punishment gradually change the interpretative repertoires of judges and lawyers" (Proulx below: 95). In this latter respect Proulx shows how interlegality in reverse is a real possibility. It proves the existence of what is for some observers unexpected *mutual* shaping of legal orders that differ so greatly in terms of principles, procedures and social power. He shows a guarded optimism and warns strongly against a black and white way of thinking, but has also to relate the discontinuation of the mediation scheme and seriously questions the feasibility of such intercultural mediation in cases where legal outlooks and worldviews are so different.

The French case of the veil

Finally, Eberhard et al. (2005) question the way the French authorities deal with the veil worn by Moslem girls and women in public schools. The article is an important contribution on the present topic because it describes in great detail on what grounds the French élite condemns, even loathes, interculturality in the public domain of law and state. In the Dutch legal order the wearing of a veil in public schools by either pupils or teachers cannot be legally banned (with some obvious restrictions based on practicalities), but this position cannot be attractive to French policymakers who are so sensitive to the possibility of multiculturalism in matters of law and public education. The integration of the nation is at stake. French collective identity since the Revolution "has depended on the idea that citizenship should transcend community ties and define beyond all particularisms, a national 'we' with which each person can identify" (Hervieu-Léger 1998: 57). Allowing community values of minority cultures to blend with the dominant political liberalism of the autonomous individual, would hurt the 'Republican pact' with its notion of *laicité* which ended 'the War of the Two Frances', the war between a religious communitarian version and a political republican version, centred around the autonomous citizen. Looking at the French debate about the veil, taking into account the rather specific history of the making of the French republic since the Revolution, we need to take cognizance of the drastic legal measure taken: a general legal prohibition on wearing the veil in public education, under the guise of forbidding ostentatious religious signs in general. As in the UK case and to some extent also in the Norwegian case, there is a lesson here about the ways in which political actors devise strategies to curtail minorities' aspirations. We learn about the need of dominant political society to define its internal enemies and exclude these so as to survive as a pure majority.

Final Remark

I have no doubt that organizing a multi-cultural democracy well is one of the keys to a peaceful 21st century Europe. This means a head-on attack on the myth of cultural homogeneity and the related concept of formal equality of the citizen. Even the welfare state and its crucial notion of material equality does not suffice. The unmistakable presence of distinct sub-state communities calls for a politics and law in which partly different treatment of members of different communities is justified not only as a remedy for social vulnerability, but also as a sign of acceptance of these communities as legitimate and valuable partners in the common enterprise of living to some extent apart but also together. As I have already written, references are made time and again to the so-called fact that multicultural and multinational democracies cannot survive, because it is impossible to imagine a well-integrated society in which two or more peoples or communities just live apart from each other. This statement is nonsense, because there is no serious minority attempt to break away from the dominant society and state. Many minority members are cleverly using two or more identities, and try to find common principles, history and beliefs which may keep society together. But this optimism is not meant to underestimate the problem of the making of conflict rules: where are we to draw the line and how can we find the common ground which one always needs to allow for meaningful differences in the public realm? It is not uncommon for leading commentators to call attention to unacceptable minority practices like revenge killings, female circumcision and many more. They plead the need for a crack down on these and think this settles the intercultural challenge. This sweeping approach is like adopting again old stereotypes of more and less advanced peoples. But we have to take these problems of some unacceptable practices seriously and cannot count on some mysterious spontaneous process of maintaining social cohesion. It is a crucial task to develop conflict rules, and develop these in a common enterprise. In my view no multinational federation (to use the term propagated by Kymlicka 2001) is possible without a thick network of conflict rules of intercultural making along the lines of which authorities both of dominant and minority cultures try to find a road between unbound official legal pluralism and mono-cultural assimilatory law and policy.

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