Bangladeshis in English law

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Abstract

This article begins with a conceptualisation, in legal-pluralist and agency-oriented terms, of the legal implications of the Bangladeshi presence in Britain. It then examines how immigration restrictions, introduced particularly in the 1980s, were aimed at preventing the settlement of Bangladeshis. There is then discussion of how some concrete legal problems have been considered in actual court decisions. The article thereby considers the extent to which English law maintains a largely ethno-centrist perspective vis-à-vis the Bangladeshi presence.

1. The interplay of legal systems, or Bangladeshi legal pluralism

Much of the explanation as to why the Bangladeshi presence in Britain has hardly made a dent in British legal consciousness lies with the nature of, and presuppositions that operate within that system. What are these factors then? First, one can point to the predominant fiction that the state's law is at the centre of things and is able to control and police all aspects of social life within any of the communities that make up contemporary Britain. This ideology is consistent with what John Griffiths (1986) calls 'legal centralism'. It is the belief that all normative orders can be displaced by the state's legal system which then becomes the sole governing factor in legal terms. Whatever is not recognised or stipulated by state law is considered legally irrelevant and therefore not a concern for lawyers or legal academics. Such assumptions are common to Western legal systems that are predicated on the superiority of state-sanctioned law. The 'official' (Chiba 1986) British state law thus presents itself very much as the 'dominant' (Hooker 1975) legal system.

Secondly, the problems presented by legal centralism are compounded by its combination with ethno-centrism within the legal system and among its ideologues. Thus, not only is the state law considered the only relevant regulatory factor, but also it is not seen as necessary for the state to respond with equidistance to all the communities that make up its population. There are clear cultural biases that inform law-making and that are also strongly inclined to displace the influence of non-Christian, non-Western normative systems. The state legal system is largely seen as the property of only some of its social components. A situation of repression (Glenn 2000: 50-53) of other legal orders is therefore in place at all levels, despite a rhetorical recognition by government officers that Britain today is a multicultural society. The fact of a plural social base is not deemed to require the pluralisation of the official legal system. Rather, there remains the expectation that various 'others' must assimilate to the norms of the majority as a condition of legal protection. Thus, the state law presents a system of 'ethnic penalties' (Modood and Berthoud 1997: 144-145), such that the more 'ethnic' one is seen to be, the more the likelihood of marginalisation or penalisation.

Bangladeshis obviously don't just follow English law upon arrival in Britain, and much less so do they follow English law in Bangladesh, as proponents of the common law's triumph over non-Western legal cultures would have it. We actually do not know as much as we should about the legal system of Bangladesh. However, its basic set up seems to resemble other South Asian legal systems, with which it also shares a common

history in several ways (Monsoor 1999: 59-120). A key point for us is that the state is actually a relatively distant phenomenon in psychological terms. It is modelled on the Asian (and African) paradigm of a 'soft state' which, while formally superior, is not interested in dictating the terms of everyday life and law for most people (Menski 2000: 11). We might best describe this scenario as one of assisted self-control, in that the primary regulating factor is the society and its sub-units, but not the state. This model, with ancient roots in South Asia (Mistry 1999, Menski 2000: 149-172), is definitely *not* like the Western state system with its legal-centralist underpinnings.

Another key distinguishing feature is the place of personal laws in South Asian legal systems. Thus we find that it is officially recognised that different religious or tribal communities will follow their personal law systems in matters of family, property and religion - accordingly the state gets involved in administering Muslim law, Hindu law, and so on. This is a pre-colonial fact, recognised by the colonial Indian state in its own peculiar way, and it continues to inform the basic *modus operandi* of legal systems all over South Asia today. However, in Bangladesh this system has come under tension with the twin drives for 'Islamisation' and uniformisation (Menski and Rahman 1988, Menski 1997: 18-23). It would still appear though that, in contrast to the Western model, South Asian legal systems allow a wide scope for the operation of personal law systems, as well as facilitating their official recognition. These differences in understanding about the place of the state in the context of its social framework have a crucial role to play in conceptualising the transplantation of Bangladeshi legal culture in Britain, and they are arguably key determinants in its cognitive interaction with English law.

With migration to Britain one can expect that legal patterns that are followed at the personal level are continued unless we make the very unsound assumption that all one's cultural baggage gets lost on the flight to Britain! We therefore find that there is a transplantation of Bangladeshi, predominantly Sylheti legal culture to the *bideshi* setting. With the earlier stages of male dominated migration from Bangladesh some *bideshi* habits may have been adopted and there is some evidence in the reported cases that some of these men had got into relationships with local white women. However, with the arrival of families in more recent decades we will probably have seen the hardening of societal strictures in all sorts of ways (Ballard 1994: 14-18). We will therefore see quite different stages of legal reconstruction and inter-action on the road to the establishment of *desh bidesh*, to adapt Ballard's (1994) formulation, *desh pardesh* (see already Gardner 1993).

At this stage, it is worth emphasising that theorising and fieldwork about the ethnic minority presence in the UK have already moved on despite official dogmas about the respective place of state and society as well as inherent cultural biases. Thus we already have some material that argues for the recreation of South Asian legal cultures in diasporic contexts (chiefly, Menski 1993). For Bangladeshis the material on Muslim law, or '*angrezi shariat*' (Pearl and Menski 1998, Menski 2001) is most relevant, given the overwhelming concentration of Muslims among this group. The concept of *angrezi shariat*, an Urdu term meaning British Muslim law (*ingreji shoriyot* in Bangla/Sylheti), is understood as the Muslim legal cultures recreated within the British setting.

I do not see this as the introduction of the textual or doctrinal *shari'a*, even though attention generally tends to focus on this due to prevailing ideological predispositions. It should rather be seen as the more or less conscious process of developing a *living law* in the diaspora. Thus it is that Ballard (n.d.) argues for greater attention to be paid, not to the concepts of the doctrinal *shari'a*, but to everyday notions of *rivaz* (*rewaj* in Bangla/Sylheti) on which maintenance of honour is crucially predicated. This should incorporate the elements of 'Hindu' custom and the female-centred ritual order, apparently very strong in the Bangladeshi setting (Gardner 1995, Monsoor 1999: 48-51), though tending nowadays to be dismissed as a mere 'cultural' artefact by trendy

young Muslim students in Britain in their avowedly increasing commitment to Islam (Gardner and Shukur 1994: 161-163, Ballard 2001a). It could also incorporate adaptations to English legal requirements such as the registration of marriages. A thoroughly hybrid process is therefore presented and it is evident that all Muslim communities have been engaged in this process to some degree, the Sylhetis no less. Because this process is a dynamic one (Yilmaz 1999) it means that actual fieldwork knowledge is required to appreciate how the cultures in the country of origin have adapted to their new setting. Ethnographers, and sometimes even lawyers in practice, are better placed here than legal academics it seems.

What is the status of this emergent Muslim law then? While there were demands in the 1970s from Muslim spokesmen that the state recognise *shari'a* officially, these demands have not been met (Poulter 1990). Muslims have also been campaigning for recognition under the anti-discrimination and blasphemy laws, but these more limited demands have also been pushed away by a state that has been making confident strides towards secularism for decades now. This form of secularism is not the Indian form of equidistance to all faiths but, drawing on liberal answers to intra-European religious conflicts, demands the 'privatisation' of religion. Some concessions, particularly at local level (Nielsen 1988, 1992, Shah 1994) on issues such as education, mosque building and slaughter regulations are granted, however, and this probably remains the most viable strategy for obtaining recognition at present (Yilmaz 2000). According to the classification that we met earlier therefore, Muslim law, whether in doctrinal form, or - much more relevant - in the sense of a living legal system has been pushed firmly into the 'unofficial' sphere. There is not much likelihood that this general position will change in the near future given serious, and no doubt culturally-loaded reservations in the West about the compatibility of Muslim laws with human rights norms (Poulter 1990, 1998). The Muslim response meanwhile seems to have turned to the development of dispute resolution fora as a parallel non-state court system that demonstratively illustrates that the English legal system offers inadequate protective mechanisms (Badawi 1995, Carroll 1997, Pearl and Menski 1998: 77-80, 393-398, Shah-Kazemi 2001, Yilmaz 2001).

2. Immigration restrictions: preventing the establishment of *desh bidesh*

Before going on to examine some of the recent, almost contemporaneously decided cases, it is may be useful to examine the immigration law response to the prospect of Bangladeshi settlement in Britain. The immigration system is, after all, where much of the legal encounter between Bangladeshis and the English law has been taking place in the last two decades. The reasons are obvious to ethnographers who have noticed that the establishment of *desh bidesh*, and thus the regrouping of families in Britain, took place at a later stage for Sylhetis than it did for the other South Asian groups from India or Pakistan. There was thus a shift from the men's 'international commuter' lifestyle to the arrival of wives and children from the 1970s, peaking in the 1980s, but continuing through the 1990s (Ballard 1994: 20, Gardner and Shukur 1994: 150, Gardner 1995: 114-121, Eade, Vamplew and Peach 1996: 151, Juss 1997: 47-48). If the decision to reunite families was at least in part motivated by a strategy to avoid waiting for a time when controls would get even stricter, as Gardner and Shukur (1994: 150) indicate, the immigration law system had, by the mid-1980s, fine-tuned its restrictive machinery against South Asian settlement such that Bangladeshis found themselves experiencing its worst aspects.

Indeed, from the mid-1980s we find that restrictions were tightened further specifically in response to Bangladeshi regrouping in Britain. Thus, in August 1985, the

Immigration Rules that spouses and fiancées were required to satisfy before obtaining entry clearance were changed so that those applying to enter had to also satisfy the authorities that there would be no recourse to public funds (Sachdeva 1993: 93-100). This also coincided with the gradually worsening economic position of Bangladeshi men because of de-industrialisation in sectors where they were over-represented (Gardner 1995: 48). Many men could still claim exemption from the application of these requirements, however, as they had been working in Britain since before the Immigration Act of 1971. A clause had been inserted into this Act guaranteeing Commonwealth men who had settled in Britain prior to 1973 that their conditions for family reunion would be no worse. The full impact of the Rule changes was therefore not evident immediately.

A visa requirement imposed in the autumn of 1986 for visitors from Bangladesh, Pakistan, India, Ghana and Nigeria effectively came to strictly control travel to Britain, and it had its impact even on those dependants with a claim to British citizenship (Joint Council for the Welfare of Immigrants 1987, Drabu and Bowen 1989, see further below). The most serious attack on Bangladeshi families came about in the Immigration Act of 1988, however, and Gardner (1995: 48-49) has rightly observed its crucial importance:

> 'British Bengali men who did not bring their wives and children to the UK in the 1970s may now find themselves embroiled in complicated and expensive legal wrangling, which may take years to resolve, especially since the Immigration Act 1988 now means that their dependants are no longer guaranteed entry. Countless trips may have to be made to the British High Commission in Dhaka by family members in Bangladesh. Sometimes by the time a case is processed, the conditions of entry are not longer valid. Many rural Sylhetis, like ordinary people in the UK, have only a vague idea of the immigration laws, and none at all of their rights. The documentary evidence which is acceptable in British courts simply does not exist in rural Bangladesh, for few people know their exact age, let alone have a birth certificate to prove it. The skill of a family's lawyer may well tip the scales in deciding who gets their entry and who does not, and it is the poorer and less well-connected who inevitably lose out.'

This Act did away with the above-mentioned guarantee in the 1971 Act thereby allowing the subjection of Bangladeshis to the stringent and ever more demanding requirements of the Immigration Rules on family reunion. It is therefore no coincidence that a huge number of refusals have been made under the public funds criteria since then. This is attested to by the fact that public funds cases constitute a large proportion of the load dealt with by the Immigration Appeal Tribunal (Gillespie 1992, McKee 1995, Hussein and Seddon 1996, Wray and Quayum 1999).

The 1988 Act also attempted to neutralise another trump card in Bangladeshi hands. Many South Asian men, Bangladeshis (formerly East Pakistanis) being the most important group here, who came to work in the UK in the earlier periods of post-war migration, acquired a right of abode under the 'patriality' provisions of the Immigration Act 1971. While South Asian men could not generally establish such a right through ancestral connections or birth in the UK, many were able to do so after five years residence in the UK, or by registering in the UK as citizens of the UK and colonies (CUKCs) as Gardner and Shukur (1994: 150) have indicated. Importantly, under the patriality provisions such men could also pass a right of abode on to their wives, including second wives, and children who therefore enjoyed an unfettered right to enter the UK. Further, the children of patrial men who had registered themselves as CUKCs became entitled to claim the status of British citizens upon the coming into force of the British Nationality Act 1981. They could therefore travel to the UK without the need for

certificates of entitlement, even on Bangladesh passports, and without being subject to immigration control (see in detail Fransman 1986, Fransman 1989: 210-231). The key events that culminated in the 1988 Act being passed again reinforce the impression that the main target of control were family members from Bangladesh. Fransman (1989: 215) recounts the cumulative effect of the 1986 and 1988 legal changes:

> 'The Bangladesh British citizens by descent began to arrive in 1985 and during 1986 the numbers increased substantially. However, as of 16 October 1986, the UK government made Bangladeshis visa nationals. As a matter of law, those claiming British citizenship by descent did not require visas but the airlines, fearful of financial penalties, simply refused to carry any Bangladesh passport holder without a visa. The result was that in all but a few isolated cases the flow of claimants from Bangladesh was halted.
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> 'The government, however, was not satisfied with a mere *de facto* prevention of direct arrivals of claimants of British citizenship by descent. The introduction of visas may have placed a hurdle in the path of claimants wishing to travel direct to the UK but did not affect their legal right to do so. Accordingly, after the 1987 election the government announced its intention to amend the law and so to extinguish the statutory entitlement.'

Thus, the 1988 Act (in section 3(1)) imposed a requirement on all claimants to the right of abode or British citizenship to establish that status by obtaining a certificate of entitlement or a British passport when seeking to enter the UK. This provision obviated the risk of claimants to entry simply arriving at a British port, and rather attempted to ensure that controls were applied at diplomatic posts abroad where any adverse publicity could be avoided.

The 1988 Act also had specific implications for those in polygamous marriages. Some of the earlier immigration case law seems to indicate, at best, an ambivalent official attitude to the recognition of polygamous marriages, and a refusal to allow family reunion could often result even though the persons involved had always considered themselves married under their personal law. The 1988 Act and accompanying Immigration Rule changes then introduced a prohibition on the entry of a polygamously married wife where another wife had already been admitted to Britain. This can also be read as a direct attack on Bangladeshi families as the practice of polygamy seems to be have been most prevalent with this group as compared to other South Asians. Although not significant in terms of overall numbers, these restrictions were also indicative of the fact that the UK legal system was prepared to tolerate the separation of families, and of mothers from their children, ironically as a way of signalling its civilisational superiority (Shah 2002). As discussed further below such posturing has led to the downgrading of the rights of Bangladeshi children too, who are now deemed illegitimate by English law. A more general point that can be made about the immigration restrictions is that, not only are they aimed at curbing the settlement of Bangladeshis in Britain, but the way in which particular legal conflicts are handled shows much evidence of ethno-centrist assumptions in full play within English law. This then has its own function in signalling to Bangladeshis that assimilation to dominant norm systems is expected.

3. Bangladeshis in English law: a case study in legal ethno-centrism

If we take the two elements identified earlier - of state centrism and ethno-centrism - together we find that there is ample scope for the dismissal, marginalisation or distortion of Bangladeshi legal culture within English legal fora. On the other hand, we can also find at least some evidence that English judges cannot escape from having to grapple with evidence of Bangladeshi legal reconstruction in Britain despite the official mono-culturalist policy. Here I want to present evidence from three reported cases to show how these patterns work themselves out in concrete situations. All three cases are linked to the extent that they all deal with the issue of marriage albeit in different contexts, and all three are also, directly or indirectly, concerned with the status of children of the marriages. One concerns recognition of a long-standing marriage in the absence of evidence of registration or indisputable documentary evidence. The second is concerned with the consequences of a polygamous marriage for the status of children. The third, which is discussed in a separate section considering the challenging issues it raises, concerns the dreaded mixed marriage and the question of renaming and circumcising the child once the couple have split up.

3.1 Sanctity of marriage or over-reliance on *kagzi* evidence?

In our first case, *R (Shamsun Nahar) v Social Security Commissioners* (21 December 2001, QBD (Admin Ct), [2001] EWHC Admin 1049), the underlying question was whether the applicant was entitled to a widow's pension as the surviving wife of a Bangladeshi man. There was some evidence that she had already fought a long legal battle with the immigration authorities to obtain a certificate of entitlement to the right of abode on the basis of her marriage. Her initial appeal against refusal of a certificate was allowed but then, on further appeal by the entry clearance officer, the matter was remitted by the Immigration Appeal Tribunal (IAT) to another adjudicator who also allowed the appeal. The IAT refused leave to appeal further, and the applicant finally arrived in the UK with her son. Throughout the immigration proceedings, the validity of the marriage, which had taken place 'in accordance with Muslim tradition and practice' in (what was then) East Pakistan in 1952, was accepted. Also, a document described as a 'marriage deed' had been accepted as valid.

The applicant's claim for a widow's pension had already been made while she was in Bangladesh and, having been interviewed at the British High Commission in Dhaka, her claim was refused by an Adjudication Officer. It was in the social security proceedings that the whole question of whether she was married at all was then raised. The 'marriage deed' was produced before the Social Security Appeal Tribunal on appeal. The document was referred to a 'document examination officer' within the Department of Social Security. He was of the opinion that it was highly unlikely that the marriage deed was actually issued in 1952. Munby J's judgment then sets out what followed:

> 'On 27 February 1998 the Social Security Appeal Tribunal refused the claimant's appeal, having found on the balance of probabilities that it had not been established that a valid marriage had been contracted between the [claimant] and Abdul Kadir [her deceased husband]. The Tribunal's full reasons were issued on 1 June 1998. Referring to the expert's opinion the Tribunal described the marriage deed as suspect. The Tribunal mentioned that the claimant's solicitor had referred to the decision of the [immigration] adjudicator of 22 July 1997 and went on to record the presenting officer's riposte that that decision had been

based on the supposed validity of the marriage certificate. The Tribunal concluded on the balance of probabilities that the marriage deed was a forgery.'

The challenge before Munby J then concentrated on the extent to which the social security appeals proceedings ought to have followed the findings as to validity in the immigration proceedings. It was held that there was no such obligation on them, and the judgment is an excellent review of authorities on this and related points. In fact the judge held that even when a party has satisfied one government department of the existence of a certain relationship, other departments may lawfully reopen the issue of validity.

The problem that needs to be highlighted here, however, is that it was unhelpful for the social security proceedings to have focused on the genuineness or otherwise of the 'marriage deed', on which the whole effort of establishing validity of the marriage seemed to have depended. As seen, the doubts as to the genuineness of the 'deed' seem to get progressively greater through the social security proceedings. What ought to have been revealed at some stage in those proceedings was that marriage laws in South Asia are not premised on registration systems; although such systems do exist they are not mandatory and informal, customary marriages are invariably recognised. It is common practice for people to obtain secondary documentation in order to show that the relevant relationship exists when such a need arises. While such documents can never be absolute proof that the relationship claimed exists, neither should it have been assumed that if the documents were not drafted at the time of the relationship's coming into being (for example at the time of a marriage ceremony) that they are necessarily invalid.

Munby J did recognise in the judgment that:

> 'The claimant thus finds herself in an unenviable and invidious position and, I do not doubt, one which seriously affects her standing in and treatment by her community. As [her counsel] points out, the effect of the Commissioners' decision is to brand her son M as illegitimate.'

Despite this acknowledgement, no significant effort seem to have been made to satisfy any doubts about the relationships through appropriate means. If validity of the marriage was at issue, then there are other rules that could have been used. This must be assumed to be more than an isolated case as Pearl and Menski (1998: 171) have commented:

> 'In quite a few cases, absence of witnesses or more generally lack of documentation of a Muslim marriage entered into in South Asia has been an issue for the determination before the British courts and tribunals. While the South Asian courts … lean in favour of recognizing such marriages as valid, European judges appear to need constant reminders of the existence of a strong presumption in favour of marriage in Muslim law.'

Crucially, it does not appear that this was picked up by the lawyers arguing the case and they managed to divert the issue by getting the judge to decide on one of the finer points of English administrative law. In doing so, they missed the essential issue, as did Munby J himself despite recognising that a finding of invalidity would have undesirable consequences for the applicant and her son. Not only would the decision leave her worse of in financial terms, but English law would also be making allegations of *zina* (*jina* in Bangla/Sylheti) against her, and leaving the status of her son in question.

3.2 Questioning the legitimacy of children

As mentioned above, the English (and Scottish) attitude to the recognition of polygamous marriage has long been ambiguous if not altogether hostile. This hostility has not been sustainable over the longer term because courts were inevitably placed in a position of having to decide on the consequences especially when matrimonial relief was sought. In the early post-war decades, the judicial response was pragmatic, but still ethno-centric - convert the marriage to a monogamous one mentally and then provide the relief. In the early 1970s however legislation was specifically passed to allow courts to provide relief in polygamous marriages that had broken down. At the same time, in a thoroughly assimilationist move, it was stipulated that no marriage celebrated in England and Wales could be polygamous, and the marriages of English domiciled men were void if contracted in polygamous form (Matrimonial Causes Act 1973, section 11). English law was thus attempting to asset control over non-European men here. Read literally, the provisions of this legislation would have meant that those South Asian men who had married under Muslim or Hindu law that allowed polygamy were not validly married, even if the marriages were actually monogamous.

The Court of Appeal (in *Hussain v Hussain* [1982] 1 All ER 369) stepped in to partly remedy this anomaly by holding that, since no English domiciled men were capable in law of entering into polygamous marriages, all such marriages were valid. However, the effect of the legislation and this case was still that those women married to men who were already married could have their marriages treated as invalid under English law if their husband was considered as domiciled in England. Thus many actually polygamous marriages were treated as such when second or third wives made application to enter Britain (Shah 2002). Even though the reforms of the early 1970s were predicated on extending the protection of the matrimonial relief laws to polygamously married women, the cumulative effect of subsequent developments has been to penalise those women by derecognising their marital unions altogether. We have seen above how the immigration law positions of such wives declined further.

However, children of such marriages were still considered legitimate under the Legitimacy Act 1976 and thus able to inherit British citizen status from their fathers just as described above (Pearl 1986: 48-49). Or so it was thought! The recent decision of the Court of Appeal in *Azad v ECO, Dhaka* (10 May 2001, [2000] WL 1918688 (CA), [2001] INLR 109, [2001] Imm AR 318) now puts the whole thing in doubt. The applicant child, born in Bangladesh in 1984, was a son by a third wife. An application was made for a certificate of entitlement to the right of abode in the UK on his behalf. It was also recognised that this would be a test case for all other children by the father's second and third wives. By the Court of Appeal stage, some matters had already been conceded, specifically that the marriage between the applicant's father and mother was considered void under English law, even though valid under Bangladesh law, as the father was already domiciled 'in the United Kingdom'. The father, it was conceded, knew that to be so, and so it was the mother's belief as to validity on which the case would turn. This is because s. 1 of the Legitimacy Act 1976 (as amended) provides in the relevant part as follows:

> '1 (1) The child of a void marriage, whenever born, shall … be treated as the legitimate child of his parents if at the time of the insemination resulting in the birth or, where there was no such insemination, the child's conception (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid.
> …

(3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law.'

As the Court saw it, the main question was whether the mother's belief was one as to validity under English law or under the *lex loci celebrationis*, that is, Bangladesh law. In an extremely briefly reasoned speech Jacob J, with whom Laws and Kennedy LJJ fully agreed, held that the question ought to be whether she had a reasonable belief in the validity of the marriage under English law. Jacob J also felt that, as there was no evidence as to the mother's state of mind, no finding could be made as to her belief. He dismissed the test in an earlier Tribunal case (*Begum*, 16 March 1990) in which Prof. Jackson had suggested that the Tribunal would be prepared 'to approach the matter on the basis that it would suffice if one parent had no reason to believe that the marriage would be invalid in English law'. Given that there was no material from the third wife as to her belief about the position under English law, the Tribunal's decision in the present case was upheld.

This is an extremely worrying judgment. For observers who are used to decisions on South Asian laws being largely driven by immigration concerns it probably does not come as much of a surprise. However, it means that decision makers are now able to refuse citizenship to children of polygamously married parents on the basis of a belief about validity under English law that was held by either spouse even though that marriage was considered legal in the place where is was performed and, crucially, under the *personal laws* of the parties concerned. Further, the decision on citizenship rests on an initial finding of illegitimacy that would have thoroughly offensive overtones to a significant number of communities (not only Bangladeshis) now settled in Britain. Not only may it already be considered offensive enough that English law does not respect polygamous arrangements allowed under the laws of large sections of the world's population, but it may not go unnoticed that English law is so easily prepared to declare children of such unions illegitimate.

That such law can be created by judicial fiat in an extremely short judgment and with a reasoned speech made by only one judge, is a further sign that immigration concerns are now creating a private international law that seems to have lost all perspective. Where is this trend now likely to stop? If one is prepared extrapolate on the basis of this judgment, are we also to treat as illegitimate children of second marriages that take place after a first marriage has been dissolved by an extra-judicial divorce? Even though recognised under other legal systems, it is certainly the case that such divorces are routinely being de-recognised by UK decision makers who are supported in this by case law from the highest courts (Pearl and Menski 1998: 382-398, Jones and Welhengama 2000: 118-132, Mayss 2000). As seen in the *Shamsun Nahar* case (above), there are even cases where English law has trouble recognising first marriages where no official element of registration is involved. The fact that most legal systems in the world are happy to continue recognising such marriages does not seem to make a difference in English law, however. Rather, in the face of increasing social pluralism, English law seems again to retreat further into an ethno-centric posture.

4. Towards a Bangla-Anglian law?

The third, and in some respects a path-breaking case, is *Re S (Change of names: cultural factors)* (15 May 2001, [2001] 2 FLR 1005) decided in the family division of the High Court. Although Wilson J's judgment really deserves an article by itself, I will restrict

myself here to remarking on what I see as its most significant aspects. The case involves a Bangladeshi Muslim girl who had arrived in the UK in 1990 from Bangladesh, was now 22 years old and a British citizen. She had eloped with her child's father, now 28 years old, who was Sikh by 'religion and culture', and an Indian national who had obtained indefinite leave to remain by virtue of marriage to the mother. They had got married when she was 17 and he 22, and she thereby became ostracised by her parents and brother, having only minimal contact with her family through her younger sister. In time, the marriage broke down, the father of their child applied for a contact order from the court. The mother made a cross application to resist that and also to have the child's three Sikh names changed so that he would be accepted by her natal family, with whom she had now become reconciled, and her community.

In the event, the judge refused to grant permission for the child's names to be changed by deed poll, stating that the child should continue to be aware of the Sikh part of his identity and that should he wish to have his names changed officially then he could do so when he came of age. The judge did, however, allow the mother to continue to use a Muslim name for him, including registration with the school and medical and dental practices. The judge decided that the child should be brought up as a Muslim since it was impractical for him to be brought up as a Sikh at the same time, although he observed that this did not preclude him being encouraged to respect the Sikh faith. He therefore accepted that the child could be circumcised. He finally ordered that contact by the father should be maintained at a contact centre twice a year.

While these overall conclusions by the judge could obviously be discussed further, what makes the case especially stand out is the lengths that he goes to use the cultural backdrop, particularly as concerns the mother, to arrive at the end result. Indeed, he starts off by remarking that:

> 'It is difficult for a white judge to understand, let alone to articulate, the depth of the shock which the mother's family suffered and of the shame which she brought upon it, as well as upon herself, by running away with and marrying a Sikh man.

This is a rare example of a *white judge* admitting in effect that his cultural distance prevents him from deciding the issues in the case alone. In fact, he goes on to credit the assistance of the lawyers in the case both of who seemed, judging by their names, to be South Asian Muslims, if not Bangladeshis, as well as the benefit of reports by experts on 'Indian [*sic*] law, culture and religion', who had been employed by either side.

This passage is also but one illustration of the judge's treatment of the mother's position and conduct through the proceedings as being intimately linked to her status in her family and in her wider community. In other words, the judgment shows some awareness throughout that whatever decision was made had to be seen, not from an individualistic perspective, but must take into account the mother's and her child's future chances of successfully maintaining their social position in their wider context, even though this had been obviously affected somewhat by the mother's history. Wilson J thus refers to her having transgressed the taboo against having sexual relations outside marriage, and that too with a non-Muslim man; that her portrayal of the father's behaviour towards her was at least partly motivated to assist in her own reconciliation with her family; and that she could still aim for remarriage within her community.

In several places in the judgment there are references to the fact of this community context. The judge thus also refers to the 'East London Muslim community', 'the Muslim community' and 'the East London Bangladeshi community'. The very localised nature of the mother and her child's social context also seems to be recognised

by specific references to the East London setting. Is this actual judicial recognition of the fact that different localities are now influenced by particular South Asian legal cultures? Is it possible to argue that this is also *official* recognition of the fact of legal reconstruction, of a 'translocal' (Ballard 2001b), legal *desh bidesh*? Certainly, Menski (1988: 11, 1993: 262, Pearl and Menski 1998: 59-61) has observed that patterns of local concentration have their particular significance for legal reconstruction. It is thus certainly possible to argue that judges cannot escape the relevance of local knowledge and developments and that this judgment shows a proactive taking-on-board of such phenomena. If we are saying that 'law' is anyway much more about lived cultures, rather than just positivist dictats 'from above', then the idea should not be so hard to grasp. It is thus certainly possible to argue that there is a potential for seeing a movement from the 'unofficial' to the 'official' levels here.

On the other hand, the precise manner in which this is done also carries its own dangers. In reading the case, one must wonder whether the points about Muslim law and religion are played up particularly because of the influence of Muslim lawyers on either side. One of my Bangladeshi students remarked upon reading the case that in his view the way in which Islam was portrayed reflects a 'white' perspective, even though one of the experts is an Arab specialised on Middle East affairs. But there must certainly be room here for arguing that the portrayal of religious or ethnic identity can appear as a caricature to the extent that it does not really represent the lived reality for the people concerned.

Wilson J begins his judgment by referring to religious conflicts from South Asia and their transplantation to the British scene as seen in Muslim-Hindu and Muslim-Sikh. While he may have perceived this as a relevant backdrop to his evaluation of the factual scenario, one may ask about the extent to which his decision really need have rested on these conflicts. It can be argued that this specifically British way of viewing South Asian pluralism has the unfortunate effect of exaggerating what Ballard (1996) has described, in the Punjabi context, as the '*quamic*' elements of religiosity that emerged specifically as a reaction to British colonial policy in India. Elevation of these, effectively male-centered, *qaumic* elements has the side-effect of suppressing many more common elements of religiosity and world view among South Asians. Highlighting conflict among these groups enables the white judge to then place himself above all this and thus appear as a neutral arbiter. If this judgment also carries the hallmark of ethno-centrism, then it does so in a much more subtle way, and this is a possible line of action in the future of the reluctantly-pluralising English legal system. Whether this will be in interest of the groups concerned, and whether it will successfully contribute to building sustainable pluralism, remains open to question.

Whether this decision, or at least its more positive features, ends up as a mere flash in a pan, or as a limited concession in line with the more general tendency of approaching ethnic minority laws within the English legal system, or whether it will have a lasting significance is difficult to estimate at this stage. Given the firm resistance to seeing the pluralisation of the official legal system, observers will not want to be too sanguine about it relevance. Were it not for the combination of circumstances in this case, including its factual situation, the strategy pursued by the lawyers, and some sympathy from the judge, this case could have easily looked quite different. Yet, one can also wonder how far avoidance strategies are a real option for judges anymore given the rapid pluralisation of the British social order. For Bangladeshis, meanwhile, life under English law, with its in-built superiority complex, will remain difficult.

Glossary of terms

angrezi shariat	British Muslim law, here interpreted as the living law among Muslims, so not confined to textual/doctrinal sources (Menski in Pearl and Menksi 1998), *ingreji shoriyot* in Bangla/Sylheti
bidesh	abroad, foreign country
desh bidesh	a home abroad or a home from home (Bangla, from Gardner 1993)
desh pardesh	a home abroad or a home from home (Panjabi, Urdu, Gujarati, Hindi, from Ballard 1994)
desh	country/home
kagzi	of paper (literally, Urdu), here meant to signify 'bureaucratic', as in '*kagzi raj*'
quamic	capacity of religious ideas and loyalties to act as a vehicle for ethno-political mobilisation (Ballard 1996)
rivaz	custom, rules of appropriate behaviour within a family or community context (Ballard n.d.), *rewaj* in Bangla/Sylheti
shari'a	Muslim law (but here qualified to also indicate textual or doctrinal sources of this law)
zina	illicit sex, *jina* in Bangla/Sylheti

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