Common law and uncommon sense:

the assessment of "reasonable behaviour" in a plural society

Although the inflow of migrant workers from Britain's former colonial possessions during the nineteen fifties and sixties was largely a response to the labour shortages which emerged in the midst of the post-war boom, and although relatively little attention was then paid to what the long-term consequences of their arrival might be, it is now quite clear that that presence of a substantial minority population of non-European descent – which currently includes nearly three million people – has wrought a far-reaching transformation in the social and cultural character of the British social order. That transformation is particularly strong marked in the major urban centres where most members this population-group – whether immigrant or British-born – still resident. As a result Britain is now not only a *multi-racial* society – or in other words one in which a significant (and still-growing) proportion of the population is visibly of non European ancestry – but it is also one which is much more overtly *culturally plural*. For despite the widespread expectation – at least amongst members of Britain hegemonic English majority – that such "immigrants" both would and should rapidly assimilate to English ways, it is now quite clear that that has not occurred. Instead members of the new minorities have gathered together in what are best described as ethnic colonies, within which they have made as systematic attempt to reproduce all the most important social, cultural, familial and religious institutions of their homelands. Such a reaction was, of course, by no means unprecedented. Although not they were not so immediately physically identifiable, members of groups of who had established themselves in Britain during the course of the previous century – the Eastern European Jews and the Irish Catholics, for example – had behaved in exactly the same way. Nor – given a little reflection – should the native English been in the slightest surprised that both the newcomers and their offspring should have behaved in this way. As should be only too obvious, the millions of English emigrants who have established themselves around the globe during the past five centuries have hardly been noted for their willingness to adopt the lifestyles of those alongside whom they settled: instead they have in many respects been amongst the most successful ethnic colonists the world has yet seen.

However, my purpose here is not so much to describe the dynamics of such processes, but rather to explore their consequences. In particular I want to take the opportunity to explore all the many conundrums which the increasing salience of ethnic pluralism has now begun to pose in legal terms, most especially with respect to organisation of system for the equitable administration and delivery of justice in the context of an increasingly heterogeneous society. I should also stress that my interest in these issues is as much practical as theoretical, for although I have a long-standing interest in the challenges which ethnic pluralism offers to the administration of social policy in general, the arguments I have set out in this Chapter have very largely arisen as a result of some much more immediately practical experience: namely of acting as an expert witness in a wide variety of cases involving South Asian settlers in Britain.

As a result of so doing so I've not only found myself operating within a conceptual arena with which I was previously unfamiliar, but one which is also relatively arcane, for it is normally only inhabited by professionally qualified lawyers. But although the experience of acting as an expert witness has certainly alerted me to how little I know about the details of English Law, let alone about its underlying conceptual principles, it has simultaneously made me very conscious of the far reaching challenges – both practical and theoretical – that our current condition of ethnic pluralism offers to the equitable administration of Justice. Nor, in my view, are these issues of such a kind that they are ever likely to be resolved by lawyers alone, on the

contrary a cross-disciplinary dialogue is called for if the knotty issues which have now begun to emerge are to be resolved with the urgency which is undoubtedly required.

That said, I'd also like to stress that my own starting point in this exploratory exercise is that of an anthropologist, not that of a lawyer. However it is in the nature of a cross-disciplinary exercise that involves moving into unfamiliar conceptual territory, with the result that I have little doubt that from a legal perspective this essay will include all sorts of silly blunders about the principles and practice of English law. I make no apologies for that, for I stand ready to be corrected in this still largely unexplored field, in the hope that this will eventually develop into a collaborative exercise between anthropological analysis on the one hand and legal analysis on the other.

Let me begin, though, by outlining the way in which I myself have come to be interested in these issues. As I have already indicated I am an anthropologist by training, and for the past twenty-odd years my principal professional concern has been to trace out details of the patterns of social, religious, cultural and linguistic adaptation which have occurred as migrants from India, Pakistan and Bangladesh – together with their locally born children and grandchildren – have set about making themselves at home in a British environment. But although I have consequently kept a close eye on both the growth and the changing internal character of Britain's myriad South Asian ethnic colonies, as well on the parallels between these developments and those which have taken place amongst other minority communities, both visible and invisible, I have by no restricted my attention to these groups. Rather I've also found it essential to consider how far and in what ways the character of the British social order as a whole has been transformed by the increasing salience of ethnic pluralism, and in the consequent challenges which these developments present to all those responsible for the provision of public services – whether in the field of education, of social and welfare services, of health care, and last but not least of law.

Over and above my academic interest in this field, I can now claim a considerable degree of practical experience in its legal dimensions. During the last five years I have received an ever-increasing number of requests from solicitors asking me to prepare expert reports on one aspect or another of the cultural, linguistic, and religious dimensions of the proceeding in which their clients are involved. To date I have produced around eighty such reports, in cases which range right across the field of civil, criminal and immigration law, and having become reasonably heavily engaged in this arena, the time seems right to take the opportunity to reflect analytically on that relatively unique experience – for few if anything of my anthropological colleagues have become engaged in doing so to anything like the same extent – and on that basis to report on the issues and contradictions which I've encountered along the way.

How, though, can that task best be approached? Tempting though it is to get straight down to the nitty-gritty by giving a blow-by-blow account of particular cases in which I've been involved, that would, I fear get me so bogged down in specifics that I'd be left with little or no space to address the underlying theoretical issues. Hence I've opted, instead, to set down a brief account of my own analytical perspective on the processes change and adaptation which have occurred as South Asian settlers have established themselves in Britain, before going on to presenting a review – which is till very much an account of work in progress – of my own developing understanding of the way in which the English legal system is currently responding to ethnic pluralism, based primarily on my own personal experience of acting as an expert anthropological witness.

Britain as a plural society

Let me begin by outlining the most salient features of my own perspective on the processes of ethnic colonisation in which South Asian settlers in Britain have been engaged, as well as on the way in which these developments have added yet further dimensions to the plural character of the contemporary British social order. Although my views on all this are spelt out in some detail in my published work, if required to sum up the central theme of my conclusions, the following points are perhaps the most crucial:

i) No matter how homogenous Britain's "Asian" population may seem to external observers, its members rarely, if ever, constitute a single homogenous entity, even in the context of a single restricted locality. Not only do migrants from South Asia vary sharply in terms of their regional, religious, sectarian and caste origins, but since they relied heavily on these necessarily highly differentiated resources to build structures of mutual reciprocity around themselves, they have gradually coagulated into a multitude of distinct and often mutually competitive communities; and given the substantial variations in the character of the cultural capital upon which they have drawn whilst doing so, each group has also tended to follow its own distinctive trajectory of adaptation.

ii) Ethnic distinctiveness is consequently much better understood as a resource than a handicap. Virtually all South Asian settlers have by now achieved a moderate degree of material prosperity, and some, at least, have become extremely wealthy. But they have not done so by comprehensively assimilating indigenous lifestyles; rather the key to their success lies in their creative utilisation of their distinctive heritage as source of cultural capital.

iii) That although, in consequence, some groups may appear to be a great deal "more Westernised" than others, these variations often turn out – on closer inspection – to be much less significant than they seem at first sight. Once one focuses on the quality and character of relationships which members of such groups maintain in more personal, familial and domestic contexts, it soon becomes apparent that no matter how wealthy they may be, few if any have followed a trajectory of comprehensive assimilation. Nor should this be regarded as surprising, for in a manner closely akin to developments within Britain's Jewish communities, the key to their success is very largely grounded in the active networks of mutual support – which are in turn largely based on kinship reciprocities – which they sustain between themselves. So it is that once one penetrates the gloss of westernisation produced by material affluence, those who have achieved rapid upward mobility by no means necessarily exhibit any greater degree of anglicisation than do members of much less affluent communities which have not yet broken out of the inner-urban bridgeheads where they initially established themselves.

iv) That whilst virtually all South Asian settlers – as well as their locally-born children – have consequently made themselves at home in Britain on their own terms, this is by no means to suggest that they have remained mindlessly wedded to "tradition". Quite the contrary. Just as the domestic lifestyles of contemporary British Jews are by no means identical with those which their ancestors followed in the *shtetls* of eastern Europe, so the social, cultural and linguistic conventions deployed within Britain's South Asian ethnic colonies are anything but fixed in aspic. Instead they are better understood as the outcome of a dynamic – and hence constantly evolving – response to changing circumstances. Lack of assimilation in domestic contexts should therefore not be mistaken for an absence of change: rather it illustrates how closely the strategies of adaptation devised by newer minority groups parallel those followed by their less visible predecessors, such as the Eastern European Jews and the Irish Catholics.

v) But whilst all this suggests that changes associated with the South Asian presence are in now way unprecedented, but instead best regarded as added some additional dimensions of diversity into a society which has in nay even long been marked by ethnic plurality, it would be a mistake to assume that members of the resultant ethnic colonies are in any way sealed off from the wider social order. Quite the contrary. Even though everyone has their own specific domestic starting point in which their initial moral, conceptual and linguistic socialisation took place, everyone – whether affiliated to the ethnic majority or any one of Britain's numerous minorities – *also* routinely participates in the public sphere of work, education, health care and so forth. However insofar as transactions in that sphere are ordered in term of majority – and hence broadly English – cultural and linguistic conventions, it follows that at least from a minority perspective, public transactions of all kinds are ordered according conventions which differ more or less sharply from those which they themselves deploy in domestic contexts.

vi) This state of affairs is not intrinsically problematic, for most members of minority communities have by now developed the capacity to manoeuvre their way within and between a wide range of differently coded arenas. By definition, members of the younger British-born generation are particularly adept at so doing. As skilled cross-cultural navigators they have now developed a wide a range of cultural and linguistic competences, such that they can now act and react in an appropriate way in a wide range of different contexts; but even though such skills tend to be particularly well developed amongst members of otherwise excluded minority groups – if only as a means of everyday of survival – they are by no means restricted to them alone. Like languages, cultural competence can be learned. *Everyone* has the capacity to develop such navigational skills if they so choose.

vii) But although such skills may be open to all, they are nevertheless differentially developed in different sections of the population. Hence whilst members of minority groups routinely develop a multiplicity of linguistic and cultural competences, those affiliated to the dominant majority enjoy the doubtful privilege of being under little or no pressure to so. It is not hard to see why. Thanks to the position of unchallenged hegemony which they have long occupied within the established social order, English people can – and indeed invariably *do* – require all others to conform to their own behavioural, linguistic and cultural expectations in virtually all public contexts. By contrast, all those whose home base lies outside the magic circle find themselves in precisely the opposite position.

viii) Nevertheless it would be a mistake to assume that the minorities' higher levels of cultural competence resolve all the many handicaps they are likely to encounter. In the first place all those who either lack, or fail to develop, or refuse to deploy the capacity to present themselves on a so-called "normal" basis will inevitably face all manner of difficulties when they seek to cut a deal for themselves outside their own familiar arena. Perhaps more seriously still, if they are struggling with personal issues which have been generated within such non-standard arenas, and seek (or are forced) to resolve them in arenas where majority conventions hold, there is every prospect that lack of cultural competence amongst established service providers – be they lawyers, judges, doctors, psychiatrists, social workers or whoever – there is every prospect that they will be treated in a wholly arbitrary (and hence grossly unprofessional) way.

Pluralism and the Law

How, then, do these processes pan out in legal contexts? Let me begin with a very broad generalisation: as far as I have been able to discern, English law appears to make very few concessions – whether at the level of principle or of practice – to current patterns of ethnic pluralism. To sure a few recent legislative initiatives have sought to do so, as, for example, in the case turban-wearing Sikhs. Thanks to some astute Parliamentary lobbying, they have gained the right to opt out of the requirement to wear protective headgear whilst riding motor cycles on the public highway, and also whilst working on construction sites. Nevertheless, it would be most unwise to regard these initiatives as straws in the wind. Despite some even more intensive lobbying, the prospect of further legislative exceptions in the case of Muslims appears to be remote in the extreme. Indeed the suggestion that such an initiative might even be considered invariably generates extremely vigorous popular resistance, on the grounds that to offer further "privileges" to ethnic minorities, and most especially to Muslims, constitutes a wholly unacceptable threat to the integrity of the established social and institutional order.

Nor does the coming incorporation of the European convention of human rights into the English legal system seems likely to offer very much scope for improvement, for even though it will at long last provide religious minorities with formal rights of freedom of worship and belief, at a social and behaviour level – in other words in precisely the arenas which concern us here – those rights nevertheless still hedged in, as Sebastian Poulter has recently shown – by all manner of limitations. In a phrase, whilst the European convention does indeed guarantee minority rights, it does so far only in so far as they do not threaten the integrity of the wider social order within which they are set. Nor – interestingly enough – does Poulter himself seem to differ from that view, for he concludes his survey by arguing that

> "While English law should broadly approach other cultures in a charitable spirit of tolerance and, when in doubt, lean in favour of allowing members of minority communities to observe their diverse traditions here, there will inevitably be certain key areas where *minimum standards, derived from shared core values, must of necessity be maintained if the cohesiveness and unity of English society is to be preserved intact*" (Poulter 1998: 391, my italics)

When used in this way "tolerance" is clearly a very slippery concept. Whilst it enables Poulter – and the many other commentators whom I suspect would find this line of argument congenial – to present himself as strongly committed to the principle of protecting the rights of minority groups, his use of the phrases I have highlighted (although wholly in keeping with the sentiments of the Convention) has precisely the opposite effect. Set within such a conceptual framework, it follows that in the interest of social stability the legal right to differ must in practice be kept on the tightest possible leash. Some tolerance! Nevertheless it would be quite wrong to suggest that the analytical and moral perspective which Poulter adopts, or indeed the conclusions which he draws, are in any way exceptional. Quite the contrary. In so far as most members of Britain's indigenous majority are committed to maintaining the established social and cultural order largely as it stands, and their consequent reluctance to concede any significant degree of legitimacy to cultural alterity, there is good reason to suppose that most members of the judiciary as well as most practising lawyers would strongly concur with these sentiments. Indeed that will be amply confirmed in the illustrative examples which I present later in this paper.

Statutory commitments to uniformity

Nor, in my view, should we be greatly surprised that this is so. Despite the widespread popularity of the belief that England is, and always has been, an open-minded and tolerant

society, and hence a welcoming refuge for all those in search of freedom, the facts are otherwise. On the contrary, history largely points in the other direction. For the last 500 years, the English state has displayed a marked reluctance to accord any degree of legitimacy to ethnic – and more specifically to *religious* – pluralism. In this context I can only lay out some broad brush-strokes of the arguments needed to support this assertion, but in my view the key developments which need to bear in mind can almost all be traced back to the establishment of the Church of England, along with the introduction of a series of Acts of Uniformity in the aftermath of Henry VIII's decisive break with papal authority in Rome.

Whilst on the one hand these measures were used to provide the very foundation of the English state, they were also deliberately, and indeed quite explicitly, anti-pluralist. It is easy to see why. Since Henry and his immediate successors were engaged in a very active nation-building exercise, they were strongly committed to developing the maximum degree of coherence and uniformity within the newly autonomous entity which they had constructed, whilst also drawing a clear cut boundary – in social and political, no less than in religious terms – between those enclosed within the new-found English state and those who stood outside it. Hence in the English version of the reformation not only was the established Church drawn into close conjunction with the English State – such that all subsequent rulers have simultaneously occupied the office of supreme governor of the Church of England – but the newly established socio-religious order was both explicitly English and strongly committed to uniformity. Hence the new book of Common Prayer and the Authorised Version of the Bible – both rendered in English rather than Latin – were prepared by the Church and approved by Parliament, but put to use on a uniform basis throughout the realm. Meanwhile all those seeking public office were required to swear an oath of allegiance not just to the Crown, but also the thirty-nine articles of the Church if England – a step which those who remained loyal to the Catholic Church could not in all conscience accept. Nor was that all. The reforms also reinforced the authority of the Church of England by making the parish the basic unit of public administration throughout the realm, so much so that there was no escape from participation. Not only was Church attendance rendered compulsory – at least in principle – but care was taken to ensure that the only legitimate way of celebrating births, marriages and deaths (and hence of ensuring that property rights could be securely transmitted by inheritance) was through the good offices of the Parish and its priest, who also gained the power to tax all local residents.

The implications of these measures were decidedly double edged. Whilst the commitment to developing comprehensive doctrinal, liturgical, ritual, linguistic and organisational homogeneity across the length and breadth of England was a highly effective means of organising and articulating a sense of national solidarity, it simultaneously placed – and was indeed *intended* to place – all those who stood outside that structure, or who found any aspect of its underlying conceptual vision unacceptable, in a quandary. If they accepted the demand for uniformity, they would necessarily contradict the values and commitments which they held most dear; but a refusal to do so could be read as indication of their disloyalty to the nation, to Parliament and the Crown, and could therefore invite charges of sedition.

Nor was this just a late Tudor phenomenon. Whilst the whole structure was initially formulated as a means of marginalising English Catholics, it was kept in place for many centuries thereafter, and its effects can still be felt to this day. Nor was it just the English Catholics who found themselves caught in this net. On the contrary a whole series of religious minorities – of whom the most notable were the enthusiastically Protestant Huguenots, the Eastern European Jews and the Irish Catholics, let alone all manner of wholly indigenous non-conformist movements – also found themselves placed in just the same dilemma. Nor was in this in any way a mistake. As the regular use of the Test Act until well into the nineteenth century shows, the English majority were only to keen to rub in the principle of uniformity to maintain their own position of privilege. So even though England became an increasingly plural society as a result of immigration the low countries, Ireland and eastern Europe, the central effect of the state's long-standing commitment to uniformity was that in the absence of

comprehensive religious assimilation (a step which few were prepared to take) members of all these minority groups were promptly reduced to a position of social and political marginality. Most of these deliberately anti-pluralistic measures were not repealed until the middle of the nineteenth century, and indeed some are still in force to this day. Members of all local minorities were therefore quite deliberately presented with a stark choice: either assimilate to English ways (or at least give every possible public appearance of having done so), or accept relegation to a position of second class citizenship.

Yet although in contemporary contexts English people tend to react to an analysis of this kind by arguing that even if is correct, it is nothing but a detail of history, it certainly does not follow that these ideas and practices can now safely be regarded as wholly *passé*. To be sure the Test Acts have now been long since swept away, but even so the Church of England remains just as established – with all the many privileges that entails – as it ever was; and whilst the number of active Church attenders has now fallen to an almost insignificant proportion of the English population at large, it is noticeable that in the context of majority/minority confrontations – as in the Rushdie affair for example – slogans such as "England is a Christian country" remain an intensely popular rallying cry, above all as a means of articulating hostility to alterity.

All this serves as reminder not only that commitment to the ideal of achieving a condition of comprehensive social, cultural and religious homogeneity still remains as deeply entrenched a feature of the English cultural tradition as it ever was, but also how Janus-faced a commitment to tolerance in this context can be. Poulter's argument that alterity should indeed be tolerated – but only in so far as it offers no threat to the integrity of the established order – may be a contradiction in terms, but it also represents a quintessentially English response to the challenge of ethnic pluralism. Much the same is true – or so it would seem – of the English legal tradition as whole. Once stripped of its trappings of self-righteous obfuscation, English law – and especially its statutory dimensions – has very little time for religious and ethnic pluralism. But at another level this is in no way surprising, since it is no more than a reflection of the popular priorities of the wider society within which it was set. And whilst anti-pluralistic sentiments are now rather less explicitly expressed than they once were, they have by no means evaporated. To the extent that still deeply embedded in popular thought, they continue actively to support judicial and legislative resistance to making any kind of positive initiatives in this sphere.

An alternative approach through common law?

But if English law was explicitly hostile to religious pluralism from the sixteenth right through to the nineteenth century, and even the European convention of Human Rights seeks to confine positive responses to religious pluralism within the strictest possible limits even as it nominally provides formal guarantees of religious freedom, what about that other fount of the English legal tradition, common law? Whilst that tradition undoubtedly contains all manner of pitfalls to progress, could it be that the inherent flexibility of this dimension of English law – arising above all from its strong commitment to achieving fairness and equity by whatever routes appear to be most appropriate – might provide a more positive way of accommodating the challenge of ethnic pluralism than loop-hole ridden statutory initiatives?

Such potentialities are by no means obvious at first sight. Since the principles of common law applies with equal force to everyone, and since the tradition also insists that everyone stands before it as an equal, it would seem – at least on the face of it – to leave next to no scope for the development of positive responses in our area of concern. Nor should this dimension of common law be regarded as intrinsically unwelcome. There is a great deal to be said in favour of the stark proposition that equity demands equal justice for all, no matter what the origins, wealth or status of those involved in the proceedings may be. Anti-discriminatory practice demands no less. Nevertheless there are other dimensions of the common law tradition – and most notably its flexible approach to the very concept of equity itself – which also offer an

opportunity to develop some very much more positive responses to the challenge of ethnic pluralism.

With this in mind, there are two principle avenues along which more positive developments might be expected to occur. Firstly around the concept of *reasonableness*, which suggests (at least in principle) that behaviour can and should be adjudged in a contextual rather than an absolute way; and secondly – at least in the context of criminal law – through the jury system. In so far as "common sense" consequently plays a key role in legal systems grounded in the tradition of common law, this *might* – and I stress the conditional – open up space for some much more positive developments. It is worth sketching out how.

In the first place the presence of a jury means that as well as seeking to impress the judge with the quality of their legal analyses, counsel also routinely appeal to the jurors' common sense – or at least to what they assume are its members commonplace understandings – as they seek to demonstrate that their own interpretation of the facts is more reasonable than that put forward by their opponent. Secondly such considerations also provide – if only in the last resort – a check on the power of Judges, since however much they may limit counsel's room for manoeuvre by means of procedural rulings, and to confine the limits of discussion within the jury room through their instructions about the principles which should guide their deliberations, juries nevertheless have a ready opportunity to drive a coach and horses through these formalities by applying their common sense understandings not just to the evidence placed before them, but also to the instructions they have received in the course of the Judge's summing up.

There can be little doubt that these possibilities are of crucial systemic importance, for whilst it would certainly be naïve to suggest that the impact of ideas of "reasonableness" and "common sense" in such circumstances has been sufficiently great to ensure that the precepts of English law have always remained wholly congruent with changing social values, there can be little doubt that they have long provided powerful pressures in that direction. As a result, the underlying premises of English law have been kept broadly – if somewhat tardily – in tune with changing forms of social and cultural practice within English society at large.

Yet however effectively these processes may have enabled the legal system to keep in touch with developments in the English mainstream, to what extent have they – or might they – provide a means of facilitating similar responses to development of religious, cultural and ethnic pluralism? Or is that the case that whilst the common law tradition may indeed contain the potential for such developments, how far is it the case that centralising and homogenising tendencies – whether they be a product of contemporary developments, or of those which can be traced right back – have actively militated *against* such initiatives.

Common sense and the role of juries

At this point I'd like to change tack somewhat, and seek to further illuminate these theoretical arguments by drawing on my own experience of acting as an expert witness in cases where issues of cultural diversity were at stake, and on the conclusions which I have begun to draw as a result of so doing. Let me begin with the issue of juries, for whenever I appear in person as a witness – rather simply preparing written reports for lawyers – I'm acutely conscious that it is above all to the jury that I need to address my remarks, in order to alert its members as to how important it is for them to seek to understand the evidence they have heard in its appropriate context, and to provide them with a credible and intelligible indication of how they

might do so. As I set about that task I'm also very much aware that should its members include people who appearances would suggest are of South Asian descent – and in my experience there are rarely more than one or two, and often none at all – the chances of getting my arguments across are in all probability very considerably enhanced. Nevertheless even in their absence it is still possible to get one's points across, and it is certainly most satisfying when one's contextualising evidence does indeed appear to make a difference – and all the more so when the Judge makes his own position on such matters very clear by studiously examining the scenery outside the window whilst one is seeking to do so. One such case stands out particularly in my mind. The defendant was a middle aged Sikh who had stabbed his son-in-law to death, and having been charged with murder was pleading guilty to the lesser charge of manslaughter on grounds of provocation, given that his son-in-law had just announced that he planned to leave his wife. The issue before the court was therefore unusually clear-cut. Whilst any father-in-law would undoubtedly have been most upset to hear such news, could that possibly be sufficiently provocative to lead a reasonable man to lose control of his senses to such an extent as to lead him to stab his-son-law to death?

I argued that in these specific circumstances that could indeed be the case. As the court had heard, the defendant had arranged what could only be described – at least with hindsight – as an ill-advised match for his much loved daughter during the course of a brief visit to India, after the first marriage which he had arranged for her with a British-resident Sikh groom had acrimoniously collapsed. His daughter held a British passport, and this enabled the son-in-law to gain entry to Britain. However, the moment he was granted right of abode in the UK, he announced he had no further use for his wife, and was leaving her forthwith. This action – I suggested to the jury – had not only radically dishonoured the daughter and her father (at least within the context of a Punjabi moral and symbolic universe), but the son-in-law had yet further humiliated his father-in-law by contemptuously dismissing all pleas to reconsider his decision, and by kicking his father-in-law away when he attempted to touch his feet. And whilst such behaviour, as well as the actors underlying concerns and sensibilities, might be of little or significance in a contemporary English contexts, I argued that within the context of a Punjabi moral and conceptual universe the son-in-law's behaviour had indeed been profoundly provocative.

Yet although my evidence appeared to have had a very positive effect – for there can be little doubt that the jury would have been a great deal less likely to have brought in a verdict of manslaughter in its absence – such cases also raise a much a broader set of issues. Firstly with respect to the precise nature of my own role as an expert – a matter which I will explore later on – and secondly with respect to the way in which juries are recruited to hear cases of this kind. Given the ever-increasing salience of ethnic pluralism in most of Britain's major industrial cities, how should juries be selected, and just how should they be expected to go about their assigned task of bringing in a verdict? In such circumstances, is it appropriate to continue to select juries on a wholly random basis – such that they rarely include more than one or two brown or black faces, and very often none at all? Or, to the contrary, should we now routinely seek to make a more positive intervention in the process of jury selection? If so why, when, and on what basis should we seek to do so, and in any event just how *should* juries – whatever their makeup – be expected to respond to racial inequality and ethnic diversity in the course of their deliberations?

As Sean Enright has described in an excellent review of the issues ("Multi-racial Juries", *New Law Journal* 1991: 992-996), when a significant number of cases involving Afro-Caribbean defendants had begun to come

before the courts from the late 1960s onwards, their counsel began to press the case for the deliberate recruitment of more multi-racial juries, especially when even a vigorous use of the right of peremptory challenge seemed unlikely to produce such an outcome. Despite widespread judicial opposition, some progress on this front did indeed begin to be made during the course of the 1970's, but as Enright shows this was brought to a sharp halt in 1979. In the first place the right to peremptory challenge was abolished – largely as a result of its alleged "abuse" by Afro-Caribbean defendants, and secondly by the outcome of an appeal against the refusal of a trial judge to order that steps should be taken to empanel a multi-racial jury. The case ((1989) 89 Cr App 278) was heard by the Lord Chief Justice, and Lord Taylor took the opportunity to rule that even though judges had long had the power to exclude incompetent jurors, that power had

> "never been held to include a discretion to discharge a competent juror or jurors in an attempt to secure a jury drawn from a particular section of the community, or otherwise to influence the overall composition of the jury. For this latter purpose the law provides that 'fairness' is achieved by the principle of random selection". ((1989) 89 Cr. App: 280)

He then went on to underline the force of this conclusion by quoting an earlier ruling by the then master of the Rolls, Lord Denning:

> "Our philosophy is that the jury should be selected at random – from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole – and thus represent the views of the common man ….. The parties must take them as they come". (*ibid:* 281-2)

If so it followed that provided the jury in any given case had not been recruited in a biased or otherwise improper fashion – as would be the case if it were to be selected on anything other than a random basis – defendants could have no grounds for complaint, for

> "there is no requirement in law that there should be a black member on a jury or jury panel …. if it should ever become desirable that the principle of random selection should be altered, that will have to be done by statute and cannot be done by judicial decision". (*ibid*: 282-3)

Given that there is no sign whatsoever that either this or any potential future government is contemplating such a statutory initiative, it would seem that at least for the foreseeable future, random selection – untrammelled by any other considerations – will remain the only legitimate basis for jury recruitment in English law.

Whilst Lord Taylor's ruling may consequently have placed the case for constructing multi-racial juries out of bounds for the immediate future – even though, as Enright shows, there are substantial legal grounds on which it might be challenged – the arguments deployed in his judgement also deserve careful scrutiny from a sociological perspective. In the first place it is striking that at no point in his judgement does he make an effort to consider how far "the people as a whole" can reasonably be regarded as a broadly homogeneous mass, or whether – to the contrary – it has now become a significantly plural society, which is therefore radically differentiated in both cultural and experiential terms as between its various racial and ethnic sub-sections. Had Lord Taylor been prepared to make a more explicit acknowledgement that that was indeed so, not least because that was the very nub of the defence case at the original trial, and had he also been much better informed about statistical practice, he might also have been aware that from a social scientific point of view the most effective way of accurately representing the views of the population at large in a twelve-strong sample would – in that context – be through a process of stratified, rather than random, sampling.

Yet in many respects technical arguments about sampling procedures are simply by the bye. When boiled down to its essentials, the bottom line of both Lord Taylor's and Lord Denning's arguments – reflecting, no doubt, the commonplace assumptions of the great majority of the judiciary – is that England simply *is* a homogeneous society, at least for these purposes, and that it is therefore wholly reasonable to seek the views of "the common man" (for their whole mental framework assumes that the existence of such a collective person can indeed be posited), and whose views can adequately be tapped through the random selection of a twelve-strong jury.

***De mediatate linguae:* the right to call for a plural jury**

Yet despite the firmness with which this view has now become entrenched in contemporary English Law, an explicit recognition that there may be circumstances in which it is appropriate to make an explicit recognition of the existence of ethnic pluralism in the process of jury construction is, as Enright points out, by no means foreign to English law: from the fourteenth century up until 1870, "aliens" had a right to request that the should be tried *de mediatate linguae*, or in other words before an ethnically mixed jury.

The practice was formally codified in the Statute of the Staple of 1353, which set out to regulate the activities of merchants from overseas trading in such staple goods as wool, leather, tin, lead and so forth; and the statute itself provided that

> "if a plea or debate between merchants came before the mayor of the staple, to try the truth thereof ….. (and) …. if one party and the other be a stranger, it shall be tried by strangers, and if one party or the other be denizens, it shall be tried by denizens; and if one party be a denizen and the other an alien, the one half of the inquest or of the proof shall be of denizens and the other half of aliens" (Constable 1994:98)

Constable's detailed study of this now little-know bye-way in English law is extremely illuminating from our perspective, for she demonstrates that the right to demand a jury *de mediatate linguae* was indeed regularly utilised right up to the middle of the nineteenth century, only to be eliminated – although in a thoroughly off-hand way – by the Naturalisation Act of 1870. Whilst this is no place to discuss the history of the provision itself, it is nevertheless worth giving careful attention to the arguments about the circumstances in which *de mediatate linguae* could and should be used in one of the last cases where the issue was considered by the Court of Appeal, as well as to the tenor of the Parliamentary debate which led to the abolition of the right to do so at all.

The case of Manning and Manning

Maria Manning was Swiss-born, but married to a "natural-born subject of the realm", and in 1849 she and her husband were jointly charged with murder. Both pleaded not guilty, but when Maria sought to exercise her right to a jury *de mediatate linguae*, the trial judge denied her request. The case went to appeal, where her counsel sought to establish her case from first principles, arguing that the whole purpose of the procedure

> "seems clearly to have intended to give all persons born abroad under another allegiance, habituated to other customs, and probably speaking another language, a jury *de mediatate linguae*, some of whom might comprehend the customs, and understand the tongue of the country of which the prisoner was native" (*ibid*: 135)

However the Crown made no attempt to confront this argument head on, but instead argued that the appeal should be dismissed on technical grounds, suggesting firstly that it was inappropriate to assemble a jury *de mediatate linguae* where one of the defendants was English, since there was no provision for an English person to be tried using such a procedure, and secondly that Maria was not entitled to this right in any event, since marriage to an English born husband meant that she was not an alien at all, but a *de facto* naturalised subject of the Crown. The Court accepted both dimensions of the Crown's arguments, and the appeal was dismissed.

|In the aftermath of this case the debate about the extent of such an entitlement appears to have become caught up in a much wider, and much more heated, debate about naturalisation, with the result that when legislation to formalise the process of naturalisation was drawn up in

1870, a clause wholly abrogating the right to *de mediatate linguae* was slipped into the Bill. However as Constable indicates, this provoked very little discussion. In the House of Lords the Earl of Derby commented that its abrogation was

> "an unmixed advantage. It is not always easy to find such juries; it is not certain that when found they will be the most intelligent or unprejudiced that can be found. Indeed, the probability is rather in a reverse direction, because in general the field of selection is so very small …… It seems to me, moreover, that it is stigmatising ourselves as a nation very unjustly to assume that the prejudice against foreigners is such that an alien on his trial will not have a fair trial before British subjects".

Meanwhile in the Commons, the clause was virtually nodded through the Committee stage (Constable 1994: 143-145). So it was that a centuries-old measure which aimed quite directly to facilitate the operation of justice in conditions of pluralism was unceremoniously dumped in the dustbin of history, where it has since lain virtually forgotten.

But however regrettable that move may now seem, it is nevertheless worth remembering the circumstances in which it took place. Firstly, the Victorian era was reaching the zenith of its (surely hubristic) self-confidence. Hence it seemed eminently reasonable to suggest that such was the extent of England's superiority over all other, an English jury never be so unintelligent, so uninformed or so prejudiced as to give a foreigner reasonable cause to fear that he would not get a fair trial before them. Secondly, and perhaps just as importantly, by far the largest and most salient ethnic minority presence in late Victorian England – the Irish Catholics – were not, in formal terms, aliens at all; nor indeed were the small number of "Asiatic" seamen who had by then established toeholds in many English ports. As native-born subjects of the Crown, and in broader terms the Queen-Empress, they were not entitled to a jury *de mediatate linguae* in any event, no matter how much their lifestyles and language might differ from the hegemonic English majority. It was not the case that England had grown any less pluralistic than it had been in previous centuries, nor had the issues associated with that condition been rendered any less significant than they were before. What *had* changed, however was the strength of English assumptions about their own intrinsic intellectual and cultural superiority over lesser "races" of all kinds, so much so that it was found possible to *deem* theirs to be a homogeneous society where no special provisions for minorities need or should be made; and although more than a century has now passed since the right to a jury *de mediatate linguae* was abolished, the line of argument deployed by Lord Taylor to demolish any suggestion that it might sometimes be appropriate to seek to construct multi-racial juries displays some disturbing parallels with popular late 19th century sentiments.

Judicial initiatives

What all this appears to suggest is that the bulk of the judiciary – no less today than a century ago – remains most reluctant to acknowledge just how strongly plural British society has now become. Hence even though the notion of ethnic and cultural homogeneity is much more fictional than real, especially in urban industrial contexts, judges still rely heavily on the notion that a more or less homogeneous "corporate good sense of the community" can indeed be identified; and having done so they still routinely rely on this idea in a wide variety of judicial pronouncements, even though in empirical terms ethnic heterogeneity has now grown so extensive as to render the underlying concept of common sense virtually meaningless. Yet however deeply entrenched these anti-pluralist attitudes may be, a few Judges – led with some asperity by Mr. Justice Brooke in his role as Chairman of the Judicial Studies Board's Ethnic Minorities Advisory Committee – have sought to confront the implications of these developments in a much more positive way.

This is particularly clear in his 1993 Kapila Lecture, which is not only entitled "The Administration of Justice in a multi-cultural society", but having begun by setting out five anecdotal – but true – stories of incidents which had recently occurred in English courts, went on to put his cards plainly on the table.

> "All these stories have three features in common. In each, something went seriously wrong with the administration of justice. In only one of them did the court do something as a matter of law which it had no business to be doing: guessing at evidence it had not received. In each story, the person who was disadvantaged or hurt by what happened came from a different cultural background from those on the bench. And in each, serious mistakes were made by well-intentioned, well-educated people in good faith, in ignorance of what they were doing wrong. And from what I hear innocent mistakes like this are often made in our courts today. At one end of the spectrum they merely cause hurt, sometimes great hurt. At the other they may cause serious injustice". (Brooke, 1994: 7.1.5)

Nor have Mr. Justice Brooke's activities been confined to some obscure liberal backwater. The words just quoted were delivered in the Inns of Court Law School, and the Lord Chief Justice was amongst those who gathered to hear him speak. Moreover, the Lord Chancellor's Department has also entered the debate. In his role as Chairman of the Ethnic Minorities Advisory Committee of the Judicial Studies Board, Mr. Justice Brooke has also overseen the preparation of a *Handbook on Ethnic Minority Issues*, copies of which have been circulated to all serving members of the judiciary; and since the Handbook's substantive sections – which address issues such as oaths and oath-taking, names and naming systems, differential patterns of body language, problems of cross-cultural communication, religious diversity, differential patterns of family patterns organisation – all serve to highlight the extent of religious, ethnic and cultural diversity in Britain, it should be plain as a pikestaff not only *is* a plural society, but that condition of pluralism has far reaching implications for the administration of justice.

Yet however welcome these developments may be, and however how high a profile – not least within the judiciary itself – Mr. Justice Brooke may have been able to give them, what is much less clear is the extent of the impact on the everyday administration of justice these initiatives have yet begun to have. Hence whilst the preparation of the Handbook is undoubtedly a development of great significance, for it appears to signal – in sharp contrast to the position taken by no less a figure than the lord Chief Justice himself in the multi-racial juries ruling – that there can be no getting away from the fact that issues race and ethnicity *are* of significance in the legal process, whilst also providing all members of the Judiciary with some basic information about the most salient social, cultural, religious and linguistic characteristics of Britain's larger minority communities, one of the most striking features of the whole exercise is that it offers little or no guidance on what *implications* all this might have on the actual course, character and content of legal proceedings in which members of one or other of the minorities were involved.

Nevertheless, a careful scrutiny of the arguments which Mr. Justice Brooke develops in his lecture enable us to tease out what appear to be his own assumptions and priorities. They appear to be four-fold. Firstly to remind his fellow judges of how easy it is to cause unwitting offence as a result of ignorance of the cultural traditions of those who appear before them in court; secondly to emphasise how easily linguistic and cultural difference can precipitate a failure in communication; thirdly to show how easily unsubstantiated prejudices can precipitate – and indeed almost certainly *are* precipitating – wholly unjustifiable racial and ethnic differentials in patterns of sentencing; and last but not least – although he makes the point with infinite cautiousness and care – to highlight just how reluctant many of his fellow Judges may be to acknowledge even the possibility that all this may be so, no matter how blindingly

obvious these points may be to all those who stand outside the comfortable English mainstream. But although this is clearly a vital starting point, how much impact have Mr. Justice Brooke's apparently well institutionally supported strictures yet begun to have on actual courtroom practice? And if it has not had much impact – and all the indications are that it has not – how far is this the outcome not just of plain judicial ignorance and cussedness, but also because it throws up some far reaching questions about how far some basic concepts in English law, and most notably those associated with ideas such as "reasonableness" and "common sense", now stand in need of careful re-examination in the context of an increasingly plural society.

What is reasonable behaviour? And how far is sense still common in a plural society?

Perhaps the most graphic way of highlighting the extent to which immigration from overseas has transformed the character of our society is with reference to the conventional legal measure of both common sense and of reasonable behaviour: the views of the man on the Clapham omnibus. When that phrase was first coined – towards the end of the nineteenth century – the passengers on such an omnibus would presumably have been a pretty homogeneous group of men and women, almost all of whom would have readily identified themselves as "English". By contrast, the passengers travelling on the same bus today would be a great deal more heterogeneous: indeed those who would identify themselves unambiguously as English would almost certainly only form a small minority.

In the light of this, just what is common sense? Against what kind of yardstick should reasonable behaviour be adjudged? Whom should judges and juries have in mind when contemplating the notion of a reasonable man? These problems are far from academic. In so far as these concepts play a key role in English law, and in so far as lawyers now appear long to have assumed – in the aftermath of the abolition of *de mediatate linguae* juries – that ours could reasonably be regarded as a homogeneous society, a recognition of the existence of ethnic pluralism cuts all these concepts free from their moorings. If "common sense" cannot be regarded as common to all sections of the population – if only because members of each of its sub-sections constructs their own world according to their own distinctive lights – it follows that without giving careful consideration to the *context* in which any item of behaviour occurred, it is quite impossible to establish whether or not it should be regarded as reasonable. This is not, of course, to suggest that there are no universal yardsticks whatsoever. At least in England (although obviously not in France) anyone who insists on driving on the right hand side of the road is clearly behaving unreasonably – as well as contravening the Road Traffic Act. Nevertheless, there is a whole host of more personal contexts where such conclusions cannot so easily be insisted upon. After all, is there any single correct or reasonable way of organising one's domestic affairs? To be sure members of a hegemonic majority may often so insist, but minorities will – by definition – beg to differ; but to uncritically deploy the common sense yardsticks of the majority group to adjudge the behaviour of members minority groups is – as Mr. Justice Brooke rightly implies – as indefensibly ethnocentric as it is intrinsically unjust. Sense is anything but common in the context of a plural society.

So when it comes to practice, rather than theory, how have the courts begun to cope with these dilemmas? My own experience suggests that many lawyers – and also, or so I suspect, many judges – still regard this as very much a moot point, which is perhaps not surprising given the contradictions embedded in a relatively recent decision touching on these matters made by the House of Lords (DPP *v* Camplin [1978] AC 705).

The appeal arose following the conviction of a 15 year old boy for murder, after he had killed a much older man with a chapati pan. The boy presented a defence of provocation, argued that the victim had buggered him

despite his resistance, and then laughed at him. The trial judge had directed the jury that they must consider whether the provocation relied on had been sufficient to make a reasonable man, not a reasonable boy of the respondent's age, in like circumstances act as the respondent had done. The jury had convicted the boy of murder, but the Court of Appeal subsequently ruled that the judge had misdirected the jury, and substituted a conviction of manslaughter. When the case was further appealed to the House of Lords, the Crown contested this decision, arguing that it was wrong to use a subjective rather than an objective test of reasonableness, for "it is very important to have an independent standard applicable equally to everyone up to which members of a society are expected to conduct themselves."(*ibid*: 707). Whist all five law lords rejected this position, the grounds on which Lord Morris argued this should be done are of particular significance in the light of our concerns, since he held that

> "In my view it would now be unreal to tell a jury that the notional "reasonable man" is someone without the characteristics of the accused: it would be to intrude into their own province. …. If the accused is of a particular colour or ethnic origin and the things said to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different culture or ethnic origin – or to consider how such a man would have acted or reacted. The question would be whether the accused if he was provoked reacted as even any man in his situation would or might have reacted." (*ibid:* 721)

Although articulated with specific reference to the issue of provocation, this approach to the way in which the concept of the reasonable man should be constructed would seem, at least in principle, be applicable in all manner of other circumstances – although as far as I am aware few if any attempts have yet been made to exploit the potential of this argument.

However, the judgement as a whole also contains a major sting in the tail. Although the Law Lords' unanimous ruling that the test of reasonableness should be applied in a contextual rather than an absolute way can only be regarded as welcome – at least from our perspective – aspects of Lord Diplock's ruling as to how this can actually be achieved a rather more alarming. Although he goes out of his way that juries have a vital role play in this process, since such a matter of opinion "is no longer one to be decided by a judge trained in logical reasoning but is to be decided by a jury drawing on their experience of how ordinary human beings behave in real life" (*ibid*: 718), he also insists that precisely because such issues are a matter of opinion (rather, presumably, of fact), "the evidence of witnesses as to how they think a reasonable man would react to the provocation is not admissible" (*ibid:* 716). Lord Simon took exactly the same view, arguing that

> "whether the defendant exercised reasonable self-control in the totality of the circumstances …. would be entirely a matter for consideration by the jury without further evidence. The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal circumstances) act as the defendant did. I certainly do not think that that is beyond the capacity of a jury" (*ibid*: 727)

Yet although it may well be appropriate to argue that a bar on the introduction of formal evidence on just what "reasonable behaviour" might consist of is sensible enough with respect to the matters of age (as in the case under appeal), or with respect to the parallel situations which Lord Simon specifically discusses (pregnancy, immaturity and malformation), it is by no means obvious that this position makes equal sense with respect to differences in culture, religion, and language. If the reasonableness of the behaviour with which the jury is charged with assessing has occurred in a cultural or a linguistic context with which most (and very often all) members of the jury are entirely unfamiliar, is it reasonable to suggest that their collective common sense – wholly uninformed by any expert advice to how the evidence set before them might be most appropriately contextualised – could possibly provide a sufficiently reliable foundation for the production of a just and equitable verdict? Or to the contrary, might

it not give them free reign to exercise their collective prejudices – especially when those involved in the proceedings were drawn from a minority groups whose physical and cultural features are routinely evaluated in a negative way?

Pluralism in court: my own experience

How, then, do judges currently respond went confronted with issues of pluralism? My own experience suggests that their reactions vary a great deal. On the one hand there are at least some circumstances – and most particularly in family and matrimonial contexts and disputes over property – where most Judges not only appear to be very willing not only to take the cultural context into account, but also to have no qualms about regarding expert anthropological evidence as admissible. Indeed my experience suggests that Judges frequently go out of their way to indicate that they find such a contribution helpful, for it enables them to come to more confident conclusions about events and processes which they might otherwise find baffling, contradictory and mysterious. I have also had much the same experience in the more specialist field of immigration law. Hence, for example, when the Home Office appealed against an adjudicator's determination on the grounds that undue weight to my opinions, and to what the adjudicator had described as my "arguably unique experience of assessing social and political conditions in Pakistan". However, the Immigration Appeals Tribunal rejected the appeal, on the grounds, *inter alia*, that the adjudicator was quite entitled to attach the importance he did to my report. This is by no means always the case, however: in criminal contexts judges tend to adopt a much more sceptical attitude towards the utility of an anthropological perspective, and not infrequently hold that such material is entirely inadmissible as evidence.

All this was dramatically exemplified in one recent case in which I was instructed to prepare an expert report. The issue at stake was extremely serious, for the defendant, Jameel Akhtar, had been charged with illegally importing 20 kilograms of heroin. However, the facts were extremely complex. First of all, whilst the defendant was born in Britain to Pakistani parents, he had lived in Pakistan since childhood; hence his command of English, as well as his familiarity with English ways, was extremely limited. Secondly the heroin in question had not been physically imported into the UK by Jameel himself, but rather by an undercover agent who was, in return for a substantial fee, working in close collaboration with Customs and Excise; however the Crown alleged that Jameel had recruited the agent in Pakistan, and that the agent agreed to import the heroin consignment into the UK on his behalf, and to deliver it to Jameel during the course of a planned visit to his relatives in Birmingham. Thirdly the Crown didn't even suggest that Jameel had taken physical delivery of the heroin consignment, but only that the sum of £1,000 which the undercover agent had handed him in the car park of Birmingham Central station was a down-payment for it – on receipt of which Jameel was promptly arrested by the Customs surveillance team. Further complexities were further introduced when the Crown successfully argued that in order to ensure the courier/agent's safety he should be covered by Public Interest Immunity, thereby severely limiting the range of questions which the defence was able to put to him.

Furthermore virtually all the evidence on which the Crown relied to establish that Jameel had indeed been the mastermind behind the whole deal (rather being the victim of an elaborate set-up, as he himself contended) took the form of translated transcripts of telephone conversations in Urdu which had taken place between Jameel and the undercover agent, and which Customs officials had surreptitiously tape-recorded. My own contribution to the defence was a lengthy report challenging the adequacy of the Crown's interpretations of a series of events which had taken place in Birmingham, Islamabad and Peshawar, based partly on my own knowledge of the styles and conventions used to order business transactions in Pakistani contexts, and above all on a very detailed analysis of the tone and character of the verbal interchanges between Jameel and the agent, which in my view indicated that Jameel was in no way the dominant partner in the conversations, as would be plainly apparent if Jameel was indeed the master-

mind and the agent merely a lowly courier. But although in the interests of equity it would seem reasonable – at least in principle – that court should have had an opportunity to consider whether the Crown's interpretations of these complex transactions still stood up when considered its relevant cultural and linguistic context, the trial Judge thought otherwise, and ruled that none of the material which I had prepared was admissible. So it was that an all-white jury in country market town with no significant Asian presence found themselves faced with the task bringing in a verdict where the defendant gave all his evidence in Urdu, and where all the most damning evidence against him was either in Urdu (as in the case of the tapes), or grew out of transactions which were located almost entirely within a Pakistani cultural context, but in the absence of any indication as to whether or not a knowledge of the relevant social, cultural and linguistic context might cast doubt on the credibility of the Crown's allegations. Hardly surprisingly, Jameel Akhtar was found guilty, and sentenced to 13 years imprisonment.

However, when the case subsequently went to appeal (Akhtar, 10th March 1998, unreported), the court took the view that there was nothing exceptional in this dimension of the case. Hence in response to counsel's argument that jury might have been faced with an impossible task because of the immense difference in cultural background between themselves and those concerned in the events in Pakistan, Lord Justice Buxton took the view that

> "that is true, but juries in this country often find themselves trying cases of this sort, and with assistance from the judge, such as the jury certainly received in this case, they are able to do so perfectly fairly. None of the issues in this case are unusual".

Moreover he also went to rule that in so far as the in so far as my evidence went to an issue in the case, the trial judge acted quite properly in wholly excluding it. Indeed

> "the judge was quite right to think that the additional evidence of Dr. Ballard would not add anything of substance; quite apart from the fact …. that Dr. Ballard's evidence would no doubt have been met by other evidence from other anthropologists or other universities, an accretion of evidence that would be wholly unjustified. We would further say, for avoidance of doubt, that insofar as Dr. Ballard's evidence was going to be relied upon by the defence to seek to elucidate the truth or plausibility of what Mr. Akhtar gave as the explanation of his various conversations …. we consider it was inadmissible in any event. It was or would be evidence seeking to support the credibility or truth of another witness. There was nothing to do with Mr. Akhtar's psychology, state of mind or anything of that sort. It was evidence of cultural background which, in our judgement, would not be admissible in any event when the issue in the case …. (was a matter which) …. in our judgement could not be illuminated at all by any expert in any discipline whatsoever. It was for the trial judge to decide whether Dr. Ballard should be allowed to give evidence. He was entirely right in not admitting such evidence".

All one can say of Lord Justice Buxton's judgement is that he appears to have taken no heed – nor even seen any reason to think of taking heed – of his colleague Mr. Justice Brooke's concerns.

Nor does this reaction appear to be in any sense unique in the context of the Court of Appeal. So far I have only been involved in one other case which went up to that level, Zoora Shah's much publicised appeal against her conviction for murdering her drug-dealer lover, Mohammed Azam, which similarly dismissed. Once again I prepared a lengthy Report setting the events which led up to Azam's death – which came about as a resulting of eating a piece of *gajrella* which Zoora had spiked with a substance which subsequently proved to be arsenic – and in which I suggested that once the specific character of a Pakistani cultural context, as well as the complex history of the relationship between Zoora and Azam was taken into account, there were indeed grounds for suggesting that Zoora had been subjected to unreasonable provocation. This time, however, Lord Justice Kennedy made no effort to rule

on the admissibility of my analysis in the course of his Judgement: he simply ignored it completely. But the other hand he certainly did not ignore the cultural issues: on the contrary he went out of his way to take account of them – at least according to his own lights. Hence in the section of the judgement in which he considers whether Zoora's evidence is capable of belief, Lord Justice Kennedy starts by indicating that he has made "every possible allowance for the difficulty of giving evidence through an interpreter to English judges whose knowledge of Asian culture is bound to be limited". Nevertheless he has no doubts whatsoever about his ability to cut his way through these difficulties, for he follows this up with the confident assertion that "we have to say that we found the appellant a most unsatisfactory witness" – and on that basis he promptly sets about picking Zoora's account of her behaviour apart. Inevitably he explores many of the issues which I myself discussed in my report – but virtually without exception draws the opposite conclusions from those which I argued were most appropriate. This is not to suggest, of course, that my conclusions were necessarily correct, and his were necessarily wrong: what does seem most odd, however, is that a Lord Justice of Appeal, learned though he necessarily is in legal matters, should nevertheless conclude that his own preferred perspective should prevail – without any further debate, analysis or discussion – over that of an experienced anthropologist when it comes to assessing whether an appellant's account of her behaviour was capable of belief, when that behaviour was set within a cultural context with which he is – by his own admission – largely unfamiliar.

So it is that even though Lord Justice Kennedy's approach might gives the appearance of being much more ethnosensitive than that of Lord Justice Buxton, since he does at least make an attempt to address the issue of pluralism, the ultimate outcome is still much the same. In my view Zoora's behaviour – no less than Jameel's – was largely adjudged from an anglo-centric perspective, and so almost inevitably found wanting. As a result she still faces a further fifteen years of imprisonment. Can such outcomes – and the procedures which precipitate them – be confidently regarded as just? As we have seen the Earl of Derby had few doubts that English common sense would be enough to underwrite that goal when confidently asserted that "it is stigmatising ourselves as a nation very unjustly to assume that the prejudice against foreigners is such that an alien on his trial will not have a fair trial before British subjects", before going on to vote for the abolition of the right to demand an ethnically mixed jury. But that was more than a century ago, when Victorian confidence in the innate superiority of all things English was at its height. Yet faced with just the same issue more than a century later, Lords Justice Kennedy and Buxton, let alone the late Lord Chief Justice, appear to have adopted much the same attitudes – even if their rationale for doing so was not nearly so explicitly expressed. Hence, despite the vigour with which Mr. Justice Brooke has expressed the view that these issues *must* be confronted if systematic injustice is to be avoided, his arguments seem – thus far at least – to have yielded very little fruit.

An expert what? Some anthropological dilemmas

Yet despite Mr. Justice Kennedy's denial of the admissibility of anthropological evidence, which would, on the face of it, appear to be wholly in line with the House of Lords' ruling in *Camplin,* the experiences which I have had – and dare I say it, continue to have – in fulfilling that role very often make me feel somewhat uneasy. Moreover those feeling would undoubtedly be doubled and redoubled if the Lords Justice of Appeal were to change their minds, and expert anthropological evidence did become routinely admissible. For if – as is clearly necessary – I switch into a more reflexive mode and turn the spotlight on the logic of my own activities, I would be the first to admit that I am by no means certain of my own *locus standi* in this field. When I use the self-invented title of "Consultant Anthropologist" to

identify myself both to lawyers and to the courts, it is by no means clear just what kind of expert knowledge can I legitimately seek to present, or on what basis I can and should suggest it has been constructed. In other words, just what kinds of issues can an anthropological expert (if such a role is legitimate at all) reasonably seek to address – and from what perspective?

I must admit I have no very clear answers to such questions. I have stumbled into this role by accident, and I have had no formal legal training. And since I appear to be a pioneer in the field – if only because none of my academic peers have yet had the temerity to become so actively involved in it – I have had, of necessity to generate my own operational conventions. But given a steadily increasing level of activity over the past four years, during which I have prepared around eighty reports (usually for the defence but occasionally for the police) in cases which have ranged from murder, rape, fraud and drug-smuggling in the criminal field to libel, compensation for death and injury, inheritance, divorce settlements and adoption in the civil sphere, I reached a point where I feel I can reflect with some confidence on the role into which I have slipped, as well on the kind of solutions which I have adopted in order to cope with the challenge with which I have found myself confronted.

Themes and issues

With this in mind, one point is quite clear. Despite the great diversity of situations about which I've found myself being asked for my opinion, and despite the equally diverse character of the proceedings themselves, a number of themes have never recurred time after time, and consequently routinely feature in my reports. These include:

i) The corporate character of South Asian extended family structures

One of the most obvious differences between English domestic lifestyles and those deployed in South Asian contexts has to do with the way in which families are organised. Not only do South Asian families draw together a much more numerous and wide-ranging kindred, but kinship structures are primarily constructed around relationships of descent rather than marriage. Moreover, since extended families are explicitly corporate in character, they generate much tighter networks of mutuality and reciprocity, as well as of authority and subservience, than is normally the case in English context. Hence in a nutshell whilst English family life is – and indeed has long been – underpinned by strong commitment to individualism, South Asian families are not only much more strongly corporate in character, but the mutual commitments which underpin them have largely survived the passage to England. But since contemporary English law invariably assumes that persons are – or at least can be treated as if they were – free-standing individuals, its standard procedures are thrown into confusion (and are not infrequently deliberately thrown into confusion by more powerful members of the extended family) when the courts are asked to adjudicate bitterly disputed cases of divorce, dowry repayment, inheritance, adoption and so forth. Nor are these issues solely restricted to the arena of family law. Since the disputes which are now bringing cases of rape, murder, assault, arson, abduction, fraud and so forth before the courts with ever increasing frequency are equally invariably rooted in the internal dynamics of extended kinship networks, these issues – and the confusions which they all too often precipitate – tend to be of almost as great significance in criminal proceedings

To pinpoint just where these difficulties arise, two dimensions appear to be of particular importance. First of all if counsel, judge and jury are unawareness of how great an impact the prioritisation of corporate loyalty over individual choice, as well as formal (but nevertheless

vigorously contested) rules of hierarchy may have on patterns of behaviour in such contexts, it is often difficult, if not impossible, for them to make adequate sense of what has been going on – and all the more so when some or all parties to the dispute represent their behaviour *as if* they had in fact been following individualistic English-style norms. Secondly, and just as importantly, I have the strong impression that most English observers are so unfamiliar with the byzantine character of the micro-political manoeuvres which invariably emerge within extended family networks that they find their dynamics almost impossible to comprehend without a little guidance. And in the absence of such guidance they not only tend to fall back on ill-informed stereotypes, but also regularly grasp the wrong end of the stick.

ii) Transnational connections

Besides including a much larger number of people than their own much more nuclear kinship structures, English observers are often perplexed by – or on the other hand may overlook – the extremely wide geographical spread of most South Asian kinship networks. Not only do these often link households based in widely separated towns and cities in Britain into a tight-knit network, but these linkages frequently spread overseas, not just to migrants' villages of origins, but to a wide range of settlements in the Persian Gulf, elsewhere in Europe, and in North America. Many successful kinship networks therefore operate as miniature multi-national corporations, whose various components are not only constantly in touch by telephone, but also regularly rotate information, personnel and capital between themselves, and where the whole structure is held together by strategically arranged marriages.

Two points arise from this. First any attempt to "halt immigration" in such a context – or even to establish unambiguous criteria of nationality and domicile – becomes an almost hopeless task. Ever more draconian immigration controls may somewhat inhibit the flow of personnel, but they cannot halt it completely, not least because they cannot even begin to touch the networks of reciprocity which underpin the dynamics of circulation. But if multinational *biraderi*s are therefore in a position to evade national regulation almost as successfully as multinational corporations, this can also precipitate all sorts of problems for the courts, especially when events which are crucial to their proceedings may well have occurred in a location way beyond their jurisdiction.

iii) Considerations of izzat, honour, and sharam, modesty

A further set of issues on which I find comment is very frequently required is the far-reaching impact which the inter-related concepts of *izzat*, honour, and *sharam*, modesty, invariably have on patterns of behaviour, most especially in family and domestic contexts. This tends, once again, to be a two fold task. Before one can even begin to explain the extreme lengths – at least from an English perspective – to which individuals and groups of South Asian origin may go to avoid dishonour, or if already dishonoured, to exact revenge by compromising the honour of their rivals, one must first describe in some detail just how (largely male) notions of *izzat* and (largely female) notions of *sharam* are constructed, defended and sustained, and the key role they play in the dynamics of South Asian kinship systems. Only then is one in a position to set about analysing the behaviour in question.

The circumstances in which one may need to do so are extremely varied. Quite apart from the domestic consequences of such ideas, such that women may find themselves in an exceedingly disadvantaged if their husbands choose to abandon their responsibilities towards them, such considerations frequently play a major role in precipitating the violent – and very often lethally violent – inter-personal and inter-family disputes. All the indications suggest that these are

becoming just a commonplace feature of the South Asian scene in Britain as they are in rural contexts in the subcontinent. It is also worth mentioning that if Clauswitz argued that war is the pursuit of diplomacy by other means, then at least in South Asia civil litigation has long been used as an particularly effective vehicle for the further pursuit of *izzat*-driven disputes. It remains to be seen whether this tendency will be replicated in Britain, or if the huge cost of litigation to all those unable to obtain legal aid will nip it in the bud.

iv) Magic, witchcraft and spirit possession

A further feature on which I often it necessary to comment arises from the commitment which most South Asian settlers still sustain towards their religious traditions – always remembering that their beliefs and practices for the most part reflect popular rural ideas and ideologies, rather than the formal theological positions laid out in religious textbooks. So it is that when unexpected disaster strikes – including, of course, the eruption of explosive breakdowns in an extended kinship networks which eventually lead to legal proceedings being opened – those involved almost invariably seek to explain both their own experience and the behaviour of their antagonists in occult terms. As a result, they often explain the oppressive of others and their own condition of distress in terms of magic and witchcraft. Hence they regularly seek out the assistance of spiritual healers such as Pirs, Yogis, Sants and Devis in diagnosing the source of their of their distress, such that they are then able to provide their clients with a *tawiz* (amulet) with which to keep the occult forces which have caused their distress at bay. With this in mind I often find it extremely illuminating to enquire about such matters before preparing my report, not least because they provide an extremely illuminating guide (once one knows how to read the signs) to the location and character of the inter-personal tensions within the kinship network. As should be obvious, however, such material has to be treated with very great care. Sometimes aspects of these processes will already have come to light, and will therefore require explicit commentary to set them in context. But where they have not I tend to be a great deal more cautious. In so far as most English audiences can be expected to be profoundly unimpressed when made aware of occult beliefs and practices, and hence instantly to dismiss them as an indication of “ignorance”, “irrationality” and “superstition”, any attempt to use such material to illuminate what is going on can all too easily be wholly counter-productive.

Yet however tactically appropriate such a practice may be in the short term, in broader terms its seems equally clear that editing one’s expert representations of what is going on in this way leads one into all sorts of ethical pitfalls, not least because it would clearly be quite wrong to avoid mentioning all those ideas, ideologies, institutions and practices which one fears an English audience would find objectionable as a matter of principle. Not only do I see a central component of my role as an expert as being to open up such doors to comprehension, but such notions so often play such a critical role in the progress and in the resolution of inter-personal disputes that many aspects of these processes will remain virtually incomprehensible unless the actors’ own understanding of what they are up to are taken very firmly aboard. Hence there are often very good reasons why the court *should* be prepared to take notice of the occult beliefs and practices of those involved in the proceedings, no matter how alien and indeed “irrational” these may seem at first sight. If the court is unable to get to the bottom of what has been going on, the door to inequity and injustice will remain wide open.

Acting as an expert

Yet although it is easy enough to identify the kind of issues about the courts could often benefit – at least in my experience – from expert anthropological advice, I still remain most

uncertain as to how and on what basis such material is best introduced into legal proceedings. Moreover it is easy enough to identify one major – but as yet apparently insurmountable reason why this is so: the adversarial system which requires all witnesses to be called by, and hence to be associated with position being argued by, either one side or the other in the proceedings. In common with many other experts in an ideal world I would much prefer to be instructed by the court itself, rather than one or other of the contending parties.

As it stands, however, not only do I receive instructions from solicitors acting for one side or the other, but given that there are so few precedents as to what expert anthropological evidence might look like, they tend to be most uncertain about just what they wish me to do. Most usually their initial request is for an export report on a specific cultural practice, such as arranged marriages or dowry payments or caste or culture conflict within a very broadly defined groups such as "the Sikhs" or "the Muslims" or "the Hindus". My immediate response to such instructions is that in the first place I need to know much more about the specific community to which their client is affiliated, and secondly that it is quite impossible to provide meaningful answers to the questions posed without being aware of the detailed circumstances which have given rise to their request. Hence, I now routinely insist on having sight of detailed documentation – including all relevant witness statements and affidavits – before I even begin to respond to their request. Moreover, when I have had an opportunity to review all that material, I invariably find myself inventing my own instructions. This is not surprising: if the instructing solicitors fully understood the issues at stake, they probably would not have needed to instruct me in the first place.

But what about my reports themselves? After a good deal of experimentation, I now find that my reports invariably have two sections. In the first I set out the details of the cultural codes and conventions which are relevant to understanding the case in hand; and in the second I go on to explore how these can help to illuminate the behaviour, and the strategic objectives, of all those involved in the case in hand, eventually culminating in some sort of concluding overview. Yet although this may seem a relatively straightforward procedure, closer inspection soon reveals that all three dimensions pose very considerable theoretical and conceptual challenges.

Cultural *facts*?

Whilst the initial stage of my self-imposed agenda might appear relatively straightforward, since it requires me to do no more – or so it might seem – than to set out the relevant cultural “facts”, in practice the task is a great deal more complex. In the first place I’m acutely aware that my report is, of necessity, a highly *selective* exercise: neither the instructing solicitors, nor the barrister who will consider its contents, and even more so judges are at all interested in receiving an extended learned disquisition on every dimension of the matters in hand. Once has to be selective – but in consequence one is placed in a position of considerable power. The more fully one’s report is accepted, the further one will have effectively established the conceptual framework within the context of which all the culturally-specific issues at stake in the case are likely to be addressed. This is a very large responsibility, which would clearly become yet more onerous still if my opinions were more frequently sought.

Nor is that all. From an anthropological perspective, any suggestion that cultural phenomena might be reduced to “facts” is exceedingly problematic, to say the least. In the first place culture better understood as an ideological than an empirical phenomenon: it is not so much behaviour itself, but rather the conceptual framework in terms of which people construct their

behaviour in any given context. And if culture, like grammar, is a mental construct, it is in so sense an empirically observable and checkable "fact". Secondly cultural conventions – even when understood in this abstract way – are in no sense fixed. Not only do individuals actors, and most especially those drawn from ethnic minorities, routinely draw on a *range* of differently structured conceptual systems as they weave their way from one social arena to another, but the conventions deployed with any given arena are themselves subject to constant development and change. Hence in preparing my reports I not only have to give an indication of how far and in what ways the passage to Britain has had an impact on locally-deployed cultural conventions, but in doing so I also find myself forced to offer further (and necessarily selective) judgements about the kind of yardsticks which it might be relevant to deploy in the context of the specific proceedings in hand.

Yet in so doing, on what sources is it most appropriate for me to rely? Since members of South Asian minorities are most frequently identified – and indeed identify themselves – in *religious* terms, and hence as Muslims, Hindus, Sikhs, Jains and so forth, and since both Islam and Hinduism are associated with formal legal traditions, it might seem reasonable to look to the principles of Islamic and Hindu law as a source of such yardsticks. Yet although I would be the first to acknowledge that the broad principles of these traditions will be a *component* in any context-setting exercise, my anthropological experience leads me to argue that these sources can rarely, if ever, provide a *sufficient* foundation for so doing. Even if one leaves the changes precipitated by the passage to Britain wholly to one side, everyday life in settlers' villagers of origin was by no means ordered in terms of the prescriptions laid out in the *shari'a* or the *dharmashastra*s, or even in terms of more contemporary formulations of Islamic and Hindu law. Rather it was ordered by much more localised systems of customary law, which not only vary from region to region, but also from community to community. With this in mind I would suggest that if one distinguishes between the prescriptions of the *shari'a* as elucidated (and contested) by the *'ulema*, the realm of *qanoon* as laid down by the *sultan* (and by his contemporary replacement, the modern-day state), and the much more demotic, and of course highly varied, sphere of *riwaj*, custom, then it is above all around the ideas and practices found in this latter sphere that South Asian settlers have drawn as they set about re-ordering their families and kinship networks in Britain.

Yet whilst the internal order of each and every South Asian ethnic colony has begun to crystallise around customary conventions in this sense, it is by no means the case that the emergent behavioural conventions which we might conveniently describe as *angrezi riwaj* are mere carbon copies of the "traditional" customs deployed in settlers' villages of origin. Firstly the notion that rural life in the sub-continent is marked by cultural stasis – as the notion of "tradition" inevitably implies – must be emphatically rejected: even in that context *riwaj* is and always has been contested, and therefore constantly subject to evolutionary change. To be sure, the speed of change may be relatively slow in rural contexts. But once it is accepted that *riwaj* is always and everywhere a dynamic system, the only way in which the situation in Britain differs from that in rural South Asia is that the pace of change and adaptation has become even more rapid than it was before. This inevitably introduces yet further dimensions of selectivity into my reports, for in addition to making a judgement about how, and how far, to represent the process of change itself, I also have to indicate how far all the various participants in the proceedings – especially when they are drawn from different generations – have moved along the relevant local spectrum.

Commenting on the facts

However as indicated above, whilst in the first section of my report I usually seek to set out the relevant cultural background, in the second I seek to use this perspective to offer a commentary on the available evidence in an effort, above all, to illuminate the possible logic that may have lain behind the actions of all those who were involved in the events which led up to the proceedings. But although this is in many ways the most satisfactory part of the report-writing process as far as I myself am concerned, I am well aware that this is far more problematic as far as the court is concerned. In so far as my comments are evaluative and therefore judgmental, they might seem inevitably to trespass on territory which is the prerogative of the court, and even more so of the jury – for I would be the first to acknowledge that the Law Lords' strictures on the admissibility of expert evidence with respect to issues of reasonableness do have some substance. Quite clearly I would not want – nor could I ever legitimately seek to presume – to trespass on the jury's crucial role in assessing the plausibility of the evidence presented to them.

How, then, can one best seek to navigate between Scylla and Charibdis? In my view, the problem is not nearly so difficult as current thinking seems to suppose. In the first case, we need to be quite clear about the status of such anthropological evidence. What it *cannot* do is to seek to establish the truth of any of the evidence presented to the court: that is quite clearly a matter for the jury to decide; but what it can in my opinion quite legitimately seek to do – although I would welcome legal (and indeed judicial) comment on this point – is to set those components of the evidence with whose setting the jury is likely to be unfamiliar in an appropriate cultural context, and on that basis indicate to the court ways in which one might therefore go about assessing the plausibility of the accounts which those involved had given in the court of their evidence. In the second place such expert evidence – if accepted – is not only as open to critical scrutiny in the course of cross-examination as is any other kind of evidence, but also has to go through a second critical hurdle: the jury's own test of reasonableness. Given that the jury in any given trial are as at much at liberty to accept or discard evidence of the sort which I and my anthropological colleagues might give as they are any other evidence: what does not seem just are rulings such as that of Lord Justice Buxton, which insist that juries should be precluded from even hearing such evidence, presumably on the grounds that it safe as well as fair to expect the jury to reach a verdict on the basis of their own common sense. Nor his suggestion that accepting an anthropological input would lead to a wholly unjustified accretion of evidence, since it would be likely to be countered by "other anthropologists from other universities" seem to me to hold much water either. On the contrary, that possibility is no more than a necessary consequence of the adversarial procedures of English law.

But whilst it therefore follows, or so I would argue, that an anthropological dimension can quite legitimately be introduced into legal processes, provided always that we proceed with all due care, just as now routinely occurs in the case of expert psychiatric evidence, what seems to me to be quite unarguable is that a wholesale bar on the introduction of such evidence can all too easily lead to serious injustice. If so, it follows that for equity's sake we *must* find a means of navigating a safer passage through these admittedly difficult waters.

Conclusion

No less it does for any other sphere of public activity, the increasingly plural character of British society – and indeed of most other advanced industrial societies throughout the world – is not only posing some ever more serious challenges to the equitable administration of justice, but English law also appears to be at sixes and sevens as to how best to respond. Moreover since ethnic diversity poses a much far more complex series of challenges than does the much more straightforward issue of racial discrimination, it seems to me most unlikely that

the problems are likely to be resolved by legislative initiatives, always assuming that there was sufficient political will in Parliament to ensure the introduction of any such measures.

However in so far as English law prides itself on the logic and fairness of its procedures, as well as having a deep-seated commitment to equity, there can be little doubt that in this field the legal system now finds itself confronted with some unprecedented challenges: never before has British society contained ethnic minorities which are so large, so committed to maintaining a sense of cultural distinctiveness, nor of such culturally and religiously distant origins. Yet at the same time the issue of pluralism itself is – as the law of *de mediatate linguae* clearly demonstrates – anything but unprecedented. Paradoxically enough whilst English law was, at least in its early mediaeval phase, very much alive to how difficult it might be for jurors to bring in just an equitable verdicts if they were unfamiliar with the linguistic and cultural conventions deployed by the participants in the proceedings before them. What is also striking is that the relevance of this mode of proceeding continued to be recognised despite the far reaching impact of the Acts of Uniformity, and the provision was only finally swept away at the high point of late-Victorian hubris, when it was confidently believed that Englishmen were by their very nature so just and fair-minded that they could be relied to judge everyone and everything from right across the globe with complete equity – and thereby conveniently forgetting that they were doing so almost entirely in terms of their own taken-for-granted ideological and cultural presuppositions.

As we enter the third millennium, such views attract much less widespread support: indeed to anyone not blinded by their own ethnocentrism, they are clearly wholly indefensible. But whilst commonplace intellectual assumptions have now begun to change even amongst the most crusty beneficiaries of a long tradition of English hegemony, British society has changed more rapidly still, and the new wine simply will not fit the new – or in this case the not-so-new – bottles. As Mr. Justice Brooke is clearly aware, if equity is to be sustained, and if all sections of the British population are to remain confident in the English system for the administration of Justice, a comprehensive re-examination of some of its basic premises is clearly required; and whilst the activities of the Ethnic Minorities Advisory Committee undoubtedly represent a step in the right direction, there are still many more mountains left to climb. In this respect my own experience suggests that some of the most important of these are the issue of jury selection, and of how, and on what basis, the issue of reasonable behaviour is to be understood.

Despite having been waylaid into many pitfalls in recent years, English common law does in fact have a reasonably impressive track-record of dealing equitably with such matters; but now that sense is very firmly un-common – as inevitably the case in ethnically plural societies – uncritically applied common sense articulated by juries who have been recruited on a wholly random basis but who have received no further advice on the issues at stake can no longer reasonably be regarded as guarantors of equity and justice.

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Whilst some aspects of this case may be highly unusual, the issues it raises – although in many ways extreme – are far from untypical. Not only are most inter-personal transactions within South Asian ethnic colonies still very largely grounded in linguistic and cultural conventions with which members of the local English majority are almost wholly unfamiliar, but the networks – and especially the kinship networks – within which those transactions are set are strongly transnational in character. So it is that disputes in Birmingham or Rochdale are very often quite incomprehensible without reference to disputes over land, or marriage, or *izzat* in remote Pakistani villages. In circumstances such as these those who lack the relevant cultural competence – or even any guidance as the yardsticks which they might employ in making sense of the evidence laid out before them – will almost inevitably tend to find themselves all at sea. This inevitably leaves a great deal of scope for injustice. Sometimes, as in the case just cited, the impact of these deficiencies is such that it is virtually impossible to support the view that the defendant got a fair trial. But there is also plenty of scope for precisely the opposite outcome. I have also come across a number of equally serious cases – including one of murder – where the police and the prosecution remained so baffled that they found themselves unable to bring any charges at all.

This is not to suggest, however, that every legal encounter involving members of Britain's South Asian minorities might require the application of this kind of detailed linguistic and cultural competence if they are to be equitably resolved. Some issues are as plain as a pikestaff, and need no such special consideration; likewise others will relate to events or transactions which have occurred in a broadly "English" arena, again rendering such concerns unnecessary. Nevertheless my own experience suggests that in all forms of legal proceedings, be they civil or criminal in character, that wherever the events which gave rise to the proceedings were located primarily in a personal, domestic or familial context, and hence articulated around minority rather than majority codes and conventions, expert evidence on the content of the relevant components of the linguistic and cultural codes on which those involved are likely to have drawn, as well as on the way in which these are likely to have conditioned the behaviour of those involved in the proceedings, should as a matter of course be regarded as admissible. In the absence of such procedures travesties of justice are in my experience simply bound to occur.

iii. Counsel

Yet just what is the current status of such arguments? As far as I have been able to determine, whilst there is no precedent in English Law which gives either side an absolute *right* to introduce such evidence, neither is there any ruling which explicitly prohibits its introduction. And since it is therefore a matter of judicial discretion, whether or not such evidence is actually introduced depends firstly on counsel raising the issue at all, secondly on the vigour and effectiveness of his arguments as to why it should considered at all, and thirdly on whether the judge in that particular case rules that it is indeed admissible. But although counsel therefore play a crucial role in this whole process, let me say a word – even though it is only based on my own inevitably limited personal experience – about my observations of judicial reactions. For even though in both the cases I have so far cited their reaction was more or less strongly negative, that is by no means universally the case. Indeed in many family-based cases Judges appear to have positively welcomed such an input. What all this suggests is that despite

my earlier strictures, the procedural conventions of English law are such that the door which might open more positive developments in this direction can best be described as still standing ajar, for there are still few if any precedents to show just how far open it might be pushed.

But if such pushing is to occur, it will clearly have to be undertaken by counsel, as well as by their instructing solicitors. How well equipped are *they* to do so? Let me turn, again, to my own experience.

In the first place it is worth noting that although there is a gradually spreading awareness that reports on pluralism-related issues are indeed obtainable from people like Werner and myself, I am often alarmed – and I don't know whether Werner will concur on this one – by the naïve character of the instructions I receive. There are multiple reasons for this; in the first place solicitors are often unaware of just how far the ramifications of issues of language, religion and culture may stretch; secondly they display a marked tendency to assume that issues in this field – "dowry" or "arranged marriages" or "caste", for example – are free-standing reified entities about which it is possible to prepare a decontextualised report; thirdly even where the instructing solicitor is him or herself drawn from a minority background, their *analytical* knowledge of how minority distinctiveness might best be represented is often little better than that of their English colleagues. In a word, therefore, instructions can often be problematic. Nevertheless this is one which can easily be overcome: I write simply write my reports according to my own lights, and all the feedback I have received suggests that those instructing me usually find them extremely helpful.

However whilst commissioning an expert report is a necessary first step, persuading the bench to accept its admissibility as evidence – particularly in criminal contexts – can, as we have seen, be quite another. How well do counsel do in that regard? Whilst they obviously face some difficulty in deciding how best to formulate their arguments in the absence of any leading cases on the issue, I am nevertheless struck how varied their reaction to the challenge can be. Some counsel certainly tackle the matter head on, and are prepared to argue with the judge that the whole of my report should be admissible – although for procedural reasons I am of course precluded from hearing those arguments. In other cases counsel have often requested me to excise large chunks of my report on the grounds that the Judge would be bound to regard what I have to say as inadmissible, whilst others yet again have taken the easy way out by adding the remark "only such parts as are admissible" to my report before formally submitting it to the court. All of this suggests that even though the door through which such evidence might be introduced may stand ajar, there is still a great deal of confusion – to put it mildly – as to how, when and on what basis the opportunity can be made the most of.

Nor is this uncertainty about admissibility restricted solely to written reports, for one those occasions when I have been invited to come and give evidence in person, there is clearly equally great confusion about just how to make best use of an expert anthropological witness. What I can report, however, is that the experience of being examined by counsel who already has some knowledge of South Asian linguistic and cultural traditions is generally far more productive than by one who is not – no matter how senior the latter might be. But although barristers who are themselves of South Asian background may therefore tend to be in a better position to address these issues than most, it would be idle to suggest that such barristers are always willing to explore those issues in a confident – and if necessary a counter-hegemonic – fashion in court. Given their usual position of relative juniority, their urgent need to establish themselves in the eyes of their professional peers, let alone the lack of any prior training as to

how best to address these issues, most South Asian barristers have preferred to keep their heads down, and have thus remained disappointingly mum.