

# CULTURE AND COMMUNICATION

(Prepared for the Judicial Studies Board)

*Roger Ballard*

## 1 Communication and Due Process

Effective and efficient communication constitutes, by definition, the very bedrock of every legal process. Unless all the parties to the proceedings – be they prosecutors or defendants, plaintiffs or respondents, witnesses, jurors or judges – accurately understand the material put before them, and above all the meaning of the all questions asked and the answers given during the course of the proceedings in court, the due process of law is will at best be seriously impeded, and at worst be thrown seriously off course. If communications blockages directly threaten the integrity of the whole legal process, it follows that all those who take charge of processes of adjudication – whether as judges, as magistrates or as tribunal chairman – should make every possible effort to reduce the impact of such blockages. Equity demands no less.

Yet how do such blockages arise? During the course of our daily lives we rarely seem to experience much difficulty in communicating with one another. We all speak the same language (or so it is assumed), and we normally seem to comprehend each other – whether at home or at work – pretty well. If something seems unclear or we want more information, all we have to do is ask; and if no one asks us to explain, we assume we have indeed been understood.

How sound is that assumption? Even at home interpersonal disputes often precipitate anguished cries of ‘but you don’t *understand!*’ – most commonly from younger (and so less powerful) family members. These sentiments may be more commonplace than we realise. Whilst defendants, plaintiffs and witnesses rarely articulate – or get the opportunity to articulate – such protests, there can be little doubt that many of them are not only bewildered by the arcane ritual of courtroom practice, but also that those who feel at home in that arena are wholly unfamiliar with the kind of world in which ‘ordinary people’ like themselves inhabit. We all live in differing worlds, whether of age, of gender or of social class; and to the extent that that is so, anyone who stumbles unprepared from one such world to another will

often find it extremely difficult to make sense of what is going on, let alone to make themselves understood. But if that is so even within a population whose members can all be broadly identified as 'English', such difficulties can only be expected to double and redouble in the contexts of ethnic diversity. It is easy to see why. In such situations the linguistic and cultural codes which those seeking to communicate with one another habitually employ will differ far more radically from one another than deployed by members of different social classes (for example) amongst the native English.

Communication is a tricky business. Sometimes one or both parties may be well aware that they have not understood, or been understood. Quite often, however, this is not the case: one or the other of the two – or even observers of their transaction – may *think* they have gained a correct understanding of what was intended, when in fact they have not done so. In principle, at least, it is possible to check out the adequacy of one's understanding – or the extent to which one has been understood – by asking a supplementary question. But that takes time, and time is often short. Moreover when those involved are relatively powerless, the prospect of halting the whole proceedings in search of clarification is extremely daunting. Just because someone sits mum does not mean that they necessarily understand, or that they feel they have been adequately understood. On the contrary they may well feel too fearful, too inadequate, or too inarticulate to voice their query in that arena.

By contrast the relatively powerful face a different set of difficulties. Unless one has been alerted to the dangers of so doing, most people habitually 'read' behaviour in terms of their own familiar cultural conventions, and in so doing overlook the possibility that its intended meaning may well have been quite different, especially if the behaviour in question was generated by someone who habitually operates within a linguistic and cultural context with whose rules and conventions the observer is unfamiliar. Ethnocentrism – the use of one's own taken-for-granted cultural assumptions to (mis)interpret other people's behaviour – is a commonplace human failing.

However failures of this kind can have far-reaching consequences, most especially in situations of social inequality. In general the rich and powerful tend to be particularly prone to ethnocentrism: not only does their very status enable them to impose their own agenda in the context of their transactions with everyone less influential than themselves, but the powerless have by definition only a limited capacity to challenge that agenda, no matter how

alien to their own experience it may be. The use of ethnocentric assumptions is therefore a ready source of social injustice, since it enables members of one group unthinkingly to impose its own expectations and evaluations on another. It is all too easy to fall into such a trap, and there can be little doubt that the tendency to do so is widespread. But the consequences of doing so can be most unfortunate. Ethnocentric assumptions are a major source of the (often unwitting) processes of social exclusion which Sir William Macpherson has identified as institutional racism.

## **2 Culture, cultural plurality and potential social injustice**

Ironically enough, language and culture are a Janus-faced phenomena. Although at one level a they are a *means* to successful communication, since information can only be accurately transmitted if both parties have access to a shared conceptual code, they have precisely the opposite effect in contexts of linguistic and cultural plurality. In those circumstances culture, or rather cultural difference becomes *barrier* to, not a facilitator of, mutual understanding.

How can these difficulties be overcome? At first sight the most straightforward answer is to suggest that users of non-standard codes should eliminate these difficulties by adopting less alien linguistic and cultural conventions as quickly as possible, since a failure to do so will necessarily bring social exclusion, and so institutionalised disadvantage, down on the heads. Yet however sensible such a solution may seem at first sight, especially from an ethnocentric perspective, the minority perspective is often very different. In the first place it rests on the assumption that members of minority groups will routinely accept the view that English ways comprehensively a superior to their own: members of Britain's visible minorities are by no means alone in rejecting that view, as members of many less visible minorities, such as the Scots, the Welsh and the Jews, for example, would immediately confirm. Secondly and in many respects more importantly, the routine acceptance of that view would make access justice – and indeed most other public services – a function not so much of citizenship, but of acceptance of and conformity to linguistic and cultural conventions of Britain's dominant majority: the native English. Any policy which is predicated on such naively ethnocentric assumptions, and which seeks to ignore the existence of ethnic plurality as a *de facto* reality, will necessarily precipitate inequitable outcomes.

How, though, can legal practitioners – and indeed the law itself – best respond to the ever greater salience of ethnic and cultural plurality? Although there are now an ever growing number of people with a sufficient degree of cultural and linguistic competence to be able to manoeuvre their way through – and hence both to understand and to be understood in – a wide range of differently ordered arenas, *comprehensive* multi-culturalism in this sense is clearly an impossible goal. Contemporary British society already supports far too many different such arenas for any one individual to hope to feel equally at home in them all. Although familiarising oneself with a second language or culture is undoubtedly a valuable experience in its own right, for there is no better way of grasping the artificiality of one's own taken-for-granted assumptions in perspective, it is self-evidently quite impractical to suggest that everyone should set about familiarising themselves with everyone else's codes.

With this in mind it is worth recognising that the primary condition for success in overcoming problems in this sphere is not so much the acquisition of an intimate knowledge of a wide range of other cultures, but rather through a realisation of just how profoundly one's *own* personal understandings may be culturally conditioned. Whatever others may do or say, it is through the taken for granted spectacles of our own cultural tradition – whatever it may be – that each of us initially looks out on, and seeks to make sense of, the world around us. Not only this, but we also tend to be strongly *attached* to our own culture: we have grown up within it, and it has made us what we are. Indeed until we actively reflect on what is going on, the probability is that we so routinely operate within its precepts that its specificity goes unnoticed.

We should therefore never underestimate the influence which our cultural background may have on our judgements and perceptions, no matter how open-minded we may consider ourselves to be, and that these tendencies very easily flow over from personal to professional arenas. Moreover if we lived in a society which was culturally and linguistically homogeneous there would be nothing reprehensible about this. So long as the codes which are routinely deployed by those making such judgements are congruent with those used by the people whose behaviour is being adjudged, all questions about the actual content of the codes they use, and as to whether or not their users are aware of doing so, are quite literally academic.

In a plural society, however, such a position is manifestly unsustainable. In that context it follows that unless and until everyone – and every organisation – whose professional role includes making sense of, and making judgements about, other people's behaviour can demonstrate that they have taken active steps to counter the impact of ethnocentricity, minority complaints that their either have been, or may have been, treated unfairly will remain incontestable. Developing the skills, strategies and institutional procedures needed to allay such fears must therefore be regarded as an urgent priority.

### **3 Improving the quality of communication**

#### *3.1 Verbal communication*

The culture of the courts attaches exceptional importance to verbal communication. The law is a written body of rules and procedures, evidence is what witnesses state in court; hence the verbal skills of the barrister and judge in questioning witnesses, in analysing their evidence, and in transmitting their arguments to the jury are fundamental for successful performance their roles. Any failure in verbal communication arising from cross-cultural misunderstanding in any of these contexts will strike deeply at the effectiveness of the delivery justice in the court system.

There are a number of ways in which verbal communication problems may arise in court, the most obvious of which is when a witness lacks fluency in the English language. This calls for the use of an interpreter, whose free services all non-English speaking defendants can expect to be provided as of right; for equity's sake, it is probably wise to take the same view with respect to non-English speaking witnesses as well.

#### *3.2 When is an interpreter needed?*

An interpreter is needed when effective communication through the medium of the English language, at a level adequate for the purposes of the court, cannot be achieved. In most cases, the need will be apparent to all concerned, and will have been identified in advance of the hearing. In some cases, however, the need for an interpreter may only become apparent in court, either because the witness appears to be quite unable to move beyond a series of 'Yes' and 'No' answers, or because the witnesses' answers are incomprehensible, or because it becomes clear that the witness is quite unable to grasp the questions put to him or her. Although there is always a possibility that witnesses are using an alleged lack of fluency in

English in an effort to evade answering questions, it is nevertheless wise to err in the direction of caution in this sphere. Just because someone can 'get by' with street-level English does not mean that he or she will necessarily have a sufficient command of the language to confidently withstand rigorous cross-examination.

### 3.3 *The role of interpreter*

The role of interpreter is primarily to provide a technically efficient and accurate translation of what has been said, and the first qualification required of an interpreter is that the person undertaking the task has the requisite degree of skill and integrity to be able to do so effectively. However it is worth remembering that the effective performance of this role in court places very wide range of demands on the interpreter.

First of all he (or she) should have the relevant linguistic skills. Although in principle self-evident, this raises much more complex issues than are apparent at first sight. On the one hand the interpreter needs a fluent command *of the dialect which the witness actually speaks*. Most migrants to Britain are of rural origin, and in such contexts dialects often vary significantly over distances no greater than a few tens of miles, and in any event each of these rural dialects may differ from the standard version of the language spoken by people from urban educated backgrounds. On the other hand it is just as important that the interpreter should have a fluent command of English, and especially of any technical vocabulary which is relevant to the proceedings in hand. Although the quality of interpreters serving the courts is steadily improving, it would nevertheless be idle to suggest that all those currently acting as interpreters really fulfil even these minimum requirements.

Nevertheless it should never be forgotten that acting as an interpreter is by its very nature an *extremely* demanding task, so whilst a reasonably competent interpreter can be expected to remedy a condition of comprehensive non-communication, reaching the other end of the spectrum – such that both the parties concerned gain a comprehensive understanding of what the other has said – is a great deal more difficult to achieve. As anyone who speaks two or more languages will be aware, translation involves much more than replacing words drawn from the lexicon of one language with those drawn from another. Not only does every language have its own distinctive grammar, but this is in turn is part of an equally distinctive semantic and conceptual framework. If so it follows that even translating simple sentences – let alone detailed accounts of what the witness saw or had done – in such a way that they are

adequately (let alone accurately) understood by someone wholly unfamiliar with the lexical, grammatical, conceptual and cultural code within which those answers were initially framed is an *immensely* complex task. Moreover it is also worth remembering that interpretation is a two-way process: the task of translating English questions into the witnesses' language is just as challenging as that of translating the answers back into English again.

It follows that unless interpreters have the opportunity, whenever they deem it necessary, to explain to each party the logic of the linguistic and cultural framework within which the other is operating, and then to set each question and answer within that context, it is most unlikely that the interpreter will be able to facilitate really effective mutual understanding. Translation is therefore anything but a mechanical process. Besides having the relevant linguistic competence, the ideal translator also needs to be thoroughly familiar with the details of the conceptual universe within which each party to the transaction operates, and also skilled in rendering questions and answers generated in one into equally meaningful questions and answers in the other. Doing this is a tough job, so much so that further clarification will often be required if the interpreter is properly to fulfil the task. With this in mind the previous edition of this *Handbook* rightly stressed that "The judge or magistrate should ensure that the interpreter .... feels able to bring forward any difficulties or problems should these arise". But although interpreters are widely used, experience suggests that such interventions are so rare as to be virtually non-existent. This suggests that the complexity of the task which interpreters undertake is not as widely appreciated as it might be.

It goes without saying that none of this should be read as a critique of the use of interpreters: litigants with a limited command of English would clearly be much worse off in their absence. But it is to emphasise that the bare presence of an interpreter cannot be regarded as a sufficient solution to the underlying problems of communication – as both interpreters and their clients are very well aware. Members of minority groups are invariably acutely conscious of how often members of the majority misunderstand them, and if recent arrivals themselves, often just as confused by the curious ways in which members of the majority express and conduct themselves. But although members are usually even more unskilled when it comes to making sense of the way in which members of a minority group express and conduct themselves, they tend to be much less aware of the depth of their misunderstandings, if indeed they even get so far as acknowledging their very existence.

## 4 Culture and Communication

### 4.1 *Beyond language and interpretation: reaching across cultures*

If the presence of interpreters is therefore best regarded an aid – rather than a solution – to the problem of facilitating inter-ethnic communication, what additional measures can the courts reasonably be expected to take in dealing with issues of this kind? Once we take aboard the fact that Britain *is* a plural society, and that a failure to acknowledge its existence is a potential source of inequity and injustice, on conclusion seems quite clear. Where issues of this kind arise, counsel need to be given adequate space within which to explore, and witnesses should be given a parallel opportunity to express, any distinctive cultural ideas and practices which might be relevant to the proceedings in hand.

As is in so many other situations this does not require judges, magistrates or tribunal chairman to have any specific expertise in the field, but rather that they should have a broad awareness of the reasons why problems of inter-ethnic communication may occur and the unacceptable consequences of ignoring them, together with a positive commitment to addressing them as and when they arise in court. Two main conclusions follow from this. First a simple point of etiquette: since no-one is likely to be able to give a good account of themselves, or to feel that their point of view is being listened to, unless they feel at ease, active steps should be taken to ensure that this is indeed the case. If in a doubt – even about such a simple matter as the correct pronunciation of a witnesses' name – there is a very simple remedy: ask! The second issue is more substantial. To the extent that issues of culture and communication can at the very least cause bottlenecks in due process, and at worst precipitate severely inequitable outcomes, members of the bench should make it plain to counsel that they are well aware that this is so, and that they are ready to accept arguments and evidence which are presented in such a way as to take such matters into account, provided it is relevant to the proceedings in hand.

If judges and magistrates were to make it plain – simply as a matter of routine – that for reasons of equity no less than of good practice, potential issues arising from the presence of ethnic diversity could not be overlooked, not only would members of the minorities begin to have a greater degree of confidence in the judicial system than they do at present, but counsel would also be encouraged to explore such issues in much more explicit terms throughout the course of proceedings.



#### 4.2 *Culture, equity and 'common sense'*

It is also worth noting that as soon as questions of culture and communication are recognised as being a necessary component of the courtroom agenda, a parallel set of issues also arises with respect to judicial instructions to the jury. In particular the routine injunction that jurors should deploy their 'common sense' as they set about evaluating the credibility of the evidence set before them may need careful qualification. If understandings of the kind which one might describe as common sense were uniformly shared by all segments of British society – as would be the case in the absence of ethnic pluralism – such a bare injunction might well be entirely adequate. In contexts of ethnic pluralism, however, common sense becomes a much more slippery concept. In the first place where different sub-groups organise their lives around radically differing sets of conceptual premises, 'common sense' ceases to be a common phenomenon, but will *vary* as between different groups; secondly the 'common sense' understandings found within any one group is very likely to include deeply entrenched negative stereotypes about the lifestyles of many of the others. In either case the 'common sense' test could lead members of the jury to evaluate some aspects of the evidence according to wholly inappropriate yardsticks.

Whilst ethnically mixed juries could, at least in principle, provide an antidote to these problems, it would clearly be unwise to suggest that this provides anything like a sufficient safeguard. Firstly juries in cases with minority defendants are very frequently not ethnically mixed, especially when cases from major conurbations (where sheer demography ensures that defendants are much more likely to be drawn from one or other of the minorities) are farmed out to less pressurised courts elsewhere, and whose locally-recruited juries are much less likely to be mixed, or indeed to have had any experience of ethnic pluralism at all. Moreover even when a jury is visibly mixed, it does not necessarily follow that those jurors will be familiar with the specific linguistic and cultural context in which the proceedings in hand are set. Moreover even if they do have such knowledge, there can be no guarantee – especially if the matter has not been explicitly addressed during the course of the proceedings themselves – that such contributions will not be dismissed as special pleading by the remainder of the jury.

In these circumstances it seems wholly appropriate – and indeed necessary – for the judge to provide the jury with an indication of just what *kind* of 'common sense' to employ during the course of their deliberations, and above all to warn them of the dangers of deploying their own taken for granted assumptions to evaluate the behaviour of those whose cultural

conventions are very far from being congruent with their own. In such circumstances it is much more appropriate to think oneself into the shoes of the actors in the case, and to seek to apply *their* notions of reasonableness and common sense, rather than unthinkingly applying one's own.

But if this is so in criminal cases involving juries, the same principles also need to be borne in mind in all forms of adjudication in which no jury is present, as in most civil cases, magistrates courts, and a wide variety of tribunals.

#### 4.3 *Culture as a contextual, not a causal phenomenon*

Since the adoption of such an approach at first sight seem very challenging, if only because of its relative novelty, it is worth saying a little about what it does, and what it does not, entail. Most importantly of all, it offers no support whatever for the proposition that 'my culture' can be offered as a *carte blanche* excuse for any kind of aberrant behaviour, for the very good reason that culture no more determines the actual content of our behaviour than grammar determines what we can or cannot say.

Culture, like language, is a *vehicle* for human activity. Just as every meaningful verbal utterance has, by definition, a specific grammatical foundation, so every act of behaviour is likewise grounded within a specific cultural context.; and just as it is impossible to decipher the meaning of any utterance without reference to the linguistic code being used by the speaker, so the significance of any act of behaviour cannot be adequately adjudged without reference to the relevant cultural code. But whilst these codes set the context for all forms of speech and behaviour, and also provide the vehicle through which both are articulated, they cannot and do not determine the actual content of anyone's actions. Hence, for example, it would be quite wrong to suggest that culture might have 'caused' an Indian or Pakistani husband to strangle his wife following his discovery that she was having an affair with another man; nevertheless it would be quite right to remind a jury that given the immense significance of honour and shame in South Asian cultural contexts, such a husband might well find such an experience far more deeply humiliating – all other things being equal – than would a man of some other ethnic affiliation. Moreover in exploring issues of provocation, it is also worth emphasising that the depth of hurt caused by any given verbal insult can only be assessed subjectively, or in other words in terms of its impact on its target's sense of dignity.

It is also worth remembering that culture is a contextual phenomenon in a further sense, such that those with the necessary cultural competence can switch between different cultural modes as and when appropriate. A linguistic comparison graphically illustrates the point: just as someone who is bi-lingual has the ability to express themselves in two different languages as and when appropriate, so someone who is bi- or multi-cultural will have the ability act and react appropriately in a range of differently structured social and cultural arenas. From this perspective the younger – and especially the British born and bred – members of many minority communities can best be described as skilled cultural navigators, with the ability to manoeuvre their way around and between a wide range of different arenas.

With this in mind it follows that it is quite wrong to assume that just because someone is manifestly at ease with English ways at work for example, they will of necessity only feel at ease if they order all other aspects of their lives in a similar way. Quite the contrary: someone with a successful professional career may, for example, also act as a dutifully respectful daughter-in-law when in the company of her more traditionally minded parents-in-law. Nor is such personal cultural pluralism simply a matter of either/or between ‘English modernity’ and ‘Asian tradition’: our young professional and her husband will almost certainly follow a third – and much more mixed – set of conventions between themselves, as well as in the company of friends and associates of similar backgrounds to themselves.

#### *4.4 Putting culture itself in context: stereotypes are not the answer*

Despite our constant emphasis on the crucial importance of ensuring that behaviour is always evaluated with an awareness of the cultural context within which it was generated in mind, all one’s efforts to do so are likely to be rendered entirely counterproductive if tries to deal with the issues by relying on simplistic short cuts such as using one falls into the trap of taking simplistic short cuts such as “All Muslims do  $x$  ...” or “All young Black men are  $y$  ...”. Such stereotypical generalisations are not only grossly inaccurate, but the perceptions they generate are invariably as unhelpful as they are misleading.

Two ‘health warnings’ should therefore be constantly borne in mind. The first is to take great care to avoid falling into the trap of assuming that some apparently easily identifiable body of people will of necessity constitute a discrete and homogeneous ‘cultural group’. Hence, for example, whilst outsiders may assume that members of groups they identify as ‘Asians’, ‘Afro-Caribbeans’ and ‘Chinese’ have so much in common that each one can reasonably be

regarded as forming a cultural group, insiders may well be much more aware of the *differences*, as, for example, between Hindus, Muslims and Sikhs, or between Punjabis, Gujaratis and Bengalis, let alone as between the disjunctions of caste, sect, gender and generation which snake their way round and through all those more obvious disjunctions in ever more complex ways.

Secondly even if one was well-informed enough to be able to take all these many dimensions of differentiation into account with reasonable accuracy, it would quite wrong to assume, for example, that all members of the Visa Halari Oshwal Jains (who trace their origins to the Shaurastra region of Gujarat, and who have come together as a relatively prosperous, but nevertheless very tight-knit community in Britain) can all be expected to behave in an identical way. Even at this very detailed level of ethnic specificity there are differences between rich and poor, between old and young, between the more and the less educated, , let alone as between those families which did, and those which did not, spend some time in East Africa before moving to Britain. Last but not least all these more or less systematic within-group differences are overlain by all sorts of *individual* differences. Hence any expectation that cultural awareness can be reduced to a series of rules of thumb constructed along the lines of ‘all x’s do y’ is invariably hopelessly misleading. To reiterate, culture is a *vehicle* for the organisation of behaviour, not a determinant of action. Stereotypical accounts constructed around the latter assumption are just as misleading and often more damaging than plain straightforward ignorance.

#### 4.5 A summary

If there are any general conclusions that can be drawn from all this, one of the most important is *don’t jump to conclusions in any direction*. Making sense of what is going on is, as ever, a matter of judgement, and such judgement should be exercised with care. Nevertheless in making such judgements it is worth remembering that since virtually every dimension of human activity is linguistically and culturally conditioned, any given item of speech or behaviour, any transaction, and any set of events which a witness may be seeking to describe should be located within the logic of the cultural context within which that events in question took place. Any observer (and the entire judicial process is ultimately such an observer) who seeks to decode the significance those events in the absence of an awareness of – or without taking account of – the logic of the cultural context within which they were generated is

danger of misreading, and so to misinterpreting, what went on. Careful and well-informed context-setting is therefore an essential component of good – and above all equitable – professional practice.

## **5 Appearances in Court**

Whilst law itself is essentially an abstract set of propositions and principles, proceedings in court – in which concrete events are examined in minute detail, albeit against the backdrop of those propositions and principles – lie right at the opposite end of the spectrum. Moreover the term hearing is an apt description of what goes on in court. Not only does the verbal presentation of evidence provide the court with an opportunity to weigh and assess its significance, but that very process also provides the court with a parallel opportunity to assess the personal credibility of every witness who appears before it. And given the pervasive impact of culture on human behaviour, the conventions which are used to establish – and likewise to assess – personal credibility are far from uniform.

Since witnesses are well aware that the evidence they offer will be subject to scrutiny, and also that the way in which they present themselves is likely to have a far-reaching impact on the extent to which what they have to say is adjudged to be credible, most go to considerable lengths to brush up their appearance. Such efforts can, however, easily become badly unstuck if the code which the witness habitually deploys is at odds with those habitually used by the court.

### *5.1 Eye-contact*

Consider, for example, the use of the eyes, for although eye-contact plays a crucial role in the process of communication in every cultural system, the rules governing its use vary. In most European cultural traditions, for example, a person's willingness to sustain a direct gaze into his or her interlocutor's eyes is routinely taken to be a positive indicator of honesty and sincerity; and by contrast an unwillingness to do so is equally routinely read as an indication of shiftiness and unease, and very possibly of guilt. However other cultural traditions organise matters quite differently. In South Asian contexts, for example, any woman who makes direct eye contact with an unrelated man is regarded as brazen, and in all probability signalling her sexual availability. Hence modest and respectable women expect, and are expected, to shield themselves from the direct gaze of men, and most especially from senior male relatives. From this perspective for a woman to present herself for public examination in

open court will be a daunting experience at the best of times. She may well therefore keep her eyes lowered partly as a defensive measure, but also because of a deeply ingrained feeling that the best way to establish her personal social worth as well as the credibility of her evidence is by demonstrably sustaining a proper sense of public modesty.

In a similar vein most Chinese traditions are acutely concerned about the prospect of a possible 'loss of face', which have in turn led to the development of elaborate forms of politeness, particularly in public contexts. So its that highly elliptical forms of expression perfectly normal in Chinese contexts can easily be read as bafflingly unhelpful, and hence as inherently suspicious by Euro-American interlocutors. By contrast Chinese observers take the view that the 'honest and straightforward' approach so favoured in the West is crude and uncivilised, especially since blundering about in this way can all too easily lead to a quite unnecessary loss of face.

Both African and Caribbean traditions utilise conventions which differ yet again, with consequences which can be equally unfortunate. Thus whilst Europeans favour a straightforward 'look me in the eye' approach, in many African and Afro-Caribbean contexts for a young person to look an authority figure in the eye is not taken to indicate impudence, insult and hence disrespect. When codes of behaviour differ so comprehensively, the potential for confusion is enormous: not only are signals likely to be misread, but there can be nothing more disturbing than to be told 'Act appropriately!' when one is in one's own opinion already doing just that.

Whilst much more could be said about rules of eye-contact, as well as the wider theme of differing conventions of body-language, the basic issue should by now be obvious enough. If English conventions are uncritically deployed in assessing the demeanour of witnesses, there is a very real danger of drawing wholly erroneous conclusions about the personal credibility of those from minority backgrounds before they even said anything at all.

## *5.2 Conformity and Resistance*

This whole situation is rendered even more complex when – as is most usually the case – members of the minorities are aware of the dangers that their behaviour may be misread in this way, and where they take steps to counter that possibility. In doing so a number of

strategies may be adopted, although each one brings an attendant set of dangers and contradictions.

The most straightforward response is, of course, one of conformity: of presenting oneself *as if* one's normal modes of self-expression were identical with those of the native English. But although this is the strategy which most English observers would prefer all members of the minorities to adopt, it is only likely to be really successful if deployed by someone who is fully conversant and with English ways. If, however, the witnesses' skills in cross-cultural navigation are not up to the task in hand, their valiant efforts to present themselves in a manner which they hope and believe an English audience will find more acceptable can easily turn out to be wholly counter-productive. If witnesses are less culturally competent than they imagine, their efforts to re-package themselves may well be so crude and stilted as to be entirely unconvincing, so much so that all their evidence is dismissed either as irrelevant or as patent fakery.

Nor does the process end there. If we accept Sir William Macpherson's definition of institutional racism, and consider the impact of the kind of collective failure to which he points might have on members of the minorities themselves, it is clearly idle to assume that their own ideas and expectations will have been unaffected by regular exposure to "processes, attitudes and behaviour which amounts to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping". On the contrary to the extent that members of the minorities are habituated to the experience of not being taken seriously – and of being mistreated in just those ways highlighted in this volume – in all their encounters with the education, health and social welfare systems, it follows that they may well regard the police service and the courts with a considerable amount of suspicion, even if they have previously had no personal contact with the criminal justice system.

These experiences can leading, at the extreme, to two very different kinds of response: either to bow one's head in the hope that by causing as little further difficulty as possible one might pick up some small crumbs of mercy, or – at the other end of the spectrum – to expect the worst, and on those grounds to make little or no effort to conform to the court's expectations, choosing instead to sustain one's dignity and pride by going down with all guns blazing. Responses which tend towards this end of the spectrum, and which can frequently be observed amongst young people of Afro-Caribbean descent, are, on the face of it, wholly

counterproductive. Defendants who behave in this way tend to be treated with little sympathy, and to attract exceptionally stiff sentences. However strategies of this kind begin to make better sense once one begins to appreciate that they are almost invariably adopted by members of groups which are already socially marginalised – or, as in the Afro-Caribbean case, have an exceptionally long history of social marginalisation – and who have responded to that experience by generating an outlook which values personal dignity so highly that they are prepared even to sacrifice their liberty in order to sustain it. From this perspective ‘taking the pressure’ – and so reinforcing one’s sense of personal self-worth – can be seen as constituting a far more honourable response to institutional racism than is any strategy which ultimately requires one to bow to its unjust, and necessarily demeaning, demands.

There can be little doubt that a wide variety of authority figures, from teachers and probation officers to policemen and prison officers, find such tactics extremely hard to cope with, especially if – as invariably the case – they have had no advice or training as to what a professionally appropriate response might be. What is quite clear, however, is that if white professionals take the easy way out by seeking to *impose* their expectations come what may, their very behaviour will appear further to confirm many young black peoples’ most pessimistic assumption: that teachers, policemen, prison officers and so forth can be relied upon to act so aggressively towards them that dignified but dismissive resistance constitutes their only legitimate response. Such cycles of mutual irritation go a long way towards explaining the exceptionally high frequencies with which young Afro-Caribbean males are excluded from school, stopped and searched, appear before the courts, receive custodial sentences, and are identified as ‘problems’ in prison management.

All this poses a substantial challenge for the criminal justice system, and especially for the courts themselves. Not only do numerous cases which are grounded, at least in part, within such unhelpful cycles of polarisation come before the courts, but many Afro-Caribbean defendants have grown so sceptical about *all* majority institutions that they deploy their strategies of resistance as a matter of course. That judges and magistrates should find such behaviour extremely irritating is wholly understandable, since tactics of this kind implicitly treat the very impartiality of the court with contempt. But before utilising one’s authority to slap down those who have the temerity to behave in this way, it is worth remembering firstly that these irritating tactics may well have been generated in the context of a whole series of similar encounters, and secondly that all those who respond such challenges with naked force



thereby undermine any claims which they might have had to legitimate authority, at least as far as that section of the community is concerned.

In circumstances such as this the proper exercise of justice is manifestly rendered extremely difficult, and as Sir William Macpherson would doubtless confirm, there are no easy answers. Moreover whilst it is wholly reasonable to demand that the courts should not exacerbate these problems, it would be idle to suggest that the justice system acting alone can hope to resolve them. Only when the system of public administration in general begins to develop more specific guidelines about how the concurrent growth of racial inequality and ethnic pluralism can best be coped with will the criminal justice system be in a position to develop comprehensive solutions to these problems.

That said, some more specific guidelines which should enable the courts to avoid the worst of these problems can still be discerned. Firstly to ensure that no-one is put at a disadvantage simply because his or her normal modes of linguistic, cultural and behavioural expression differ from those routinely deployed by the native English. Secondly care should be taken to reassure minority defendants that the court will not overlook or dismiss their own perspectives and concerns, regardless of how they may have been treated – or in which they perceive themselves as having been treated – by other agencies. If routinely implemented such measures would not only significantly enhance the quality of cross-cultural communication, but also an invaluable counter to the prospect of minority defendants – and indeed minority litigants of all kinds – finding themselves being inequitably treated.

### *5.3 Telling stories*

Although improving the quality of communication in legal proceedings will clearly be welcome to all concerned, it is nevertheless worth emphasising that the comprehensive implementation of such guidelines would throw up some very substantial challenges to established practices and procedures. The reasons are simple enough. In so far as established practices and procedures are embedded within taken-for-granted English cultural conventions, as they invariably are, those very conventions and expectations will, at least in some circumstances, be at odds with the conventions in terms of which members of the minorities habitually operate. Hence considerable confusion – and hence miscommunication – can very easily occur if minority witnesses continue to utilise their own familiar modes of information presentation when these are at odds with those habitually used in court. Whilst

such problems may occur with respect all minority groups, the example presented here is set in a South Asian rather than an Afro-Caribbean context.

English lawyers, and indeed English law as currently constituted, generally take it for granted that unless every component of the evidence which a witness offers – be that in court or in earlier statements which he or she has given to the police – adds up to a coherent story, the credibility of the whole edifice is necessarily cast into doubt. Witnesses know that too, so even if they have confected all their evidence, they will invariably seek to weld their story together so that it forms a coherent whole. It follows that a central feature of cross-examination is the subjection of the evidence presented by each witness to the closest possible scrutiny; and since coherence and consistency are taken to be the touchstones of credibility, any cracks and contradictions in a witness' story invariably elicits the challenge "You're a liar!" from counsel. Moreover it is also assumed that if a witness can be shown to have lied with respect to any one component of his or her evidence, that its other components can be dismissed as unreliable.

Yet however familiar, and hence straightforward, this procedure and its underlying premises may seem, such conventions are far from being universally applied as the foundation for forensic examination and debate. In rural South Asia – as in many other peasant societies – the provision of accurate information to outsiders, and especially to outsiders who may be agents of the state, is regarded as most unwise, even if one has nothing in particular to hide. So long as one has no idea about what such outsiders are up to, nor of the use to which they might put such information, it is best – or so most peasants conclude – to dissimulate on principle. If there is a real prospect that accurate information about one's family's doings, and especially about its wealth, might be used to its disadvantage to outsiders, promoting the circulation of fictions makes good sense, since it likely to put one's enemies, whoever they may be and whatever their motives, off the scent.

Matters become more complex amongst insiders, and especially as between kinsmen and fellow villagers. They cannot be so easily fobbed off because they know too much already. Nevertheless it is striking that when disputes break out within extended kinship networks (as they frequently do), and when efforts are made to resolve the dispute in a *panchayat* or village council (as is equally routine), the rules of debate are quite different from those deployed in an English context. Whilst factual evidence is not entirely overlooked, a central

priority of each and every party to the dispute is to demonstrate that they occupy a position of moral superiority, in sharp contrast to their opponents' scurrilous behaviour. Nor are arguments necessarily restricted to the immediate dispute in hand. Besides raking over a long past history of disputes, which may go back over several generations, it is also entirely in order to seek to demonstrate that one's opponents have behaved in a morally inadequate way in some entirely different context. Since success in each of these many sub-arguments adds force to one's elbow, the debate around the central dispute is not only conducted on a point-scoring basis, but everyone readily shifts their position the better to counter whatever set of arguments their opponents may develop. So it is that all participants seek to demonstrate the inherent justice of their claims, and although a just settlement is precisely what the elders who make up the *panchayat* seek to achieve, no-one is greatly concerned with the fact that if taken as a whole, most people's stories lack coherence and consistency. How could that be, they might ask, given that everyone always seeks to present themselves in the best possible light? Indeed are not the English rather odd to regard anyone who constantly shifts their ground as *lying*, given that this is a wholly expected dimension of human behaviour? The elders – precisely because they *are* elders – are in no way alarmed, disturbed or misled by such tactics. Instead they are expected to see through all this, and to use their wisdom and experience to propose a just compromise.

An English courtroom is not, of course, a *panchayat*. Nevertheless to the extent that many members of Britain's South Asian population still routinely deploy just such conventions of debate, discussion and dispute resolution within the context of their own communities, it is hardly surprising that when and if they find themselves in court they continue to present themselves and their arguments in a familiar (and to them wholly reasonable) way. In view of this it is hardly surprising that South Asian witnesses – and especially those drawn from communities whose lifestyles are still close to their rural roots – very often do behave in ways which English observers find at best bizarre and at worst thoroughly unhelpful. Hence, for example, they may put a great deal of effort into demonstrating how morally upright they are, even when this has no apparent relevance to the matter in hand, and when they can be persuaded to address those issues, often turn out to be highly resistant to providing straight answers to a straight questions, and seem quite incapable of telling a coherent story.

To those not versed in such modes of argument and self-presentation, and especially to those who assume that the anglo-saxon tradition of empiricism provides the only viable foundation

for argument and debate, such flights of fancy may seem to point only in one direction: that rural South Asian is filled with congenial liars. But however tempted judges and magistrates – let alone solicitors and barristers – may be to concur with such a conclusion, it is worth remembering that access to the code which underpins such behaviour would not only render it much less bewildering, but would put one in a much better position to make a judgement about the total scenario to which all the witnesses had contributed, just as the elders in the *panchayat* seek to do. To ask members of the English judiciary to make equitable decisions in a situation such as this is, of course, to present them with a very substantial challenge. But if reacting positively to pluralism is the task in hand, developing the capacity to respond to situations such as this with a reasonable degree equity is precisely what is now required.

#### *5.4 Playing to the audience: exploiting stereotypes to one's own advantage*

There are, however, several levels to this agenda. Whilst dealing with situations in which both parties presents their arguments in the ways outlined in the previous section is challenging enough, reaching equitable decisions in situations where one only party does so more or less systematically, but where witnesses for the other side are sufficiently well-informed about English expectations to be able to present themselves in much more familiar terms poses yet greater difficulties still. Faced with a situation where set of witnesses follow their own relatively mysterious conventions, whilst the other present themselves in ways which the court finds much more familiar, there will almost inevitably be a strong temptation to favour that latter as against the former, regardless of what the real merits of their case may be. Whilst many examples of such a situation could be cited, one of the most classic is one in which serious conflict has developed between more or less conventionally minded South Asian parents and one or more of their British born and bred teenage daughters.

The underlying conflicts in such situations may well be real enough. Inter-generational tensions between concerned (and possibly over-concerned) parents on the one hand, and their rebellious (and possibly over-rebellious) autonomy-seeking offspring on the other are of course a commonplace feature of *all* societies. Nevertheless where conflicts grounded in such tensions come to the attention of English courts, and where the parents – in sharp contrast to their daughter – are largely unfamiliar with English ways, they may well find themselves quite unable to present their alarms and concerns in a way which will be meaningful to the court, whilst the daughter may well find she has an opportunity to have a field day at her parents' expense. Since the daughter will almost certainly have an excellent appreciation of

the impact which buzz words such as ‘arranged marriage’, ‘traditionalist’, ‘fundamentalist’ and so forth are likely to have on ill-informed English observers, painting her parents as mindless authoritarians, who are seeking to limit her freedom for reasons which are as arbitrary as they are unjust is a comparatively easy task.

That does not, of course, exclude the possibility that her parents are indeed acting in precisely that way. Nevertheless it should not be forgotten that it is equally possible, and probably more likely, that a headstrong and careless young woman is taking advantage of the deep divide between her parents assumptions and those of the wider English world to avoid all her parents’ efforts to impose a degree constraint on her unbridled hedonism. If so, it follows that she may well be far less unfamiliar with – or uncomfortable about – the moral conventions within which her parents operate than her carefully arranged self-presentation seems to suggest, and that her parents concern for her future may well have far less arbitrary foundations than was apparent at first sight.

Disinterring just what is going on in such circumstances, especially when they have led to all manner of additional altercations, is never an easy task, so much so that social workers, lawyers and judges who are not fully alive the many underlying cultural issues can easily find themselves seduced by what may well be little more than a bare-faced effort to pander to English sensibilities. Faced with a young woman who effortlessly presents herself as the put-upon victim of mindless power, unjustly oppressed in her efforts to exercise sweet freedom, it is easy to forget even to consider whether there might be another side to the story. In such circumstances worried parents can easily find their wholly realistic concerns about their daughter’s welfare given exceedingly short shrift, much to their surprise, alarm and bewilderment.

No easy guidelines can be offered with respect to issues of this kind, other than to remind oneself that to uncritically prioritise arguments which are set within a conceptual framework with which one is already familiar, and in so doing to discard and devalue those which are grounded in some other less familiar conceptual universe cannot be regarded as an adequate foundation for either equity or justice. Or to put it the other way round, a failure to do so will inevitably institutionalise inequity and injustice.

## 6 Conclusion: facing up to relativity

### 6.1 *Whose culture?*

Yet although equity demands that legal decision-making should be broadly neutral in cultural terms, for to do otherwise would inevitably privilege those who deployed one set of cultural conventions, whilst correspondingly disprivileging all those minority groups who chose to use some other set of cultural conventions to organise their lives, putting that ideal into operation is, of necessity, an exceedingly challenging task. The most central reason why this is so will by now be obvious enough. In a world which either is, or is at least assumed to be culturally homogeneous, the taken for granted premises which underpin that tradition can be used as yardsticks of normality – or in the language of the Common Law, as reasonable behaviour. However the moment one acknowledges firstly that ours is *de facto* a plural society, and secondly that a failure to acknowledge the existence of plurality will, of necessity, open the door to the institutionalised inequality, a whole series of ideas which had hitherto not been subjected to much analytical scrutiny – and most especially the concept of reasonable behaviour – is instantly rendered highly problematic. What is reasonable? Whose view of reasonableness is the most reasonable? Or to put it more precisely, once yardsticks become relative, just what *are* the appropriate yardsticks in any given context, and how, by whom and on what basis should they be located? Moreover this question also needs to be addressed at two levels: firstly within the context of any given minority community, and secondly as between the minorities and the majority.

### 6.2 *Cultural variety within the minorities*

Although verbal shorthand often leads us to use a form of words which appears to suggest that members of a large social category – such as ‘the Chinese’, ‘the Asians’, ‘the Afro-Caribbeans’ and so forth – all tend to act in a similar way, such large-scale grouping invariably exhibit a very substantial degree of internal cultural diversity. Hence, for example, Hakka cultural conventions differ in certain important respects from those deployed by Han Chinese, even if both have Cantonese roots; likewise Punjabis differ from Gujaratis, Yoruba from Ibo and so on and so forth.

However even if we accept the existence of these variations, of which only those intimately familiar with the communities in question are likely to be aware, none of these have been left untouched by their user’s passage to Britain. Hence despite the apparent conservatism of most members of the first generation of settlers, it is worth remembering that the process of

settlement and ethnic reconstruction has in fact been an active process of adaptation, such that the lifestyles which have emerged in Britain are from being carbon copies of those back home. Hence even the most conservative families turn out, on close inspection, to have made the most of – and hence had their lives transformed by – all the many material opportunities available in their new environment. But although many settlers soon become avid users of all manner of consumer gadgetry, and in that sense highly westernised, it certainly does not follow that moral values in terms of which they organise their lives will always have been similarly transformed. Quite the contrary. Although attitudes vary a good deal within, and even more so as between specific communities, most settlers are not only strongly committed to sustaining the values they hold most dear, but to the extent that their image of how one ought to behave is often set in rose-tinted vision of the past, they not are infrequently more conservative in their outlook than their non-migrant peers. Hence if one seeks to establish yardsticks of normality in such contexts, it is essential to base them in an appreciation of the logic of the customs and conventions which *underpin current patterns of social relations within local settlements in Britain*. It goes without saying that these conventions often differ quite substantially from those deployed within migrants' villages of origin, let alone from those laid down in formal compilations such as the Hindu *dharmashastras* and the Islamic *shari'ah*.

Nor is that all. However much the older generation may idealise the way things were back home, the details of that vision is endlessly contested as between women and men, between the more and the less religiously committed, let alone as between those who insist on strict behavioural orthodoxy and whose understanding of religion as a spiritual experience leads them to adopt a much more relaxed outlook. Over and above all this the younger generation have also begun to throw their hats into the arena, but in equally diverse ways. As is only to be expected they frequently their parents' understandings, but in no less diverse ways. Some (although many fewer than outsiders tend to assume) argue for the comprehensive adoption of English ways, others argue that established practices (of arranged marriage, for example) should be subjected to a greater or lesser degree of modification, whilst others yet again are seeking to create (or as they see it to revive) the ideal behavioural order which underpinned – or so their personal explorations suggest – the ideal world of the Islamic *umma*, the Sikh *khalsa*, or indeed of Rastafari.

Given the complexity of these processes, let alone the capacity of most members of the younger generation to navigate their way through a wide range of differently structured arenas, constantly re-ordering their behaviour as they go along, any attempt to label individuals as intrinsically ‘westernised’, ‘traditional’, ‘religious’ and so forth is profoundly misleading. Hence rather than seeking to slot individuals into fixed categories of this kind, it is invariably far more illuminating to make an assessment of the way in which they are likely to have configured their behaviour *in a given context*.

### 6.3 *The organisation of justice in plural Britain*

This Chapter began by highlighting the vital importance of verbal communication to the processes of adjudication, so much so that communication failures arising from cross-cultural misunderstanding could strike deeply at the effectiveness of the delivery of justice in courts and tribunals of all kinds. However it should now be quite clear that these problems – and their associated conundrums – arise at many levels in the context of our increasingly multi-lingual and poly-ethnic society. But although we began by considering the way in which properly equipped and supported interpreters can greatly assist the court in overcoming the most overt obstacles to mutual understanding, closer inspection soon revealed that accurately translating what has been said in one language into a form of words which is equally meaningful to speakers of another is a far more challenging task than is commonly appreciated.

If a language was merely a collection of words, interpreting from one language to another would involve little more than a mechanical process of substitution, such that words and phrases drawn from the lexicon of one language are replaced by those drawn from another. But as anyone who has tried to do so themselves will know, the process is in fact far more complex than this. Besides having its own lexicon, every language is grounded within its own conceptual system, which is in turn a vital component of the much wider cultural context which its speakers have constructed around themselves. In the absence of an understanding of the wider conceptual framework within which someone is operating, it is almost impossible accurately to describe – or to provide others with a means of comprehending – the significance of what that person has done or said.

To the extent that that is so, the ever-growing salience of linguistic and ethnic plurality in contemporary Britain presents all those involved in adjudication with challenges which run



far beyond the technical problem of translation: at least in principle all the system's well established measuring tools – and so the very yardsticks of justice themselves – are thereby called into question. This is not to argue for out and out relativity, or to insist that because any conceptual system is as good as any other, everything must thereby be allowed to take its course. That is a recipe for chaos. We all live in a single society, and no matter how plural its various elements may be, the legal system plays a vital role in holding all those elements together.

However fulfilling this task effectively is by definition a balancing act. Whilst order is most easily articulated in situations of comprehensive homogeneity, to act *as if* such homogeneity was the reality in the context of a society which is *de facto* plural will, of necessity, lead to inequitable outcomes, for those who differ will instantly find themselves at a disadvantage. Just how the courts can best set about negotiating their way between these two conflicting principles is still an open question, and many years are likely to pass before such questions are fully resolved. One point is quite unquestionable, however: these are issues which we cannot afford to ignore.