Ethnic and religious diversity in Britain: Where are we going?

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When the early British Race Relations legislation was being crafted, I am not sure that anyone really envisaged the extent to which the goalposts would be shifted so dramatically against the liberal model of equality which was encoded in them. In fact, that model is increasingly coming into question as the claims of ethnically and religiously diverse individuals and groups present themselves within and outside official legal systems. There is, however, no agreement, if there ever was, about what sort of response legal systems should be making to the fact of ethno-religious plurality, and it appears that British legal systems have become the sites of contestation about which vision of the future should be pursued. In this scenario, the anti-discrimination laws, which I perceive to be the central concern of this conference, appear to be just one tool with which such battles are being waged, albeit with dissatisfaction on all sides.

It may also be necessary to excavate what we think anti-discrimination law is there for. Here we waver between speaking of 'equality' and 'diversity' in the same breath, as the very title of this conference indicates. While equality is a cherished value in the treasure trove of Western jurisprudence we ought to recall that its basis lies in the Protestant notion of the priesthood of all believers, and is not a value necessarily subscribed to by all others to whom it is allegedly directed (Benthall 2005). I therefore much prefer to pin my analysis on the fact of diversity and to look at the possibilities of how we can develop a 'plurality-conscious' jurisprudence (Menski 2006) with that in mind.

Meanwhile, there seems to be deep unease among legal personnel, at all levels, including academics, about plurality and the legal requirements and demands of the 'other', and being told that we are 'institutionally racist' does not go down terribly well, particularly when we are never quite sure what that is or what to do about it. While one can certainly point to examples of cases in which judges and statutory laws have tried to accommodate claims of the 'other', there is simply too much evidence of ineptitude or fussiness in handling such claims, and perhaps even resentment about how much 'we' are giving in to 'them', positions which do not make for a strong foundation if we want to move towards a deeper constitutional commitment to plurality.

Implicit in this paper is a search for an alternative theory of legal and, in particular, judicial activism that might be better suited to the post-modern condition of ethnic plurality, however much that condition is being brought into a dialectic relationship with a post-imperial nationalism under the umbrella of which it is sought to consolidate a socially cohesive notion of Britishness. These are all large questions which can only be dealt with in a much more detailed work, so I can claim at best to be inching towards such an alternative framework. Steeped as we contemporarily are in human-rights-ism, it would be tempting to argue that human rights can constitute the best anchor for any movement towards an activist 'jurisprudence of difference'

(Cotterrell 2003). Certainly, Poulter (1998) appeared to argue that a human rights methodology might be the best way in which claims of ethnic minorities should be assessed. I am not so convinced that this is the only way to look at things, although that may well turn out to be an important hook upon which plurality-conscious lawyers and judges will wish to hang their activism.[1] Rather my plea is for an activist jurisprudence concerning issues of ethnic plurality to be based firmly in an awareness of socio-legal realities, notwithstanding their ex-post juristic grounding in human rights rhetoric.

The converse of my argument is that our legal personnel, being rather conceptually ill-equipped, have generally failed to harness relevant facts in litigation and other law-making processes in a plurality-conscious manner. In effect, this then is a plea for legal decisions to reflect the social reality of inter-ethnic relations and how these are leading to emerging conflicts and tensions requiring responses (although not necessarily resolution). This entails difficult choices, but those choices ought to be based on a wider and more explicit appreciation of social patterns about which, it appears, judges and others are not especially well informed. This may be a systemic problem of litigation generally, with legal personnel not being responsive enough to a wider range of evidentiary material. It may, in the context of general ignorance about plural Britain, also be to do with the under-use of expert evidence in pluri-ethnic contexts (Ballard 2006, 2007). This is also a plea for judicial decisions to be more explicit about the policy goals they wish to promote through the choices they have made and to what extent they are prepared to countenance the recognition of plurality in contemporary Britain.

Once I was teaching courses on ethnic minorities and the law from the early 1990s, it was obvious that the dominant framework of the Race Relations Act had to be a critical component of the curriculum. In particular, the material under examination could provide an index of how inter-ethnic encounters that led to social problems were surfacing and were being handled by the official law. Among the framers and promoters of the legislation was the Home Secretary, Roy Jenkins, who presented the Act's objective as being 'the promotion of equal opportunity, accompanied by cultural diversity in an atmosphere of mutual tolerance' (Loveland 1993: 342).[2] Jenkins vision was in stark contrast to Enoch Powell's who spoke out against the Race Relations Bill of 1968:

> Here is the means of showing that the immigrant communities can organise to consolidate their members, to agitate and campaign against their fellow citizens, and to overawe and dominate the rest with the legal weapons which the ignorant and the ill-informed have provided.

[1] See for example Munby J in *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075, esp. at paras. 61-69 and Arden LJ in *Khan v Khan* [2007] EWCA Civ 399, at para. 46. Menski 2006: 19 states: 'Since law is itself an internally plural phenomenon, a globally-focused legal theory cannot avoid taking a realistic plurality-conscious approach that respects and highlights different perspectives, never totally ignoring consideration of 'the other'.'

[2] In fact this appears to have been a reworking of a definition of 'integration' which Jenkins had publicised in the 1960s and although it has subsequently become a classic definition for that term, it is debateable how much it is subscribed to in practice.

Far from being regarded as a weapon of the weak, the race relations legislation carried, in Powell's view, the seeds of a mechanism that would be used to oppress Britain's native population. It is difficult to see how the legislation would have worked to promote an atmosphere of mutual tolerance if Powell and his many silent supporters had come to view it as an act of antagonism. Further, as Britain was pluralising, it seemed evident from the framework of the legislation and indeed many of the judgments given under it that the legal system was unable or unwilling to respond positively either to the country's general condition of plurality or to the web of tensions that it would be called to rule upon in individual cases.

The shadow of slavery and history of black-white relations in the US dominated the thinking of the framers of the race relations legislation. And legal developments in the US were to provide the model for anti-discrimination law here too. As Gregory notes (1987: 5), 'the British legislation was quite explicitly drafted on the basis of developments in American case law.' Meanwhile, Füredi (1998) argues that the global challenge to colonialism, and its basis in white supremacy, led to a concerted Western-sponsored international law-making on racial discrimination. I am interested in, though have no conclusive response to, whether in Western Europe, the lessons of events leading up to and during World War II have been more influential in establishing different legal approaches to questions of ethnic plurality. In the East Bloc meanwhile, the old questions about minority protection persisting since the League of Nations days appear to have been blanked over by the prevailing socialist emphasis on equality, but have resurfaced since the end of the Cold War. One can envisage that these different histories will make the job of establishing a broader EU wide normative agreement on ethnic diversity extremely difficult.

The US and the UK have meanwhile increasingly diversified in ethnic and religious terms as a result of continued large scale immigration from a far wider set of source countries (as have virtually all current EU member states). The race-and-class structuralism that pervaded British race relations thinking has significantly come into question (Ballard 1992). Conceiving of inter-ethnic relations is no longer constricted by the opposition of 'whites' and 'blacks', a term which once included *all* non-white ethnic minorities.[3] The term 'coloured' has interestingly persisted as a feature in some judgements as a euphemism for 'non-white' people, although it does not seem to be in use more widely any longer.[4] Questioning of the term 'black' initially led to the bifurcation between Afro-Caribbeans and South Asians ('Asians') upon which public policy responses tended to be based, but this framework is itself now questioned and we are now not sure quite what we should make of 'super-diversity' (Vertovec 2006, Shah 2008a). Meanwhile the excruciating persistence in public policy usage of the abbreviation 'BME' (black and minority ethnic), once broken down, reveals it own conceptual confusions; black people are separated from 'minority ethnic' people as if the former do not engage in processes of ethnic boundary making and self consciousness as everybody else. The term might nevertheless belie the widespread expectation that indeed black people are simply different in colour and otherwise (should) assimilate to the majority's value system (Lawrence 1974: 35-36). So, for example, a nursery for two to five year olds, with largely Afro-Caribbean children, and which sought to replace an Afro-Caribbean employee of the same background on

[3] Gregory (1987), for instance, reflecting the dominant usage in the 1980s, often uses the term 'black' in this way.

[4] See Lord Templeman in *Savjani v IRC* [1981] 1 QB 458, at 468A; Macpherson J as cited in *R v Cleveland County Council and Others ex parte Commission for Racial Equality* [1993] 1 FCR 597; Latham LJ in *R v Anthony Stock* [2008] EWCA Crim 1862, para. 55.

the basis that she would have knowledge of various aspects of Afro-Caribbean culture, has to jump through hoops before establishing the lawfulness of such a preference.[5]

The legal community has been hardly well placed to respond to such questions. Legal academics appear to have largely kept a distance from developments in other social sciences while, with some exceptions, other social scientists have tended to keep away from addressing problems underlying legal issues. Therefore, while ethnic and religious plurality has moved to a level now extremely difficult to monitor and assess, the anti-discrimination law is itself increasingly being used in ways and by people that the framers may well not have anticipated, while its conceptual apparatus is arguably ill-adapted to cope with the multi-stranded claims now being made upon it. Thus terms like religion, ethnicity and culture, assimilation, hybridity and pluralism remain under utilised within an impoverished legal discourse. The hidden assimilationist claims of Western 'legal technicalism' (Ehrlich 1917) and its methodological nationalism (Cotterrell 2008) are thereby allowed to undernourish the acceptance of cultural diversity that Jenkins foresaw. In fact, implied within such assimilationism, now repackaged under the label of 'cohesion', is a reading of ethnicity and religion as matters of choice, and one's best strategy is thereby to minimise one's difference and not rock the boat.

It remains a sad fact that the definition of ethnic group for the Race Relations Act 1976 continues to be applied in asymmetrical ways. Thus while some Sikhs had been able to mount a successful campaign to have their status as an ethnic group established by the House of Lords in *Mandla*[6], members of other groups and communities have fared less well. Rastas in particular were unable to have their status recognised as an ethnic group in the *Dawkins* case.[7] While in both cases it is arguable that, had the legislation spelt out that religion may be part and parcel of an evaluation of ethnicity, and perhaps even a central component of it, as indeed the framers appeared to have thought, then those seeking recognition would not have had to be subject to judicial nitpicking as to whether a religious group qualified as an ethnic group also. Or perhaps our judges just don't like Rastas, and prefer compliant Sikhs? But then we get recent cases like *Watkins-Singh*[8] some 25 years after *Mandla*, with a schoolgirl having to establish her right to wear a Sikh *kara*. Was this a case of faulty legal advice or simply official bloody-mindedness?

Early commentaries about the Race Relations legislation of the 1960s concentrated on the lack of effective remedies, the extent of coverage and the definition of discrimination (Lester and Bindman 1972). While the 1968 legislation extended coverage beyond entry into public places, introduced by the 1965 Act, to include

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[5] *Tottenham Green Under Fives' Centre v Marshall* [1989] IRLR 147, [1989] ICR 214, EAT and (No. 2) [1991] IRLR 162, [1991] ICR 320, EAT. The relevant aspects of Afro-Caribbean culture were stated to be: '(1) maintaining the cultural background link for the children of the Afro-Caribbean background; (2) dealing with the parents and discussing these matters with them; (3) reading and talking where necessary in dialect; (4) generally looking to their skin and health and including the plaiting of their hair.'

[6] *Mandla v. Dowell Lee* [1983] 1 All ER 1062 [HL], [1983] IRLR 209.

[7] *Dawkins v. Department of the Environment* [1993] IRLR 284. On the case law on ethnicity see, in detail, Jones and Welhengama 2000: 27-57.

[8] *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin).

employment and housing, the Race Relations Act 1976 extended the definition of discrimination so that unlawful discrimination may exist not just when one has, for example, been flatly denied a job or a tenancy 'on racial grounds' (direct discrimination), but also when a lower proportion of a particular racial group are able to comply with the requirement or condition used (indirect discrimination). This latter form of discrimination was aimed at tackling institutionalised forms of discrimination that could not necessarily be put down to individual actions, but the rules do not allow for group or class actions. As noted, the definition of 'racial group' included one defined by its ethnic origins but not religion. Remedies were restructured to allow access to industrial tribunals (now employment tribunals) in employment cases and the county court in non-employment cases. The government appointed Commission for Racial Equality (CRE) was placed in a supervisory role, with powers to make investigations, and allowed to either fund claims it thought were worth backing or to take legal action on its own initiative. While these developments allowed an extension of the types of claims which could be made upon service providers, employers and state agencies, the very mechanics of legal practice tended to be trusted to deliver just outcomes. Very little thought was therefore devoted to just how, when faced with the detail of factual scenarios which had given rise to certain claims, the legal system might be enabled to arrive at a plurality-conscious appreciation of the context.

This is not to argue that there was no incisive and critical comment on the legislation, focusing on the possible 'internal' and 'external' limits. On the one hand, the limits within legal practice were revealed by writers such as Lustgarten (1980) who wrote that the 'alien standards of the statute' would cause problems for decision makers, particularly in employment cases, where judicial thinking had been confined within the narrow framework of contract law doctrine. Lustgarten's was effectively a pessimistic evaluation of how the legislation could be expected to work in practice given the presuppositions with which judges viewed their role. This evaluation identified potential problems with their ability to grasp new concepts such as indirect discrimination which implied a shift in the line drawn between privately and publicly acceptable behaviour. Ultimately, with Lustgarten, it was not a case of statute frustrating judicial activism, but a case of judicial conservatism not sitting easily with the focus of a statute imposing new duties on judges to be more active. This view of judicial inertia was borne out by others including Gregory (1987) and Griffith (1997), the latter writing about the politics of the judiciary.

Allott (1980), on the other hand, wrote critically about the wider effects of this sort of reformist legislation which would merely result, he felt, in discriminatory practices going 'underground' as people would cease to reveal the real reasons for their decisions. Attitudes would remain unchanged as a result. Some British judges too have been imbued with this sort of scepticism about the role of statutory reformism when judging specific cases, essentially drawing a limit to law's capacity to police and alter public attitudes. In an early case Lord Diplock had said:

> The arrival in this country within recent years of many immigrants from disparate and distant lands has brought a new dimension to the problem of the legal right to discriminate against the stranger. If everyone were rational and humane - or, for that matter, Christian - no legal sanction would be needed to prevent one man being treated by his fellow men less favourably than another simply upon the ground of his colour, race or ethnic or national origins. But in the field of domestic or social intercourse differentiation in treatment of

> individuals is unavoidable. No one has room to invite everyone to dinner. The law cannot dictate one's choice of friends…
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> Thus, in discouraging the intrusion of coercion by legal process in the fields of domestic or social intercourse, the principle of effectiveness joins force with the broader principle of freedom to order one's private life as one chooses.[9]

Allott's and Diplock's may be legitimate critiques of over-ambitious positivism, and may also be a salutary corrective to Jenkins' exaggerated vision of the role of state agency. Gregory (1987: 4) for instance cites evidence of ongoing discrimination, segregation and glass ceilings in the workplace. However, such critiques should not necessarily be taken as legitimating judges' passivity in questions of considerable public importance. While advocacy of an activist judicial stance must be alive to the limits of how far state law can alter perceptions or behaviour does it necessarily mean that judicial pronouncements ought to bear no educative role?

There was series of early cases in which judges effectively crippled the CRE's attempts to investigate suspected discriminatory practices, deflated the 'activist' strain within that organisation on the basis that it was trying to promote its own brand of political correctness, and forced it to stick closely demanding 'fairness' criteria during investigations (Griffith 1997: 178-9, Gregory 1987: 118-125).[10] The organisation had become a kind of piggy-in-the-middle and bound to be accused of failing in one of its statutory functions of promoting good relations between persons of different racial groups. Gregory (1987: 6), writing of both the CRE and the EOC, argued that their impact after some ten years had been minimal and they had 'become convenient whipping posts; frequently ignored by government, undermined by the courts and criticized by disillusioned civil rights campaigners.' Some local authorities, which had taken up the cudgels on the basis of their duty to promote good relations between persons of different racial groups against firms and sports bodies seen as breaching their commitment to the anti-apartheid movement, were also told to 'cool it'.[11] Legal activism by these public bodies, which had interpreted their statutory duties robustly, was therefore effectively limited and much of the onus of litigating under the Race Relations Act was therefore down to individuals.

While the legislation does not seek to ascribe a notion of guilt to discriminatory behaviour, that is the way in which it appears to be interpreted in practice by the judges. The concept of direct discrimination requires only less favourable treatment on racial grounds to be shown, and motive or intention is irrelevant. But it seems that in practice the motives of the alleged discriminator become the central issue (Gregory 1987: 35). In indirect discrimination actions, while intention or motive is also not relevant to establishing that a requirement or condition is unlawful, for damages to be awarded an intention to discriminate must additionally be shown. While, this can act as an obvious disincentive to any claimant, it is interestingly hidden away in a latter part of the 1976 Act (s. 57(3)). Implicit in all this

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[9] *Dockers' Labour Club and Institute Ltd. Appellants v Race Relations Board Respondents* [1976] A.C. 285 at 296.

[10] See *CRE v Amari Plastics* [1982] 2 All ER 499, *R v CRE, ex parte Hillingdon LBC* [1982] AC 779, *CRE v Prestige Group plc* [1984] 1 WLR 335.

[11] *Wheeler v Leicester CC* [1985] 2 All E.R. 151; *R. v Lewisham LBC Ex p. Shell UK* [1988] 1 All ER 938.

is the notion of guilty mind and, tied to this, the worse fear that a defendant is being potentially branded as 'racist'.

Now we can turn to examining some cases which have arisen in education contexts. Here issues about respect for familial values, diversity and culture, ensuring non-exposure to institutional discrimination and, perhaps most centrally, the welfare of children, are evidently (though not necessarily explicitly) interspersed with all sorts of other public policy considerations and the interest positions of a variety of public and private actors. These problems are not of course unique to the education field. A study I am in the process of conducting on Hindu law adoptions in British immigration law (Shah 2008b), reveals the intense ethno-centrism and state-centrism of the British adoption model being applied to transnational adoption decisions among Hindu and Sikh families. In this plural field, consideration of how best to ensure the interests of children appears to take a back seat despite the ostensible claim of decision makers that they are concerned to ensure that those interests are taken account of. Much of the early formative case law from the 1970s and 1980s was concerned with employment issues, and often involved the first generation of migrants some of whom were being treated pretty badly. While such cases of migrant generations do and will forseeably continue to come up, the education cases constitute a 'second generation' of cases, particularly from the 1990s, in which parents of children schooled in Britain seek to argue for their interests as they see them through the anti-discrimination and other laws.[12] These cases also demonstrate that legal arguments are often not well chosen to properly inform courts of the multi-ethnic context of the cases and that, perhaps as a result, judges are not willing to go much beyond the arguments placed before them, and are more prone to stick to the letter of the law than to be interested in considering wider policy issues particularly as they affect ethnic minorities.

In *Cleveland*[13] one parent had asked to have her daughter, then five years of age, removed from a school in which the majority of the children were Asian to one where the majority were white. She wrote to the county education officer:

> My reason for this is I do not think its fair for Katrice to go through school with about four white friends and the rest Pakistan, which she does not associate with. I think the school is a very good school, but I do not think its right when she comes home singing in Pakistan. I know they only learn three Pakistan songs but I just do not want her to learn this language.

In a later affidavit presented for judicial review proceedings brought by the CRE against the decision of the local authority to accede to her request she wrote:

> I was simply concerned about what Katrice was being taught and the foreign language she was being taught to speak at a time in her schooling when in my view she had to learn to read, write and speak her own language first. I was also concerned that because the Asian girls did not speak good English and did not mix with the white children that Katrice was not making enough friends and that this would also be bad for her development.

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[12] The rise in such cases may also be a function of the tendency for educational matters to become legalised and a consequent increase in litigation more generally in the field, as well as the continuing development of administrative law.

[13] *R v Cleveland CC and Others ex parte CRE* [1993] 1 FCR 597.

This case illustrates a point made above about the ways in which judges have attempted to absolve defendants when, as they see it, a charge of moral guilt is implied by legal proceedings being take against their actions. Macpherson J (later to chair the Stephen Lawrence inquiry) stated in the High Court that, 'I have no reason at all to doubt that Mrs Carney has in fact no objection whatsoever to Asian people. She has lived amongst them and has always got on well with them.' Meanwhile, Parker LJ giving the only reasoned speech in the Court of Appeal, said that, 'Mrs Carney can leave this court as she left the court below with no racist stain upon her.' Interestingly, in absolving Katrice's mother of any blameworthy intention, Macpherson J also found it relevant that 'Katrice's father is partly African and is obviously coloured and that Katrice herself is thus of mixed race'.

This case is also important for role of the CRE, which had been increasingly concerned about the effects of the Education Act 1980 and the right given therein to parents to opt for a school, which the CRE thought was leading to segregationist tendencies within schooling. In the High Court and Court of Appeal the CRE came in for intense questioning about what was to be achieved by highlighting the express reasons given by a parent when local education authorities were obliged to act upon choices made by parents where no reasons or false reasons were given for those choices. Consequently, both courts found that the duty to act on parental preference under the Education Act 1980 overrode any duties under the Race Relations Act.

Poulter (1990: 84) wrote of the possibility that the tendency towards segregation could be furthered by the Education Reform Act 1988, stating:

> the 1988 Act may further encourage white parents to attempt to move their children from excellent multiracial schools … for no good educational reason at all. However, there is no reason why Asian parents should not apply to the same schools as those specially favoured by white parents if they wish to do so. In this way segregation of children by colour or culture may be avoided.

Poulter's advice was that if white parents are choosing to opt for white dominated schools, there was no reason why Asian parents should not follow suit. In *Sikander Ali*[14] a parent who tried to do precisely that for his son found that he was not allocated a place at any of his choice of three schools. It was discovered that the LEA had defined the admissions policy according to 'traditional links' which gave priority to siblings of those who were already at the schools and, in the second place, according to catchment areas which varied in size according to the extent of oversubscription. It was found out that the catchment area for the preferred school tended not to cover the area of Manningham in Bradford where the family lived, a city in which high levels of segregation along ethnic lines, in schools, amidst profound inter-ethnic tensions, has been noted.[15] It also appears that this case was being seen as a sort of test case, as some 30 Asian parents were interested in the outcome of the proceedings

One of several grounds of challenge was that the policy was indirectly discriminatory in that there was a higher proportion of Asian families living in Manningham and their chances of securing a place at a preferred school were

[14] *R v Bradford, ex p Sikander Ali*, *The Times*, 21 October 1993, [1994] ELR 299, [1994] Admin. LR 589, [1995] L.G. Rev. 81.

[15] For a vivid account of the Asian presence in Bradford and responses to it through writings see McLoughlin (2006), and specifically on segregation in education in Bradford see Johnston et al (2006).

significantly lower than that of a white family living inside a school catchment area. Jowitt J held on this point that there was no indirect discrimination because even though non-Asian parents outside Manningham were far more likely to have their preference upheld than Asians living in Manningham, this was an inappropriate basis of comparison. Rather the correct approach was to compare the rate at which the preferences of Asian and non-Asian parents living in Manningham were met and, when this comparison was made, Asians in Manningham were no worse off than non-Asian residents of that area. The basis of the claim thus brought into play what the appropriate comparator should be. There is of course a great deal of lawyerly and judicial leeway as to how an argument like this can be put. It does not appear to have been considered, given that Manningham was known to be an area of heavy Asian immigrant concentration, that to effectively limit the number of school places obtainable as a matter of preference for those resident there could in itself have amounted to discrimination because it would have affected a greater number of Asian families in the overall area of the LEA's jurisdiction. Rather, the comparators chosen by counsel for the applicant and by Jowitt J effectively defeated the cogency of the indirect discrimination claim.

It had also been argued on behalf of the applicant that the traditional catchment areas policy was an improper consideration and therefore Wednesbury unreasonable if the respondents already knew there was an immigrant community only sparsely represented in those areas. Arguably that ought to have been an additional basis of the claim for discrimination, rather than the claim of unreasonableness. Perhaps therefore there are also grounds for thinking that the arguments for the applicant were not as carefully crafted as they could have been. Interestingly, in deciding to reject the claim of discrimination the choice of terminology by Jowitt J is telling: 'there is no case made out here of indirect racial prejudice.' The issue of course was not whether there was 'prejudice' but indirect discrimination because a member of a particular racial group could not comply with the requirements set out. Jowitt's J's use of the term 'prejudice' again shows the extent to which judges have persisted in interpreting discrimination as a matter of subjective intent or motive, and then somehow seeking to limit the opprobrium entailed.

Other cases have also demonstrated that for parents, especially of Asian background, the issue of school places and admission continued to be problematic. In *Parveen Malik*[16]the challenge was against the decision of the Secretary of State to turn down the governors' application for grant maintained status for an all-girls school and to approve its closure. The challenge rested on the Sex Discrimination Act (in so far as authorities were obliged not to discriminate on grounds of sex in performing their education duties). However, one of the arguments made was that it was unlawful to have approved closure in light of the fact that there was rising demand for single-sex places for girls, especially as a result of an increase in the Asian population in the area. The judgment by Rose J was largely based on the limited amount of information available to the Secretary of State at the time the decisions were made, while the existence of another all-girls school in the LEA's jurisdiction loomed large in the reasoning. No space appears to have been devoted in the judgment to whether the situation of Asian parents should have been specifically considered and, again, it is arguable that an additional Race Relations Act ground ought to have been considered

[16] *R v Sect. of State for Ed., ex parte Parveen Malik* [1994] ELR 121.

by the lawyers.[17] Could it have been a tactical decision to keep 'race' out of the equation altogether since there might be more points in alleging sex rather than racial discrimination?

In the last few years, there has been a spurt of legislative activity which is particularly pertinent to the issues of ethnic and religious diversity. At the same time the field has become intensely polemicised, with the many contradictions keeping tensions high. The Human Rights Act 1998 has of course been a key factor and many discrimination challenges tend to tack on, or are based squarely upon, human rights grounds. The European legislation in the form of two Directives of 2000 – the so-called 'race' and 'employment' Directives - has also given a further fillip to Europe wide discussions of anti-discrimination law as it affects questions of ethnic and religious diversity.[18] While the employment Directive covers discrimination on grounds of religion and belief in workplace only (perhaps reflecting European reservations about how far religion should be a protected characteristic), the UK's Equality Act 2006 now takes matters further and reflects almost the same level of statutory coverage for religion or belief as under the Race Relations Act 1976. Thus finally grievances among members of religious groups, particularly Muslims, who had argued that the Race Relations Act favoured Jews and Sikhs are now mitigated. The test will be how judges are minded to approach claims based on religion.[19]

One should also mention the Race Relations (Amendment) Act 2000 as a further statutory development of the 1976 Act. The 2000 amending Act closes the gap for much of the public sector, given that the 1976 Act was interpreted by judges as not applicable to public authorities generally unless specifically stated. The 2000 amendment actually came with the background of some hard questioning of the extent to which public authorities had been identified as failing to live up to non-discrimination standards. This was particularly raised by the Macpherson Inquiry report (1999) which had recommended that the police and other authorities should be covered by the race relations law, a recommendation immediately accepted by the government. Crucial to the report was the Inquiry's own definition of 'institutional racism':

> the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.

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[17] Many parents concerned to secure single-sex education, particularly for their daughters, are often choosing denominational schools although their right to select in such a way as to give preference to religious background has been, perhaps rightly, upheld by the House of Lords: *Choudhury v Bishop Challoner RC School* [1992] 3 All ER 277, [1992] 3 WLR 99, and see also Education Act 1996, s. 411(3)(b). See also recently *R (on the application of E) v Governing Body of the Jews Free School and others* [2008] EWHC 1535 (Admin).

[18] Council Directives 2000/43/EC and 2000/78/EC respectively.

[19] *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin) seems to suggest that a test of 'exceptional importance' to race or religion is to be applied in cases of worn items. The South African approach, in *MEC for Kwazulu-Natal, School Liaison Officer and others v. Pillay* (CCT 51/06 [2007] ZACC 21 which appears to depend on 'sincerity' of beliefs and also uses the wider concept of 'culture', is preferable. The case was cited in *Watkins-Singh* but not followed.

Indeed, the then Home Secretary, Jack Straw, was almost self-flagellistic when he stated in the House of Commons:

> In my view, any long-established, white-dominated organisation is liable to have procedures, practices and a culture that tend to exclude or to disadvantage non-white people. The police service, in that respect, is little different from other parts of the criminal justice system - or from Government Departments, including the Home Office - and many other institutions.[20]

So while, the 2000 amending Act extended the 1976 Act's coverage to public authorities (partially excepting immigration and some other governmental functions), it also imposed on all such authorities the old section 71 duty to eliminate unlawful racial discrimination, to promote equality of opportunity and good relations between persons of different racial groups, and supplemented it with duties to undertake monitoring. The concepts contained within section 71 are broad, and can be linked to the formula of tolerance and diversity which Jenkins had earlier spoken of. But on their face, they do not appear to reflect the Macpherson definition of institutional racism nor its acceptance by the Home Secretary on the publication of the Inquiry report. Thus public authorities may be none the wiser about how precisely to address the problem of inequitable, culture-blind service provision and can continue to go about their 'unwitting' ways unless challenged by coherent and plurality-conscious litigation strategists.[21] In light of the criticisms made in this paper about the lack of a plurality-conscious perspective informing litigation tacticians and judges, it would be interesting to now study the role of the assessors who are meant to sit with county (or sheriff) court judges.[22]

Except for the Equality Act of 2006 much energy appears to have been expended legislating prior to 9/11 and 7/7. Particularly since 9/11 the atmosphere has changed dramatically and it would be difficult for a Home Secretary today to public make the kinds of statements which Jack Straw had made in the lead up to the 2000 amending Act. Since 9/11 'multiculturalism' has acquired many critics and national cohesion is now the order of the day. Alterity is now to be scrutinised in light of the resurgent values of the Enlightenment, even though some figures like Dr. Rowan Williams have refused to cow down to such contemporary McCarthyism. The Equality Act 2006 itself appears to perpetuate ambivalence about whether the aim of anti-discrimination laws should be to encourage respect for our differences or the kind of assimilationism which is implied in the concept of equality. It is perhaps no coincidence that the new supervisory body for anti-discrimination law is named the Commission for Equality and Human Rights. In light of the picture drawn in the foregoing paragraphs, and in light of current 'neo-assimilationist' (Castles 2008)

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[20] Hansard HC, 24 February 1999, col. 391. See, further, Hill 2001: 5-6.

[21] This lack of clarity has not prevented litigants from charging defendants with 'institutional racism'. See e.g. *Henry v Newham London Borough Council* [2004] All ER (D) 124 (Mar), *Commissioners of Inland Revenue and Cleave v Morgan* [2002] IRLR 776, *Rihal v London Borough of Ealing* [2004] IRLR 642 EWCA.

[22] The relevant provision is section 67(4) and reads: 'In any proceedings under this Act in a designated county court or a sheriff court the judge or sheriff shall, unless with the consent of the parties he sits without assessors, be assisted by two assessors appointed from a list of persons prepared and maintained by the Secretary of State, being persons appearing to the Secretary of State to have special knowledge and experience of problems connected with relations between persons of different racial groups.' It is not clear why the role of assessors is not extended to employment tribunals.

fashions, where we are going with ethnic and religious diversity in law is not at all clear.

References

- Allott, Antony (1980): *The limits of law*. London: Butterworths.
- Ballard, Roger (1992): 'New clothes for the emperor? The conceptual nakedness of the race relations industry in Britain'. In: Vol. 18 No. 3 *New Community*, pp. 481-492.
- Ballard, Roger (2006): 'Ethnic diversity and the delivery of justice: The challenge of plurality'. In: Prakash Shah and Werner F. Menski (eds.): *Migration, diasporas and legal systems in Europe*. London: Routledge-Cavendish, pp. 29-56.
- Ballard, Roger (2007): 'Common law and common sense: Juries, justice and the challenge of ethnic plurality'. In: Prakash Shah (ed.): *Law and Ethnic Plurality: Socio-Legal Perspectives*. Leiden: Martinus Nijhoff, pp. 69-105.
- Benthall, Jonathan (2005): 'Confessional cousins and the rest: The structure of Islamic toleration'. In: Vol. 21, No. 1 *Anthropology Today*, pp. 16-20.
- Castles, Stephen (2008): 'Migration and social transformation'. Migration Studies Unit, London School of Economics, Working Paper, No. 2008/01.
- Cotterrell, Roger (2003): *The politics of jurisprudence*. London: LexisNexis.
- Cotterrell, Roger (2008): 'Transnational communities and the concept of law'. In: Vol. 21, No. 1 *Ratio Juris*, pp. 1-18.
- Ehrlich, Eugen (1917): 'Judicial freedom of decision: Its principles and objects'. In: *Science of legal method*. Modern Legal Philosophy Series, Vol. 9, Boston: Boston Book Company, pp. 47-84.
- Füredi, Frank (1998): *The silent war: Imperialism and the changing perception of race*. London: Pluto.
- Gregory, Jeanne (1987): *Sex, race and the law: Legislating for equality*. London et al: Sage Publications.
- Griffith, J. A. G. (1997): *The politics of the judiciary*. 5th ed. London: Fontana.
- Hill, Henrietta (2001): *Blackstone's guide to the Race Relations (Amendment) Act 2000*. Oxford: Oxford University Press.
- Johnston, Ron, Deborah Wilson, Simon Burgess (2006): 'Ethnic segregation and educational performance at secondary school in Bradford and Leicester.' Working Paper No. 06/142, Centre for Market and Public Organisation, University of Bristol.
- Jones, Richard and Gnanapala Welhengama (2000): *Ethnic minorities in English law*. Group for Ethnic Minority Studies, School of Oriental and African Studies and Stoke-on-Trent: Trentham Books.
- Lawrence, Daniel (1974): *Black migrants: white natives. A study of race relations in Nottingham*. London: Cambridge University Press.
- Lester, Anthony and Geoffrey Bindman (1972): *Race and law*. Harmondsworth: Penguin.
- Loveland, Ian: (1993): 'Racial segregation in state schools: the parent's right to choose?' In: Vol. 20, No. 3 *Journal of Law and Society*, pp. 341-355.

- Lustgarten, L. (1980): *Legal control of racial discrimination*. London: Macmillan.
- Macpherson, Sir William et al (1999): *The Stephen Lawrence inquiry*. 4262-I. The Stationery Office.
- McLoughlin, Sean (2006): 'Writing a BrAsian city: 'Race', culture and religion in accounts of postcolonial Bradford'. In: N. Ali, V.S. Kalra and S. Sayyid (eds.): *A postcolonial people: South Asians in Britain*. London: Hurst and Co., pp. 110-140.
- Menski, Werner F. (2006): *Comparative law in a global context: the legal systems of Asia and Africa*. 2nd ed. Cambridge: Cambridge University Press.
- Poulter, Sebastian (1990): *Asian traditions and English law.* Stoke-on-Trent: Runnymede Trust and Trentham Books.
- Poulter, Sebastian (1998): *Ethnicity, law and human rights. The English experience*. Oxford: Clarendon.
- Shah, Prakash (2008a): 'Religion in a super-diverse legal environment: Thoughts on the British scene'. In: Rubya Mehdi, Gordon R. Woodman, Erik Reeberg Sand and Hanne Petersen (eds.): *Religion and law in multicultural societies*. Copenhagen: DJØF Publishing, pp. 63-81
- Shah, Prakash (2008b): 'Hindu law adoptions in British immigration law: A consideration of some recent cases'. Paper presented at the IMISCOE Workshop on Legal and Normative Accommodation in Multicultural Europe, Brussels, 14-15 July 2008.
- Vertovec, S. (2006): 'The emergence of super-diversity in Britain'. Centre on Migration, Policy and Society, Working Paper No. 25, University of Oxford: Oxford. http://www.compas.ox.ac.uk/publications/