Expert opinions on South Asian laws: their relevance in immigration cases

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Now published in (2003) *Tolley's Journal of Immigration, Asylum and Nationality Law*, Vol. 17, No. 3, pp. 192-196.

In the 1990 issue of *Immigration and Nationality Law and Practice* Dr. Werner Menski, expert on South Asian laws at London's School of Oriental and African Studies, wrote an article outlining the need for immigration advisers to be informed about South Asian legal systems (Menski 1990). In so doing he highlighted the relative lack of knowledge about these systems among practitioners and ways in which this could be overcome, by consulting existing writing and through education programmes. More than ten years on we might find that Menski's observations about the lack of knowledge of South Asian laws would not be significantly different. In the same period we have seen the rapid expansion of immigration and asylum as areas of legal practice, a fact that makes the knowledge-gap even more yawning.

One key method by which one can input information concerning South Asian laws, and other legal systems for that matter, into the legal process is through the submission of expert reports. My own experience of teaching and research in Comparative Immigration and Nationality Law and Ethnic Minorities and Law, has led me to become ever more aware of the need for study and dissemination of information about Asian and African legal systems in the European context (Shah 2003a). I have been called upon by practitioners to write reports particularly on South Asian laws, but also on nationality and immigration laws elsewhere. I use this opportunity therefore to set out some reflections on the writing and value of expert reports in the immigration law context.

Interaction with legal advisers

How does one identify whether an expert report is required in any particular case? Werner Menski already highlighted the fact that at the time of writing a number of existing books by both UK-based and South Asian writers could be consulted, but warned that they might be too technical, not contain the sort of information required, or may simply mislead the reader. More texts that usefully fill existing gaps in the literature have appeared since that time, particularly on the family law dimension (see Pearl and Menski 1998, Monsoor 1999, Menski 2001, Menski 2003). While these may not be conclusive or may not furnish the reader with the precise points that are required, they might certainly provide the practitioner a better starting point from which to address the expert.

Experienced lawyers will often have developed an instinct about the need for better information about a disputed point of fact or law and will tend to take the initiative to contact an expert. The ILPA *Directory of experts* (1997) is a useful database of information about country experts in a wide number of fields. There is now a pool of expertise, organised under the auspices of the Centre for Applied South Asian Studies (www.casas.org.uk), which seeks to provide an interface between academia and the practice world, and in areas that are not restricted to law. With the growth of South

Asian communities in Britain this sort of knowledge base is likely to assume a far greater importance than is currently realised.

Jim Gillespie (2001) has recently written about the role of experts in the asylum context, highlighting the need to provide clear instructions as to what is needed from an expert. However, some legal advisers will often not be sure about what they really require or what sort of expert should be consulted on a particular matter. In my experience key points might surface only after discussion with legal advisers, and this might indicate the importance of making contact as early as possible. Often an expert might be able to clarify whether a particular line of argument may or may not be worth running, even before a report is commissioned. Ideally, one would almost always prefer to be in contact with the client her/himself so as to pick out things that the legal adviser might not have thought to be of importance.

The fact that I have specialised in immigration/refugee law is, I find, an advantage. This is particularly so because of the level of communication that can be struck almost immediately since the legal adviser does not have to explain complicated bits of immigration law before introducing the main issue. On the other hand, one also often finds that advisers are not trained in public or private international law, or the finer points of international refugee law, and one can have some useful input at that level also. I am sometimes concerned that there is a tendency to rely on experts for the most basic information, although this is partly understandable given the time pressures on practitioners.

One example shows, however, that badly thought out lines of argument are not always due to the problem of time. An adviser whose client was born in India, had been trained as a militia in Pakistan, and was due to be removed to Pakistan recently contacted me. She was adamant that as her client was born in Indian Kashmir, he was therefore a Kashmiri national (as indeed the client insisted), a point that could be used to resist removal to Pakistan. She had not considered that, as he was born in what is Indian territory, he might be an Indian national and removed there even if the removal to Pakistan was successfully contested! This indicates a lack of knowledge about basic principles of international law relating to the acquisition of nationality and its consequences, and this may be put down to the narrowness of training rather than time pressure.

'Legal' or 'non-legal' information?

I have often had to say that I cannot prepare reports on political situations on any particular country. I would not advise, for example, on the accessibility of Indian territory to Taliban-linked militia groups in the assessment of possible risk to a client. Neither would I say that I advise only on strictly 'legal' situations. In the South Asian context the line between 'law' and 'society' is never as clearly demarcated, as one tends to assume is the case for western legal systems. However, this is the stage at which our preconceived notions about South Asian law - that it is but an offshoot of the common law system, or that statutory laws necessarily provide accurate guidance on law 'on the ground' as it were - interfere with a proper assessment of any legal issue or principle. Many experts and High Commission/Embassy personnel unfortunately restrict themselves to such assessments. However, disregarding what one might call the 'socio-legal' dimension, that is crucial to an understanding of Muslim and Hindu law issues, can lead to giving unduly narrow, even inaccurate and false impressions.

I find it nearly always necessary to take into account and to draw attention to how the socio-cultural issues interact with the 'legal' issues at stake. Thus, in one case, I

thought it crucial to explain by reference to Gujarati socio-cultural norms why a young, orphaned woman who had been raped, and was now applying for leave on compassionate grounds, could not be expected to have recourse to the official criminal law system given attitudes to the public airing of such matters, as well as the potential for further victimisation had she done so. I also had to anticipate the possibility that the Home Office might point out that she could have resorted to her brothers' 'protection' by attempting to draw a sort of psychological profile of her brothers from the information given, and thereby to argue that her brothers were not capable of or willing to protect their sister's interests. Similarly, in a Tamil case it had to be explained why a son would be thought to be the more appropriate carer for elderly parents than married daughters who were residing in Sri Lanka. In inter-family adoptions it may be necessary to highlight the importance of male heirs who would be expected to perform essential sacraments upon the parents' death. The examples are many and varied.

Thus while the border between the 'legal' and 'non-legal' is often not an easy one to draw, it will be important to bring out the wider issues is such cases, particularly as a way of explaining how socio-cultural presuppositions inform the behaviour of the parties involved. This might come dangerously close to assessing the credibility of clients and, in recent cases, the benches have tended to warn that experts ought not to give their opinion as to credibility. Thus, in *R v IAT ex parte Ez-Eldin* [2001] Imm AR 98 Blofeld J noted:

> "I doubt if an expert's opinion of an applicant's credibility is, in itself, admissible. Credibility is essentially a matter solely for the court or Tribunal that hears the case."

One must therefore remain careful not to pronounce too strongly about such matters, while pointing to relevant factors as objectively as possible. In practice, this may not be so easy or smooth. As in *Ez-Eldin*, the expert might have relied on certain facts as given by the client which are subsequently found not to be credible, thereby compromising part or whole of the expert opinion.

Overcoming dominant legal approaches

Legal processes in the UK always carry certain cultural presuppositions that distort South Asian legal principles and prevent a clear view of their correct applicability in factual situations. This is a problem that infects the whole legal system - from the training of practitioners and case preparation, right through to judicial decision (see, for example, Shah 2002). The key reason here is the imposition of dominant western positivist approaches to South Asian legal matters, and therefore the expectation that South Asian legal patterns should mirror the western model. If they do not, which they almost always do not, then the accusation all too easily levelled is that these systems are failing to protect the people concerned sufficiently or are breaching human rights principles. It is ironic that officials level such accusations while they are, at the same time, attempting to deny human rights to the persons concerned! Spijkerboer (2000) has instructively argued that such differences between North and South are distorting assessments of the situation of refugee women.

The UK legal system tends to hold negative attitudes to Asian and African laws, regularly delegitimising legal acts following South Asian patterns. A Professor of Comparative Law recently pointed out to me that there has generally been a difference in the way that the Home Office and Foreign Office (and formerly the Colonial Office)

have tended to treat matters of Asian and African laws. During the colonial period recognition was given to such laws abroad, while the Home Office retained the attitude that English law should prevail. It seems that negative, eurocentric attitudes, nowadays being driven by immigration control concerns, are becoming more entrenched the further we move away from the colonial period.

The adviser or the expert therefore has the added burden of overcoming such prejudiced and legally sanctioned forms of discrimination, before decision makers and judges can be informed, at the risk of being accused of 'dodginess' oneself (Menski 2002)! Thus Pearl and Menski (1998: 171) provide the illustration of marriage under Muslim law:

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

But official intransigence has been taken a step further in the immigration sphere. Immigration laws are creating their own sphere of *non-recognition*, particularly as regards South Asian laws, and in defiance of conflicts of law principles. No area is immune from attack here: marriages (Sachdeva 1993, Menski 2001: 10-12, Macdonald and Webber 2001: 418-424, 426-431, Shah 2003b), divorces (Pearl and Menski 1998: 382-396, Mayss 2000, Macdonald and Webber 2001: 424-426) and adoptions (Mortimore 1994, Macdonald and Webber 2001: 455, McKee 2002: 35-36) are just some of the prominent examples. I recently wrote a report concerning an inter-family Sikh adoption in India where the Home Office lawyers were alleging that this system of adoptions as recognised under the Hindu Adoption and Maintenance Act 1956 was violative of human rights! Considering the in-built discrimination against such adoptions in the Rules, this was adding a further barrier to objective assessment of the issues.

Once reports are submitted, the important question is how they are received. It is understandable, as Jim Gillespie (2001) pointed out, that courts and tribunals have become concerned about experts who tend to be partial, often pushing their own political agendas in asylum cases. Yet there is another dimension that needs to be discussed more openly. There is an palpable perception among the experts on South Asian issues that decision makers are increasingly dismissive of expert reports, thereby calling into question the willingness of tribunals and courts to overcome the sorts of entrenched attitudes highlighted above.

One cannot help getting the feeling that in the immigration system, decision makers are driven by control considerations at the expense of just treatment of cases. I was recently told that a marriage registrar in Scotland refused to accept my report to the effect that an extra-judicial divorce had been effected, thus undermining an Indian woman's claim to remain in the UK with her second husband. The contention of divorce was rejected, not on grounds of any faults in the legal arguments, but because I had used words like "seems to have been". So an attempt to be careful not to usurp the function of officials by making categorical findings was turned around as a device to reject the validity of a legal act on the flimsiest grounds. In a recent case involving a Hindu man from Bangladesh, a report by Werner Menski was dismissed summarily despite the provision of details of the systematic failure of the Bangladeshi authorities to protect Hindu property owners (Appeal no. HX/25277/2002). Although this area needs to be

researched in more detail, it does seem that the long-observed 'culture of disbelief' within the Home Office is tending to prevail among other official authorities too.

Academic value

While expert reports are written primarily to have an impact within legal proceedings they may serve other, rather more inchoate, but nonetheless important ends. As an academic it is valuable for me to get to write reports as way of creating a dialectical relationship between the theory we learn and teach and the 'real world' of actual cases. In this way, we too learn about what sorts of problems are being thrown up at the practice end, and how existing knowledge can be adapted to respond to them. I have found such reports very useful in teaching students about the ways in which what they are learning can be used constructively, and as illustrations that South Asian law remains of vital importance in practice despite the impressions that 'mainstream' legal education and literature provide.

It remains an unfortunate fact that, beyond their use value in the case at hand, reports that are written after expending considerable research efforts generally do not see the light of day. In my view good reports can constitute an important information resource and one is aware of several ideas to publish such reports as alternative law reports. That would be an important development in this field, which will contribute to the development of South Asian law in immigration sphere and beyond.

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