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CHAPTER

# Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?

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## Introduction

Human Rights occupy a central role in contemporary legal and socio-political discourse. Having been given concrete form in the American Constitution, and reinforced in revolutionary France's Declaration of the Rights of Man and the Citizen, all flavours of Euro-American social, cultural and political thought have since been conditioned by a powerful conceptual trope: the expectation that individual freedom, underpinned by a legally guaranteed charter of human rights, provides the most effective means of constructing a just and equitable social order. This vision was further strengthened when the United Nations adopted the Universal Declaration of Human Rights by in 1948, in the hope that it would provide a universal legal bastion against exploitation and oppression.

In so far as it provides (at least in principle) a ready means whereby the citizens of any given state can challenge the legitimacy of the unbridled application of totalitarian power, the doctrine has undoubtedly had many beneficial consequences, so much that its agenda is deemed to be inherently progressive. Hence it is routinely assumed that efforts to implement its premises will bring unqualified social and cultural benefits, regardless of either the context, the distinctive cultural commitments, and historical experiences of those on whose behalf such initiatives are undertaken. In a world where 'humanitarian intervention' is being ever more widely deployed to justify legal, political and military interference in the lives of others, can we be sure that such initiatives will always and everywhere be as beneficial as their advocates declare? Or are there circumstances in which the outcome of such efforts is seriously dysfunctional, especially when they provide a means whereby a privileged few can throw a veil of legitimacy over initiatives which do more to reinforce their own position than to advance the interests of those whom the intervention was nominally designed to assist?

This not to suggest that the discourse of human rights is everywhere and always deployed for such purposes; but it is to insist that the current discourse has been ordered in such a way that it can indeed readily be so utilized. Nor are such outcomes uncommon. In international contexts the discourse of 'human rights' has been turned into a political football, with the result that it is as often used to justify initiative whose consequences (directly intended or not) are as likely to reinforce, rather than undermine, established patterns of inequality and injustice.

My concern with these matters is, however, more narrowly focused. I write as anthropologist rather than lawyer or political scientist, in response to a delimited set of empirical concerns: the social, political and legal conundrums which have emerged from the pluralizing consequences of post-war non-European labour migration. During the course of the past half century Britain has witnessed a the rapid growth of 'ethnic colonies', within which settlers have made strenuous efforts to rebuild the personal and domestic lives on their own distinctive terms,



whilst making all manner of strategic adaptations to cope with the external challenges they were facing.

## The Enlightenment and Ethnocentrism

As the post-war economic boom developed, migrants began to arrive in Europe's industrial cities in increasing numbers to fill the gaps which had emerged at the bottom of the labour market. The response of the indigenous population was distinctly uneasy. At one level their presence was regarded as welcome, since it enabled indigenes to move into better paid sections of the expanding labour market, leaving the immigrants to perform a host of necessary but inherently menial tasks, often for lower wages than they themselves once received. But it was not long before more negative reactions came to the fore. As the settlers' colonies grew in size, so the competition which they were seen to be offering to indigenous interests, not just in the labour market, but with respect to scarce public resources such as housing, hospital beds and school places, began to be regarded as deeply unwelcome. The resultant contradictions were further exacerbated as the early pioneers (virtually all of whom were male) called their wives and children to join them, and the locally-born segment of the minority population began to burgeon.

Much has changed since these processes initially took off. Ethnic colonies continue to thrive, and its is increasingly inappropriate to describe them as 'immigrant', since in many cases well over half of their members are now in principle 'indigenous', in terms of birthplace and citizenship. But no matter how much of an integral component of the surrounding social order settlers and their offspring may have become, they still find themselves alienated by and from their surroundings. No matter how substantial their material achievements may have been, the degree of hostility they encounter remains significant, particularly since it has also broadened in character, since it now focuses at least as much on their commitment to maintaining a personal sense of ethnic alterity as it does on the unwelcome competition for access to scarce resources which those who differ are still held to represent.

To what extent has the European Convention on Human Rights served to counter such developments? In principle one might expect that such a pan-European commitment would bring some immediate and unqualified benefits to members of minority groups who found themselves subjected to powerful forces of marginalization. In part that expectation holds good. Insofar as it insists that all humans are beings of intrinsically equal worth, the discourse provides unequivocal support for the proposition that all forms of unequal and discriminatory treatment predicated on hereditary difference, such as those of race and gender, are *ipso facto* illegitimate. As a result it is widely assumed that this provides a sufficient basis around which to construct comprehensive and universally applicable policies of anti-hegemonic and anti-oppressive practice.

But as ever idealistic aspirations are one thing, and empirical outcomes are quite another. Close inspection of the conceptual foundations of current discourse reveals several alarming *lacunae*. One of the most serious is its failure to take cognisance of one of the most salient features of the human condition, our capacity to order our inter-personal relationships on the basis of our own self-constructed conceptual premises. Locked within the iron cage of the conceptual premises which its liberally minded Euro-American authors took for granted, the current discourse has nothing to say about our capacity to act as cultured beings, and hence *to*

*create the terms of our own existence*. Yet despite, indeed because of, the on-going rush of globalization it should be self-evident that the cultural universes which we humans inhabit are anything but uniform; on the contrary, our conceptual and linguistic frameworks are bewilderingly diverse, and likely to remain so into the foreseeable future.

Even if current discourse takes little if any cognisance of this dimension of the human condition, it quite wrong to assume it remains unaffected by this deficiency. Like all other human constructions, the discourse is a cultural product. As such its conceptual foundations require careful analytical scrutiny. Rooted in ideas generated during the course of Europe's eighteenth century Enlightenment, it still takes the commonplace premises of that period largely for granted. One such notion is the prospect of social progress, with the result that one of the driving forces behind development of the discourse was – and remains – an effort to chart a course towards a freer, more open and above all a more rationally grounded future, with the object of facilitating steady progress towards a *singular* vision of social perfection (Gray 2000). It follows that the discourse is underpinned by a conceptual trope which is not just culturally grounded, but structured in such a way as to impose an evolutionary perspective on culture itself. If culture is perfectible, as eighteenth century savants assumed, then it should in principle be possible to place all given instances of cultural practice along a spectrum ranging from less to more perfect. Yet although this view in principle further underpinned the assumption that the discourse was nominally universal scope, this was immediately contradicted – no less in the eighteenth century than today – by a further assumption that the arena within which such rights could be enjoyed would be spatially delimited: namely by citizens resident within the parochial boundaries of the nation-state. The circle was completed by an assumption that responsibility for their enforcement would fall on the shoulders of those had been democratically elected to exercise authority on their behalf.

However reasonable (if ethnocentric) these assumptions may seem when considered separately, their consequences can be toxic when combined. Once it is assumed that society (or rather the set of cultural premises within which the citizens of any given state democratically decide that their interactions should be ordered) is perfectible, as did the French revolutionaries and their successors, cultural plurality will tend to be perceived as a threat, not just to 'progress', but to national integrity. Tensions arising from contradictions of this kind can readily be observed throughout the contemporary world. No matter how 'universal' the discourse of human rights may proclaim itself to be, contradictory premises embedded in its roots combine in such a way as to render it difficult, it not impossible, for its exponents to champion what can reasonably be argued is the most fundamental human right of all: *the right to differ*, not just on an individual, but also on a *collective* basis.

Despite claims to universal applicability, the contemporary discourse of human rights is far more *emic* than *etic* in character, in other words in is 'accounts, descriptions, and analyses expressed in terms of the conceptual schemes and categories that are regarded as meaningful and appropriate by the actors themselves', rather than being 'expressed in terms of the conceptual schemes and categories that are regarded as meaningful and appropriate by the community of scientific observers' (Lett 1996: 382-83). Far from standing above and beyond its authors' taken for granted, parochial conceptual premises, the contemporary discourse is a product of a specific conceptual tradition: an individualistic, liberal and consciously evangelistic ideological and



philosophical outlook which emerged from the Enlightenment. As such it is not just Euro-centric: it also enshrines a civilizing mission which sought to put all aspects of humanity's unenlightened past behind it, and to promote progress towards a rosier – but necessarily singular – future.

This vision suited the political purposes of the instigators of the eighteenth century Euro-American Enlightenment. Seeking to liberate themselves from the power of monarchy, they adopted a revolutionary philosophy: that the only legitimate source of state power was that which flowed from its citizens, rather than from divinely-ordained monarchs. The notions of liberty in which this proposition was grounded flagged an equally far-reaching revolution in their assumptions about the human condition. Social actors were seen as drawing their social being not from subordination to a master, membership of a corporation, a monarch, or to God, but from their capacity to act as autonomous but *responsible* individuals. Hence as Blackstone famously put it in his *Commentaries on the Laws of England*, 'The first and primary end of human laws is to maintain and regulate the absolute rights of individuals', on the basis as of a further assumption that those made and administered such precepts were persons who had capacity to act 'as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be the most desirable' (Blackstone 1765: 119).

Nevertheless it would be a mistake to assume that Blackstone or his fellow-commentators believed that the capacity to act with moral discrimination was universally distributed. Rather, as Hunt emphasizes, settled opinion in the eighteenth century took the opposite view: 'Women, children foreigners and those who paid no taxes should be "passive" citizens only' (Hunt 2007: 148). If the republic was to be governed by its citizens, participation in the process of government should be limited to those with the capacity to exercise individual judgement. Thus along with foreigners, servants, slaves and 'savages', the immediate familial dependents of independent citizens of revolutionary France were excluded from the franchise. Lacked a sufficient degree of moral discernment to exercise political responsibility in their own right, it followed that their interests were best safeguarded by the patriarch. The gendered character of the declaration of 'The Rights of Man and the Citizen' was no slip of the tongue, as Mary Wollstonecraft (1792) underlined. The revolutionaries were not universalists: the rights they had in were deliberately constrained by gender, class, race and nationality.

Much has changed since then, of course. Thanks to extensive political battles during the nineteenth and twentieth-centuries, classist, sexist and racist restrictions on access to citizenship have been removed as a result of the application of a more universalistically-oriented vision of *Human* rights. But why has plurality proved to be such a sticking point? If progress has been made with respect to class, gender and race, absence of progress on other fronts can best be traced to a further salient feature of eighteenth century discourse, a dual commitment to methodological individualism on the one hand and methodological nationalism on the other; and as Beck (2006), Grey (2002) and Wimmer (2002) all emphasise, those premises still lie largely unchallenged to this day.

**Alternative Perspectives**

From an extra-European perspective it has long been self-evident that civilization is no European monopoly. Certainly, Euro-Americans may have developed some extraordinary technical and organizational skills which those subjected to their hegemony during the course of the past two centuries have been only too keen to borrow. But to those operating within other traditions, the untrammelled commitment to individualism which is such a salient feature of Euro-American ideology inverts their own premises regarding the proper foundations of civilized behaviour, and they have long been doubtful as to whether social orders constructed on that basis are in any way worthy of emulation. Two brief examples serve to highlight the grounds on which they reach such conclusions.

A core premise of the Confucian tradition is that righteousness (*shu*) is best sustained through the maintenance of relationships of hierarchical reciprocity as between benevolent patriarchs (ranging from the head of the family right up to the Emperor himself) and their respectfully pious filial subordinates. Individual self-interest, and hence individual autonomy, is consequently placed at a discount. *Reciprocity*, articulated in the midst of a necessary condition of hierarchy, is the starting point of Confucian social philosophy. The Hindu vision of *dharmic* order is similarly structured. Holding that the multitudinous components of the cosmic order, from the macrocosm of the entire universe, through all parts and levels of the natural and social order down to the microcosm of the human body, function as internally differentiated but hierarchically integrated wholes. This vision rejects the idea that each is merely the sum of its parts. Instead it insists that the meaning and purpose of all the differentiated parts derives from their participation in, and hence their contribution to, the operation of the wider *dharmic* whole, *varnashramdharma.* Hence from both Hindu and Confucian perspectives a viewpoint which prioritizes the personal rights of autonomous individuals but with nothing to say about maintaining the integrity of the corporate whole appears positively bizarre.

The contrast between this perspective and that articulated by the heirs of the Enlightenment could hardly be starker. Whilst the former holds that personal rights arise as the result of the fulfilment of one's obligations within a pre-existing web of binding reciprocities, the ideologues of the Enlightenment argued that a progressive social order is the outcome of a consciously deliberated agreement between autonomous and free-standing individuals to come together on a collective basis to pursue their common interests. Few authors have articulated the consequences of this revolutionary ideology more fully than Rousseau. Bitterly hostile to all forms of hierarchy, he urged citizens deliberately to throw off the yoke of duty, so enabling them to generate

> a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before (Rousseau 1762: I vi )

No matter how much the ideologues of the Enlightenment may have championed the prospect of unbridled personal freedom, their vision of freedom and equality was intensely partial, qualified by the assumption that such freedom was only available to those able to exercise moral discernment. Hence the capacity to form the 'associations' which Rousseau identified as the institutional framework within which the 'social contract' would be implemented, was – as we have seen – strictly gender- and class-specific.



All this exposes a fundamental paradox in the thinking of eighteenth century savants. Whilst the revolutionary enterprise eliminated all forms of corporate entity operating over and above the level of the citizen on the grounds that such institutions were inherently tyrannical, at a microcosmic level inter-personal relationships within domestic regimes which were in principle equally tyrannical in character were left untouched. Still subject to the yoke of duty, servants, slaves, women and children were excluded from the new freedoms, since they were incorporated into the new order by virtue of their subordination to and dependency upon the familial patriarchs to whom they were responsible, and who were in turn responsible for protecting their individual and collective interests. Hence whilst the Declaration of the Rights of Man and the Citizen may have radically reformed the structure of relationships in public domain, it left those within the private domain of corporately and hierarchically structured households virtually untouched.

Yet there is an obvious reason for the revolutionaries' reluctance to extend their arguments downwards. Had they done so, they would have risked atomizing a crucial social institution: the family. In the eighteenth century no less than today, the family was regarded as an unqualified social good. As well as forming the domain within which we express our most powerful and passionate interpersonal emotional, social and physical relationships, it is and remains the locus within which to satisfy everyday material needs. As such it is indeed a *universal* phenomenon, and one which can only function when it is held together by a network of relationships of comprehensive as between its members. A corporation, no less.

**Family Life: Mutual Support or Threat to Personal Freedom?**

Since end of the eighteenth century the Euro-America socio-political order has changed dramatically. The right to vote is no longer confined to men of property, and those restrictions which formally excluded women from the public domain have been eroded, so much that the gendered terminology of the 'Rights of Man and the Citizen' was rendered archaic. Hence when the Universal Declaration was promulgated by the United Nations its in 1948 *Human* Rights became the order of the day. The rights of women and children were brought within the scope of public law, and no longer relegated to the private domain. Moreover it also gave explicit recognition to the institution of the family, and to what has since been glossed as 'the right to family life'. Nevertheless the precise way in which the Declaration – as well as its successor the European Convention – actually did so deserves careful examination.

Article 16 of the Universal Declaration of Human Rights says

> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

This formulation contains some worrying *lacunae*. Although it recognizes the family as 'the natural and fundamental group unit of society', it does not identify the range of persons who might be regarded as belonging to an institution which it goes on to declare is 'entitled to

protection by society and the State'; nor does it seek to specify the range of reciprocal rights and obligations which its members might be expected to owe to one another. Most strikingly whilst it underwrites the *right* to found a family, it says nothing about an obligation to *sustain* the institution, once founded. Thus the text stays true to its heritage in the Enlightenment, overlooking the *corporate* character of any meaningful family unit. Instead it focuses almost exclusively on the relationship which contemporary Euro-American conventions regard as the keystone of family life: marriage. Even then says nothing about the obligations which spouses might owe to one another, other than to emphasize that they stand as equals; nor does it have anything to say about the couple's obligations to offspring arising from their relationship, or to the elderly parents of whom the spouses are themselves the offspring.

Instead the Article is primarily concerned with *individual* rights: to marry, or not to marry if one so chooses; to 'start a family'; and the right of each partner remove themselves from the marital relationship as and when they choose. Inspection of the Article's wording, especially the way 'starting a family' is presented almost as an afterthought, suggests that the framers of the text were operating within Euro-American assumptions wherein the nuclear family is the conventional norm; marriage and 'starting a family' are presumptively coterminous. However such assumptions are far from universal. In traditions in which families are normatively constructed on a corporate basis, and relationships of descent, as opposed to marriage, typically form the backbone of the corporate whole. Nevertheless from a historical (and Eurocentric) perspective one of the most significant features of Article 16 was that it established divorce as a human right. In so doing it unpicked the long standing Christian view that marriage was sacramental in character, which served to bind wives to their husbands on a life-long basis. Hence the inclusion of divorce in an article nominally guaranteeing a right to family life undermined one of the last remaining planks which sustained the formal subordination of women and which had been so carefully enshrined in the Rights of Man.

Whist it would be idle to suggest that the wording of a single article in the Declaration had an immediate impact on popular practice or social policy with respect to the family and kinship, it was nevertheless a harbinger of future developments in Euro-America. During the latter part of the twentieth century the indigenes of this vast region the eighteenth century consensus with respect to such matters has largely disintegrated. As a result of growing pressure from libertarian and feminist sources, restrictions on the dissolution of marriage have steadily been set aside. The most immediate consequence of the developments was an upsurge in the incidence of divorce, but the process did not stop there. Before long the assumption that marriage was a prerequisite to cohabitation was abandoned, as was the notion that such a formalized union was a necessary precursor to 'starting a family' Thus far-reaching changes in popular practice and in terms of the impact of statute law on well-established legal premises, the edifice of marriage as it was once understood is currently being dismantled.

Now that gender equality is been taken for granted (at least in principle), marriage law is currently being yet further revised. Efforts are being made to accommodate homosexual partnerships in such a way as to ensure that they the same degree of social and legal respect as those contracted on a heterosexual basis; likewise as new reproductive technologies and DNA analysis have become more sophisticated, the tendency to understand maternity and paternity in strictly biological (rather than as socially constructed) relationships has become steadily more



widespread. As a result family courts have begun to take the view that connections revealed by DNA tests should be accorded greater legal substance than those which have arisen within context of active patterns of emotional reciprocity which have arisen with close knit family units – so much so that the rights of genitors may well be deemed to out-trump those of paters. These tendencies have been further reinforced by numerous statutory initiatives which give the authorities a right (and indeed a duty) to intervene in family affairs to protect children from neglect and women from domestic violence. Eighteenth century caution about state intervention in citizens' domestic affairs has now been abandoned, at least in Euro-American contexts. As the 'yoke of duty' has been cast off, so has the privacy which domestic relationships previously enjoyed: family law has become ever more public – and hence individualistically oriented – in character. So even though the institution of the family still survives in Euro-American contexts, it has in many ways become a shadow of its former self. 'Progressive' individualism, operating both from within and without, has steadily eroded its corporate foundations.

Nevertheless there are few signs that current Euro-American assumptions with respect to the rights and duties associated with matters of kinship and marriage are gaining universal acceptance. Indeed, the developments to which they have given rise are the subject of critical comment throughout the non-European world, especially in those societies whose ancestral traditions are such that they continue to construct their personal and domestic lives on a corporate basis. It is not that competitive individualism is unknown in the non-European world: business and commerce is conduct on just as much as of a cut-throat basis there as anywhere else. But in more personal and domestic contexts, individualism is typically placed at a discount rather than at a premium, not least in the light of a growing awareness of the personal chaos that can be so easily precipitated by the unbridled pursuit of hedonistic self-interest in a manner which has become such a salient feature of the contemporary Euro-American socio-cultural order. Seeking actively to distance themselves from such trends, the pursuit of 'tradition', or at least social cohesion, is beginning to trump the attractions of western-style 'progress', most especially with respect to the organization of domestic affairs. The reasons for this are ultimately pragmatic. When times are hard and/or when novel opportunities begin to open up, making the most of ties of reciprocity with one's immediate associates, and especially the fulfilment of one's obligations towards one's immediate kinsfolk regularly offers the most effective route towards personal, domestic and familial satisfaction.

Where such conventions still hold, marriage is less likely to be the sole locus of reciprocity around which family life is constructed. This is not to suggest that conjugal partnerships become insignificant in such contexts. Not only do the reciprocities which normally develop between conjugal couples give rise to an extremely powerful dyad, but their on-going relationship is the only legitimate the source of offspring who will carry a corporate family forward by a further generation. But precisely because such dyads are set within the context of a wider corporate whole, the selection of suitable bride far too important in strategic terms for the choice to be left to the whims of the would-be spouses. Instead decisions with respect to such strategic issues are invariably taken on a collective basis, not least to ensure that all members of the corporate whole feel that they have a stake in the success of the project. In such circumstances the institutional backbone of family life is likely to be as strongly grounded in on-going reciprocities of descent and siblingship, together with those negotiated as between mothers- and daughters-in-law, as it is in relationships of conjugality *per se*.

**Kinship Reciprocity as a Critical Diasporic Resource**

It is not hard to discern why multi-generational corporate extended families are proving to be such resilient institutional features in the contemporary world, at least within communities of non-European origin. The economic advantages which can accrue to those who organize their domestic affairs on this basis can be substantial, especially when they are transnationally extended. Once it is taken for granted that family assets are held collectively, it follows they can and should be distributed (and redistributed) amongst family members according to the principle of 'from each according to their ability, to each according to their need', the group can readily order itself as a miniature multi-national corporation, shifting assets, ideas and personnel across borders in such a way as to maximize their collective advantages. Nevertheless inter-personal relationships within such collectivities are frequently far from egalitarian; superordinates are routinely expected to offer support and guidance to their subordinates, whilst subordinates, typically defined in terms of gender, generation and age, are expected to respect and obey their elders. However membership of such a collectivity brings substantial benefits. The capacity to facilitate access to every potential resource to which any network member may become aware of, no matter how spatially distant, enables such extended networks to maximize members' material, financial and emotional security when times get tough; they also provide the foundations for entrepreneurial springboards whenever and wherever more positive opportunities arise (Ballard 2003).

For those seeking to move upwards through unequal structures which characterize the contemporary global order, access to (and/or the capacity to construct) such translocal networks is a valuable source of cultural capital. Besides providing innumerable escalators of chain migration along which millions of migrants have moved from specific locations in the poverty-stricken South to labour-hungry locations in the prosperous North, those stepping off such escalators have made equally extensive use of this resource to construct thriving ethnic colonies at their many destinations, and to recycle ideas, assets and personnel on a global scale, regardless of national boundaries (Ballard 2003, 2005, 2008). Their progress on this front seems virtually unstoppable. No matter how actively national authorities may seek to control such cross-border traffic, migrants and their offspring are making ever more active use of these strategies to challenge the established, but grossly unequal, opportunity-structures which characterize the contemporary economic order (Bhagwati 2003, Raj 2003). In constructing these networks reciprocities of kinship – and failing that of quasi-kinship – have invariably proved to be crucial. Whilst also drawing on ties of lineage, clan, sect, and caste to construct yet wider alliances, maintained within corporately-structured families have invariably been the key to such initiatives. It follows that transnational extension has in no way undermined established patterns of kinship reciprocity; on the contrary, their strength has for the most part been reinforced.

*Contradictions*

Nevertheless such successes have invariably been accompanied by a down-side, especially when they were perceived to be 'aliens' pushing their way unacceptably upwards from below. In these circumstances or less virulent feelings of anti-immigrant hostility have regularly begun to emerge amongst members of the indigenous populations within whose territories they had



established themselves. Such concerns have invariably been articulated along two complementary vectors: first that the settlers' success constituted unwelcome, indeed unfair, competition; and that their maintenance of cultural alterity, together with the emergence of ethnic colonies, constituted an unacceptable threat to the integrity of the established socio-cultural order. As ethnic polarization has sharpened, the balance between these vectors frequently shifts from the former to the latter. In the face of protests that complaints of 'unfair competition' were essentially racist in character, arguments to the effect that the newcomers' religious and cultural alterity threatened national integrity frequently proved to have greater moral traction than complaints about the unacceptability of their physical appearance. This has certainly been the case in Western Europe. Although the precise course of such developments has varied from country to country, nationalistic and xenophobic criticisms of the consequences of the minority presence have steadily hardened. One argument has proved particularly appealing: that their presence threatened the Christian foundations of the European civilization. This opened the way for popular demands that the new minorities should be expelled forthwith, on the grounds that the lifestyles which they brought with them – and to which they perversely remained committed – were inherently uncivilized, as the barbaric fashion in which they allegedly treated their women-folk serve to demonstrate.

By tapping into well-established tropes about the innate barbarity of 'primitive' peoples, lurid accounts of honour killing, forced marriages, female genital mutilation and the repression of female autonomy under the veil, rabble rousers have further legitimized popular hostility to the minority, especially Muslim, presence. Moreover as those pressing such agendas soon realised, xenophobic policies and practices of this kind could be readily justified as a form of humanitarian intervention. The use of a *rights* agenda for such purposes has caused much confusion amongst liberal-minded anti-racists and multi-culturalists, not least because they found moral arguments of a kind which they had once so cheerfully launched against their opponent being played back on them in spades. More disturbingly, many radical feminists also took the opportunity to swap sides, on the grounds that they could not overlook the barbaric patterns of patriarchal tyranny to which so many of their black sisters found themselves subjected. These processes eventually had a far-reaching impact on social policy, and on legal provisions regarding ethnic plurality.

**Professional Practice in Contexts of Plurality**

In the early days of settlement the authorities mostly sought to overlook the conundrums created by migrant workers' tendency to order personal and domestic lives in terms of alien cultural premises. So long as the newcomers made few demands on public services, they could argue that members of this section of the population were well capable of looking after themselves, and hence in no great need of such services.[1] But as minority populations grew, and ethnic colonies became a salient feature of the urban landscape, this view became increasingly difficult to sustain. When it came to developing policies which would actively address the cultural dimensions of the challenges with which they were confronted, service providers regularly found themselves non-plussed.

[1] *Émigré Journeys* (Abdullah Hussein 2000) is an insightfully tragicomic account of group of early settlers' self-help efforts to dispose of the corpse of one of their compatriots who had died of pneumonia.

Although they were undoubtedly committed to anti-racist and anti-oppressive practice, as ethnic colonies grew in size professional practitioners rapidly discovered that such nostrums provided little guidance on how to cope with the real-life challenges with which they found themselves confronted. In the absence of the linguistic and cultural skills which would enable them to deal with minority clients on their own terms, front-line service providers regularly found themselves, and often still find themselves, out of their depth, especially when dealing with knotty problems precipitated by physical and mental ill-health, issues of child care, or by the breakdowns in inter-personal relationships in domestic context. A fundamental source of their difficulties was the lack of congruence between the familiar conceptual frameworks in terms of which they had been trained to order their professional practice, and those in terms of which their minority clients, patients and pupils ordered their domestic lives (Ballard and Parveen 2008). Should service providers seek to adjust the terms and conditions of their professional practice to take into account their clients' preferred linguistic, conceptual and behavioural conventions? If so, how far should they be prepared to go? Could such issues be resolved with the assistance of interpreters? Or do they reach much deeper, such that they engage with – and often challenge - the conceptual foundations around which professional practice is normatively constructed?

Such problems of this kind are widespread. My own observations suggest that they are likely to arise whenever professionals whose practice require them to engage in some way with the personal, familial and domestic dimensions of their clients, patients or pupils lives. Unless such practitioners have acquired a sufficient degree of cultural competence to engage positively with those whose personal lifestyles differ significantly from their own, there is in my experience a strong probability that they will do their clients a disservice, no matter how excellent the technical dimensions of their professional competence. On the basis of the experience I have acquired in the process of preparing expert reports in several hundred cases in which British South Asians have found themselves involved in proceedings before the criminal, civil, family or administrative courts, it is quite clear that lawyers are no exception to this generalisation. Nevertheless there are several features of legal practice which are exceedingly helpful to researchers such as myself. In legal context all aspect of dispute resolution are normally agued out in explicit detail, and in writing. The resultant plethora of documentation (largely absent in non-legal contexts) provides an invaluable resource for researchers seeking to explore how legal practitioners respond to the challenge of ethnic plurality.

Nevertheless so far as I can see the broad character of the challenges and the conundrums with which lawyers find themselves in these circumstances do not differ significantly from those encountered by their colleagues in other human professions. Hence whilst the issues nominally at stake in the proceedings in which I have been instructed to prepare reports have been bewilderingly diverse, the range of cultural phenomena on which I found myself focusing in reports have been far more restricted. Likewise in seeking to explain the logic of patterns of behaviour which might otherwise have appeared to be deluded, bizarre, inappropriate, unreasonable or even downright criminal can be rendered much more meaningful (although by no means necessarily forgivable) once they set in the context of the actors' conceptual logic, I have regularly found myself returning to a limited number of themes, including the significance of honour, modesty and shame, and above all the logic of



relationships of mutual reciprocity and the consequences of their disruption, often, though by no means always, where issues of family, kinship and marriage loom large.

Before exploring the specifically legal dimensions of these issues, it is worth considering why issues of plurality prove so troublesome to well-educated professionals, no matter what their specific field of practice may be. On the basis of my experience, whether acting as a teacher, an advisor or an expert, suggests that those whom I am addressing have rarely, if ever given much consideration to the prospect that the conceptual order which underpins their own thinking and behaviour, no less in professional than in everyday personal and social contexts, *might itself be culturally coded*. Instead their default assumption is that it is only the thoughts and behaviour of others which are significantly culturally conditioned, such that the conceptual premises which they themselves routinely deploy can safely be regarded as 'normal', 'natural' and 'rational'. Given such a perspective it is all too easy to reach the mistaken conclusion that the European conceptual categories implicitly underpin frame their practice are not only *a*cultural in character, but of universal applicability (Ballard and Parveen 2008).

That there should be such limited awareness of the distinction between emic and etic categories and concepts amongst members of the indigenous majority, no matter how extensive their professional qualifications may be, should be no surprise: 'Anth 101' is not part of the regular undergraduate curriculum in British universities. If the premises of the Enlightenment encourage the maintenance of such a stance, it is also clear that those who have long enjoyed a condition of *de facto* global hegemony have as yet had little if any reason to query the emic character of their everyday assumptions. Hence when asked to provide objective (and hence etic) definitions of such commonplace concepts such as 'family', 'marriage' or 'fate', most professionals find themselves non-plussed, since they have never been required to step outside their own taken-for-granted assumptions.

This may be illustrated by the nominally straightforward queries about the commonplace institution which we casually identify as 'the family' that arise when the people in question organize their domestic affairs in terms of conventions which differ radically from those which constitute the contemporary Euro-American norm:

- If a household contains two conjugal couples, should it be considered to be composed of one family or two?
- Just what body of persons might or should 'a family' include? What rights and obligations do those so included have towards one another?
- How far should family members be entitled to redistribute property amongst themselves in such a way as to minimize their exposure to taxation, and to maximize their access to social benefits?
- What is the legitimate scope of parents' rights over and obligations to their children, and vice-versa? Is it right and proper for these rights and obligation to be extended to include all members of an extended corporate family?
- Whom may one marry, and in what circumstances? What are the prerequisites for a legitimate marriage? In what sense, if any, is mere cohabitation illegitimate?

- How extensive a role can parents legitimately play in choosing spouses for their offspring? In the light of this, how can arranged marriages be distinguished from those deemed to be 'forced'?
- What is the status of a polygamous marriage?
- In what circumstances can divorce occur? When it occurs, how should rights over and responsibilities for children be redistributed? How should assets be divided?
- Should the rights and duties of paternity be ordered according to the community's understanding of the marital status of the child's parents, or should biological linkages, if they should prove not to be congruent with those conventions, be given just as much weight?
- Are parents who insist that their older children should take active responsibility for the welfare of their younger siblings restricting such youngsters' capacity to explore their own individuality?
- Are parents who have brought up their children up in this way acting irresponsibly if and when they leave young children temporarily in the care of their older siblings?
- How should the disposal of the dead be handled? To whom and on what basis should the assets of the deceased be handled?

However challenging such conundrums may seem, they can at least be described within the context of a familiar terminology of family, marriage, parents, divorce, siblings and so forth, even if their meaning may be subject to all sorts of subtle shifts when deployed within unfamiliar cultural contexts[2]. Problems of comprehension become more acute when family members assert that their behaviour has been conditioned by concepts and considerations that do not engage in any obvious way with contemporary English ideas and experiences. For instance, when domestic disputes run seriously out of hand in South Asian contexts, my experience suggests that initiatives driven by, or at least alleged to be driven by, most of the following phenomena are likely to held to have been in play:

- *Rista*: the set of reciprocities (*lena-dena*) between corporate families to which relationships of kinship, and most especially of marriage, give rise.
- *Qurban*: sacrifice: hence *kushi se qurban* is to voluntary sacrifice one's own interests (e.g.) in marriage for the benefit of the family.
- *Izzat*: honour, personal self esteem, as well as the standing of the family in the eyes of the community at large.
- *Sharam*: modesty, or more specifically the preservation of one's own and one's family's *izzat* by taking care not to flaunt oneself inappropriately in public spaces.

[2] Apparently straightforward kinship terms are a ready source of confusion. Punjabi distinguishes between two sets of five distinct categories of relationship which English boils down to 'aunt' and 'uncle'.



- *Be-sharam*: shameless behaviour which compromises one's own and one's family's *izzat*.
- *Badlah*: feud, normally engaged in to restore one's own besmirched *izzat* by undermining the *izzat* of one's opponent, and in extreme cases by compromising the modesty of one's opponent's female dependants.
- *Nazar*: occult distress caused to another (and most especially to children) as a result of the observer's sub-conscious feelings of jealousy.
- *Jadoo-tuna:* occult distress deliberately launched to cause disaster and distress, most usually to some other closely related person.
- *Churail:* one of a number of evil-minded spirits who may take possession of a person (most usually a woman) causing her to behave in bizarre, aggressive and immodest ways.
- *Tawiz:* An amulet containing verses from the Qur'an, empowered by the blessings (*barakat*) of a Pir, with the capacity of to keep occult forces of the kind listed above at bay.

Those who operate within a South Asian conceptual universe will be familiar with such terms which are deployed in vernacular discourse, especially when interpersonal tensions and contradictions within large extended families have begun to get out of hand. Moreover those familiar with I. M. Lewis (1971) classic text *Ecstatic Religion* will recognize that the apparently 'superstitious' elements of the vocabulary are less irrational than they might seem. They enable those pressed into a tight corner to articulate feelings of fear, anger, jealousy and distress in a manner which does not bring the whole corporate structure tumbling down, providing an effective means whereby junior (and consequently the most vulnerable) members of a large extended family can 'say the unsayable' to a husband or a mother-in-law whose demands have made their lives unbearable (Ballard 2000: 17ff).

If one is in a position to crack the code, discourse which outsiders dismiss as bizarre, irrational and superstitious provides immediate insight into the likely location and character of the most severe sources of contradiction within the familial network, and an indication of how those contradictions might best be resolved. But if these concepts (or more usually the actions and reactions to which their deployment gives rise) attract the attention of observers who lack the capacity to interpret symbolic discourse appropriately, the consequences can be disastrous. Unable to translate the concepts or the actions they have precipitated into the procrustean framework of their own conceptual premises, it is easy for external observers to conclude that those who deploy such notions must be deranged, wicked, or criminal. Such judgements are rarely helpful in moving towards an accurate identification of the contradictions which precipitated such outbursts, let alone facilitating interventions which might ameliorate them.

Matters are rendered more chaotic when external observers assume that given the 'patriarchal' character of the conceptual order within which such 'medieval' notions are deployed, all power must lie in the hands of men, and female family members are helpless pawns, lacking the capacity to exercise any kind of agency which would enable them to act in

their own cause. Circumstances and personalities may sometimes combine to precipitate such an outcome, but the assumption that this will *invariably* be the case is grossly misleading. Given the emotional power which they are able to exercise over their husbands and above all their offspring, mothers frequently operate as the real power behind the patriarchal throne, no matter how much they may be content to allow public appearances to suggest the reverse.

A significant number of cases in which I have been instructed to prepare expert reports have involved homicide; many more have arisen as a consequence of marital breakdown. But in virtually all I concluded that matters had come before the court as a result of inter-personal contradictions with the family getting so far out of hand that established patterns of dispute resolution had been overwhelmed, with disastrous consequences. But in the absence of a relevant degree of cultural competence, courts and lawyers frequently find themselves perplexed as to how to make sense of such cases. They are far from being alone; police officers and guardians *ad litem* responsible for collecting the evidence to be set before family courts find themselves just at much at sea, as do the psychiatrists, psychologists and social workers to whom the courts turn for expert advice on behavioural matters. In these circumstances the equitable delivery of justice is rendered just as problematic as is the delivery of other public services.

**The Development of Public Policy: Violence Hits the Headlines**

There is now increasingly widespread recognition that the provision of such services in contexts of plurality is an exceedingly challenging task. This stands in sharp contrast to the position during the early years of settlement, when the majority of migrants were fit young men. As families arrived and ethnic colonies grew more mature, so the range of services to which their members sought access become wider and are now closely congruent to the patterns of demand from the indigenous majority. But whilst those demands have consequently become steadily are less distinctive in *quantitative* terms, the *qualitative* difference remains substantial – if only because they are conditioned by a range of linguistic, cultural, religious and conceptual conventions with which the vast majority of established service providers are unfamiliar.

Providing an adequate response to the resultant challenges has proved to be far from easy. The conceptual perplexities with which professional service providers are confronted have been exacerbated by a fevered debate about the degree to which it was (and is) legitimate for the providers of public services to make *any* positive response to minority alterity. Three lines of argument have emerged. Firstly, if service provision to the minorities is proving to be problematic, the fault lies with the minorities themselves, their inadequate command of the English language and their failure to adopt more reasonable and acceptable behavioural and cultural conventions; secondly that beyond the difficulties precipitated by their ongoing commitment to alien ways, the very presence of minorities places an unjustifiable strain on the public purse, and meeting their distinctive interests and concerns does not deserve to be prioritized; and thirdly that the unequal status of women within such communities leads them to being subjected to unacceptable, all too often hidden, levels of domestic violence. As a result the press has had a field day with stories about the experience of pupils of indigenous origin isolated in schools where 90% of pupils are Muslims or about doctors and midwives overwhelmed by mothers with little knowledge of English.



Few stories have attracted more attention than accounts of forced marriages and honour killings. Whilst the reality of such incidents is undeniable, as is the fact that they are routinely regarded as ‘newsworthy’, close inspection of the facts of such incidents invariably reveals that in most cases their core characteristics most of these incidents are less unique than is popularly supposed. In all known societies interpersonal relationships with the family occasionally get so far out of hand as to lead to incidents of homicide in all societies; and as ethnic colonies have grown in size, all aspects of established patterns of family life – negative no less than positive – have begun to manifest themselves overseas. Against that background the main feature which distinguishes such incidents of domestic violence, up to and including homicide, within such families is not their greater frequency as compared to that found amongst the indigenous population, but rather the cultural context within which they occur. As a result they can readily be identified as incidents of ‘honour related violence’ which can in turned be ascribed to the influence of a further pathogenic characteristic of minority communities: parents’ propensity to subject their unwilling children to ‘forced marriages’ (see, for example, Allen 2008). So whilst the pendulum of opinion may have swung from benign neglect to agitated alarm, there is little evidence that policy-makers, let alone the media-driven popular pressures to which they have felt forced to respond, have any greater understanding of the ways in which these incidents are *conditioned* (as opposed to *determined*) by cultural factors.

A further striking feature of these developments, by no means exclusive to Britain, is the extent to which they have relied on systematic efforts to pathologise the corporate family structures which most of the new minority groups continue to deploy, as well as the alleged plight of women within them. Hence in the course of efforts to construct strategic remedies to reduce the (much hyped) incidence of forced marriages and honour killings, police and Home Office officials relied on suggestions that they were advancing human rights when they published a ground-breaking report entitled *Forced marriages: A Wrong not a Right* (Forced Marriage Unit 2006). The result of these initiatives, which are still on-going, is the emergence of what can only be described as *cultural crimes*, in which cultural factors are held to aggravate existing criminal offences such as child neglect, assault and homicide.

Developments of this kind are by no means limited to the issues highlighted above. Whilst there was a brief ‘multi-cultural’ interlude during the 1980s and early 1990s, during which tentative efforts were made towards taking more positive cognisance of minority lifestyles, virtually all such initiatives soon ran into the sand. If they were to be more than cosmetic, a prerequisite for their success was the willingness of professional service providers to make significant revisions to the conceptual premises which underpinned the norms of professional practice. Such challenges invariably encountered vigorous opposition. Indeed, most professionals took the view that such ‘concessions’ to ethnic plurality were unnecessary and intolerable. The public agreed, and financial support declined. The argument that many of the challenges confronting service providers might be significantly reduced if they gained the capacity to approach them from a more ethnosensitive perspective fell away. Instead, the favoured explanation was that the difficulties which they encountered were primarily the outcome of the alien, unhelpful and ultimately pathogenic behaviour of those standing on the far side of the ethnic divide.

These developments were reinforced by popular reactions to much publicized incidents such as the forced retirement of the headmaster of a Bradford school where 90 per cent of the pupils were Muslim, as a result of his opposition to the local authority's commitment to multicultural policies, the uproar following the Rushdie Affair, the so-called 'northern riots' in 2001, and not least the suicide bombings in London in July 2005, which led to a tsunami of hostility (Ballard 2007). Multiculturalism was deemed to have failed, and a new consensus emerged, building on arguments outlined in a report on the 'northern riots' (Cantle 2002): 'community cohesion', together with numerous anti-terrorism initiatives, would be the priority for all public policy in this sphere. As a consequence, efforts to accommodate the *de facto* presence of ethnic plurality were abandoned, attempts to amend the structures of public service provision in response to minority alterity thought misguided; alterity was an obstacle to be eliminated, rather than a resource to be negotiated with. This switch to an explicitly anti-pluralist policy was welcomed by members of the indigenous majority. By contrast the response of the great majority of those who differ has been to batten down the hatches in the hope that the storm will eventually subside.

**Plurality and the Delivery of Justice**

How have those responsible for the delivery of justice charted their way through these stormy seas? In broad terms lawyers now find themselves confronted by much the same conundrums, as well as being subjected to much the same pressures, as colleagues in other human professions. However from a scholarly and investigative perspective an analysis of professional decision-making is a good deal easier to undertake, if only because such processes are more transparent in legal contexts than elsewhere. In this respect Sebastian Poulter's publications, culminating in *Ethnicity, Law and Human Rights* (1998) must be regarded as ground-breaking. No other profession has yet produced such a thoroughgoing attempt to grapple with the issues in this field. But his approach was anything put pluralist. Although he accepts that public policy should make every effort to tolerate diversity, he nevertheless argues for caution:

> On *precisely* what basis are exceptions to the pluralist philosophy to be admitted in practice? How can it adequately be determined whether minimum national standards are breached by a particular traditional practice, which therefore needs to be suppressed? Another way of posing the dilemma is to ask exactly where the limits of tolerance lie. (1998: 21)

As he goes on to demonstrate, such matters have long been a bone of contention; although it was suggested that a clause guaranteeing minority rights should be included in the 1948 Declaration, no agreement could be reached about its wording. The matter was passed to a UN Sub-Commission, eventually emerging as Article 27 of the International Convention of Civil and Political Rights, which in principle indicated that members of minority groups should not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language. But as Poulter rightly emphasizes, the wording of the article is such that its contents are shot through with reservations:

> First, while the Article is clearly intended to recognize the claims of groups or communities within a state, the right is not spelt out, in terms, as a collective right. The right is expressed as adhering instead to individuals who belong to minority groups, and is thus of the same nature as the other rights guaranteed in the Covenant, which



> are accorded to individuals rather than to other entities. In the light of this individualistic approach, the minority itself cannot be said to possess a right of its own to the preservation of its separate identity.
> Secondly, the opening words of Article 27 display a hesitancy, almost a trepidation, about mentioning the possible presence of minority communities within a state. An earlier draft began in much more robust fashion with the phrase 'Persons belonging to ethnic, religious or linguistic minorities shall ....' Several states … were unwilling even to recognize the existence of minorities within their borders. France went so far as to … declare that Article 27 was 'not applicable so far as the Republic is concerned'.
>
> Thirdly, the guarantee is expressed in negative terms, in the sense that members of minorities are not to be 'denied' the specific rights allotted to them. These 'cultural' rights are not spelt out in the same assertive vein as are, for example, the rights to life and liberty or to freedom of assembly and association (Poulter 1998: 79, 81).

Poulter also notes that the wording makes no any attempt to address the *political* issue which invariably comes to the fore in contexts of ethnic plurality, namely how and where and on what basis a balance should be struck as between the minority interest in cultural preservation and the interest of the state and the majority in maintaining social cohesion, minimum standards, and national unity. With this in mind Poulter turns to the European Convention for inspiration, but finds little on which to rely. Like the Declaration, the Convention contains no clause which offers members of minorities any kind of explicit protection. As he rightly notes, all the Articles which address issues which are of particular concern to members of minority groups, such as the right to family life, freedom of religion, freedom of expression, and freedom of assembly, are accompanied by caveats to the effect that:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As Poulter notes, the text of the ECHR, like that of the Declaration, is primarily oriented towards protecting the rights of individuals, whilst the caveats can be interpreted as prioritizing the rights and interests of the democratic majority over those who differ. Unfortunately Poulter did not live long enough to see just how far the UK government would twist these provisions to the disadvantage of members of extended families with significant overseas connections. In interpreting the provisions of Article 8 the Home Office Immigration Service defines 'family life' as being an arena which extends no further than a conjugal couple and their dependent children. It insists that the UK has no obligation to facilitate their right to live collectively in Britain if one of the one if the spouses are a citizen of and resident in some other country, and that in the light of developments in modern communications, family life can readily be enjoyed by electronic means. Poulter's analysis reflected a time when efforts to exploit these loopholes in the ECHR were far less blatant than has subsequently been the case.

Unable to find any clear guidance from the human rights discourse as to how his dilemmas might best be resolved, Poulter turned to the resources of the English law, especially the strategies devised by Britain's colonial judiciary to respond equitably to cases set in unfamiliar (i.e. non-European) cultural contexts. In doing turns to a formula to the effect that

> local customs and conventions should be accepted as legitimate, *always provided they were not contrary to justice, equity and good conscience, and had not been declared void by any competent authority* [my italics]

which was initially articulated in the Punjab Laws Act of 1872. Subsequently taken up in numerous other colonial jurisdictions, the legitimacy of this perspective was ultimately confirmed by the Judicial Committee of the Privy Council (Poulter 1998: 38 - 42). With this yardstick to hand he goes on examine a series of high profile confrontations in which such issues subsequently came to a head in the UK, including controversies over Jewish methods of religious slaughter, Gypsies' efforts to maintain their nomadic lifestyles, Muslim demands for the recognition of their distinctive forms of personal law, Hindu temples and planning regulations, the right of Sikhs to wear turbans, and the right of Rastafarians to dreadlocks and the consumption of cannabis. In most instances he finds himself unimpressed by the minority arguments in favour of exceptional treatment. As a result he was able to reach a liberal-sounding but otherwise thoroughly innocuous conclusion that:

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

No matter how confidently Poulter may have grounded his arguments in the commonsense assumption that the 'shared core values' of the indigenous majority must trump those of deviant minorities, there are now clear signs that the judiciary is becoming less and less certain as to whether such an anti-pluralist perspective is compatible with equitable decision-making. An initial straw in the wind could be found in Lady Arden's powerfully expressed opinion in *Khan v Khan [2007] EWCA Civ 399*, a case involving the legal status of a customary form of dispute resolution within a Pakistani family. Drawing on the provisions of Article 6 of ECHR (which provides a caveat-free right to a fair trial) she argued that

> Where the parties are members of a particular community, then in my judgment the court must bear in mind that they may observe different traditions and practices from those of the majority of the population. That must be expected and respected in the jurisdiction that has received the European Convention on Human Rights. One of the fundamental values of the Convention is that of pluralism: see Kokkinakis v Greece [1994] 17 EHRR 397. Pluralism is inherent in the values in the Convention. Pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups. In turn, the court must pay appropriate regard to these differences.

Whilst Lady Arden follows Poulter insofar as she pitches her argument within a discourse of human rights, her approach to the issues is more hard edged. By grounding her argument in the provisions of Article 6, rather than the heavily qualified rights set out in Articles 8 to 11, she is able to conclude that courts have an inescapable obligation to make a positive response to plurality: hence her employment of '*must*'. In doing so she leaves no space for the ethnocentric caveats whose origins can be traced to the Punjab Laws Act. Nor has she been alone in striking out in this way. In a further case which arose as a result of a Sikh pupil finding herself barred from attending school as a result refusing to conform to its uniform regulations by wearing a *Kara*, a steel bracelet, Mr. Justice Silber handed down an equally decisive pro-pluralist judgement *[2008] EWHC 1865 (Admin)* of more general applicability:

> There is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes.



> Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multi-cultural society can be built in this country

In a subsequent paragraph he also went on to criticize

> the repeated failure of the school to consider the important aspects of [the policy] to which I have referred to in the paragraph above. In particular the school and the defendants failed in its duty of (a) 'fostering respect for people of all cultural backgrounds'; (b) 'respect'[ing] the values of cultures [with] which they are unfamiliar'; (c) 'ensure [ing] that every pupil develops a sense of identity that is receptive and respectful to other cultures'; (d) 'promote [ing] the respect of other cultures, celebrates diversity and educates against racism, our teaching challenges racial prejudice and stereotypes and fosters critical awareness of biased, inequality and injustice'.

However the discourse of human rights, on which both judges in the cases cited above grounded their arguments, is by far from being the only available source of inspiration when it comes to dealing with the challenges of plurality. A distinctive feature of the English common law tradition is its long-standing commitment to the view that judicial finders of fact should set the evidence before them within their appropriate context, and then to seek out the appropriate yardsticks against which to assess its significance. Unfortunately this ancient libertarian tradition is currently subject to increasingly severe pressure from the centralizing proclivities of the state, further reinforced by popular majoritarian hostility to the pluralizing consequences of religious and ethnic diversity. Indeed these tendencies attracted the attention of Lord Bingham, then Senior Law Lord. As efforts by the judiciary to deal with cases involving 'immigrants' and 'terrorists' on an equitable basis have begun to attract increasingly cacophonous demands that judges not be allowed to reach judgements which compromised the will of Parliament and hence – so it is said - 'the law of the land', Lord Bingham felt impelled to highlight the other side of the coin. In a magisterial speech entitled *The Rule of Law* (2006) he launched a blistering critique of the way in which statutory and executive interventions have begun to undermine many of the ancient liberties enshrined in English law, concluding: 'We are not, as we are sometimes seen, mere custodians of a body of arid prescriptive rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live'.

But what is the precise character of the sacred flame of which Bingham and his colleagues are the ultimate custodians? To modernist libertarians the proper answer to may seem obvious: the values of the Enlightenment, the discourse of human rights to which it has given rise, and the consequent promotion of greater opportunities for individuals to enjoy access to liberty and personal freedom. Whilst Lord Bingham in no way ignored this source of inspiration, his arguments were far from being predicated upon it. Rather his critique of hyperactive legislative activity by Parliament highlighted the ease with which nominally enlightened governments can all too easily set forth statutory initiatives which prove in due course to so more to reinforce patterns of injustice as to relieve them. Now is the time to explore some specific examples of how this is achieved.

**Humanitarian Concern for the Vulnerable?**

If there are two points on which all lawyers agree it is that justice should be open to all, and judicial decision-making should go out of its way to protect the interests of the vulnerable. Such assumptions are as deeply embedded in the values of the Enlightenment and the discourse of Human Rights as they are in the Hindu and Confucian systems discussed earlier. However there

is a further distinctive feature of current Euro-American thinking which can best be described as a double-edged sword: its evangelical commitment to the universal applicability of its ideological premises. That commitment can have paradoxical consequences: nominally humanitarian efforts to rescue vulnerable others from tyranny and oppression can readily be utilized to legitimize structures of social, colonial and imperial hegemony. With such considerations in mind it is worth considering how the moral and ideological arguments currently being utilised to legitimate popular hostility towards rising levels of ethnic plurality in metropolitan heartlands parallel those deployed by nineteenth century missionaries seeking support for their proselytizing activities in Britain's imperial possessions. Doing so exposes all manner of parallels, most especially with respect to the frequency which such interventions have focused on the social, cultural and religious conventions around which family life is organized, and on the allegedly horrific barbarities to which women and children consequently found themselves exposed.

A graphic example of the power and popularity of initiatives of this kind can be found in missionary efforts to justify their evangelization of the population of Calcutta in the early decades of the nineteenth century. Pennington (2005) demonstrates how those involved legitimized, and then financed their activities by producing ghoulish accounts of female infanticide, child marriages, pederastic husbands abandoning teenage widows whom Hindu custom deemed permanently unmarriageable, and most horrifically, the practice of *suttee*. Nor did the monotheistic Muslims escape the missionaries' moralistic scorn: commonplace tropes suggesting that Muslim women were hidden away in the *harem*, constantly exposed to the lascivious attentions of sex-crazed menfolk soon began to be widely circulated.

The missionaries received little if any support from the East India Company in the early years of the nineteenth century. However when the British Raj came into being after the 1857 uprising officers of the Indian Civil Service took a more activist view of their role, on the grounds that they were engaged in a 'civilizing mission' which required them to root out 'social evils' of this kind. Oldenburg (2002: 41 ff) has shown how a group of evangelistically minded British administrators in the Punjab became acutely concerned about high levels of female infanticide which they believed they had identified within the population for which they were responsible, whose causes they concluded were the outcome of a toxic mixture of two major social evils: 'caste pride', and excessive dowry payments paid at daughters' marriages. The immediate outcome of their efforts was the passage of the *Prevention of Murder of Female Infants Act of 1870.* Besides providing the authorities with unprecedented opportunities to scrutinize the internal operation of Punjabi families in every case of neo-natal death, the Act also criminalized all aspects of family life which they adjudged to stand in contravention of civilized conventions of justice, equity and good conscience: the very phrase deployed in the Punjab Laws Act of 1872, and subsequently picked up by colonial administrators elsewhere, as well by Poulter. Not that the Act had any great effect on popular practice. As Oldenburg notes, it was repealed in 1906: by then the ideological debate had moved on to other issues.

**For the Sake of Women and Children?**

Contemporary European administrators currently find themselves confronting similar problems to those faced by nineteenth century predecessors in at least three senses:



- the need to devise legal and administrative structures within which to accommodate the personal and domestic lifestyles of large bodies of people who organize their familial affairs in terms of conceptual premises radically different from those deployed by the indigenous majority
- to respond to popular demands from the indigenous majority to root out all such 'uncivilized' practices;
- to find a means of cloaking any initiatives they might take with a veneer of legitimacy.

In contemporary Europe (compared with the United States) tropes grounded in the presuppositions of evangelistic Christianity no longer cut much ice. Nevertheless an equally effective source of inspiration has emerged as a means of justifying initiatives of the same kind: the list of *Harmful Traditional Practices*, including female genital mutilation, son preference, female infanticide, early marriage, dowry, early pregnancy, nutritional taboos, and practices related to child delivery, set out by the Office of the High Commissioner on Human Rights (n.d.). Linked as they are to the Convention on the Elimination of all Forms of Discrimination against Women, these provisions ensure that unreflective feminists can be recruited to the cause with relative ease, and provide legislators with a ready legal bastion on the basis of which to introduce novel statutory initiatives.

But on just what issues do such initiatives focus, and in what circumstances? One has already been mentioned: 'honour related violence', which is formally classified as a 'hate crime' in English Law, despite the fact that Article 12 of the Universal Declaration explicitly indicates that 'Everyone has the right to the protection of the law against such interference or attacks upon his honour and reputation'. However the most active patterns on statutory interference have taken place in the sphere of immigration law, and with it rights of access to citizenship. Given that popular hostility amongst members of indigenous majorities is directed as much at continued inflows of settlers as at the growth of ethnic colonies, and that such on-going inflows are largely kinship-driven, immigration legislation introduced in the name of 'migration management' has borne down with particular force on the kinds of marriage which are frequently executed within transnational communities of non-European, and especially of Muslim, origin: those in which conjugal partnerships are contracted early, organized by the spouses' parents and arranged as between cousins.

Migration managers for many years sought to query the legitimacy of migrants' marriages as a means of curbing the incidence of family reunion, although for many years they met with limited success (Suchdeva 1993). However a more recent set of initiatives originally developed in Scandinavia are currently proving to be rather more effective. Influenced by a report of the Oslo-based Human Rights service entitled '*feminine integration*' (Storhaug and Human Rights Service 2003, see Hagelund 2008), a head of steam built up behind the view that marriages within such communities were frequently 'forced', since they were rarely the outcome of a free choice on the part of both spouses, especially when spouses were young and closely related. Storhaug argued that the most effective way in which the incidence of forced marriages, violence and abuse within marriage, and the use of marriage for immigration purposes could be minimized was by altering immigration rules to incorporate:

- A ban on entry in the case of transnational marriages between cousins.
- A limit on the number of family unifications through marriage one person can obtain, set at once every ten years (to counteract repeated circles of marriage and subsequent divorce, either through *pro forma* marriages for immigration purposes or to establish polygamous families).
- A ban on family unification for those with a history of marital violence.
- A requirement that foreign marriage contracts should contain a clause which guarantees equal divorce rights to both spouses before it could be regarded as a valid basis for family unification in Scandinavia.

These recommendations were swiftly taken up by both the Danish and the Norwegian authorities, and are currently being emulated elsewhere in the EU.

However one of the key driving forces behind these Scandinavian developments ran markedly closely parallel to nineteenth century missionary-inspired pamphlets described earlier: a much publicized monograph by Unni Wikan (2002, originally published in Norwegian in 1995) highlighting the plight of Muslim women unfortunate enough to find themselves trapped within the oppressive framework of immigrant families which has established themselves in Norway. Although Wikan writes as a social scientist, and takes her ideological inspiration from individualistic feminism rather than from evangelical Christianity, her analytical methodology is at another level remarkably close to that of her predecessors. Like them, she builds her argument around detailed commentaries on a small number of individual case studies, each of which she deploys as a means of highlighting the potentially horrific outcomes which can occur when young female members of corporate and hierarchically structured extended families have find themselves at odds with the interests and priorities of its senior members.

I do not quarrel with her observations, in so far as they go. They are familiar enough to all those who have experienced the consequences of the implosion of normative patterns of reciprocity within families of this kind (Ballard 2008: 53). What is striking about Wikan's analysis – and those of all the others commentators who make their case within the same kind of emic and hence ethnocentric perspective – is the lack of any significant effort to appreciate the conceptual universes of those responsible for treating such 'victims' in the way that they did. Instead she simply asserts that their behaviour was so far beyond civilized expectations, and hence so barbaric, that such motivations do not merit consideration. This is not to suggest that their motivations were necessarily acceptable: rather the core of my argument is that it is unsound to attempt to make such judgements without taking careful and sympathetic cognisance of the conceptual universe within which those involved in the incident in question were operating. Whatever horror stories may be circulated about the barbaric character of Muslim Law, in historical terms justice, *insaaf* (justice), has always played at least as much of a central role in the delivery of Islamic Law as it did in the Judaeo-Christian tradition.

**A Plural Future?**

It is not my purpose to dismiss the utility of a discourse of human rights *per se*. My concerns in this chapter are three-fold. Firstly to emphasize the profoundly emic character of the conceptual



foundations of the current discourse; secondly to highlight the ease with which its non-universalistic deficiencies can be utilized as a means of doing *in*justice to those whose behavioural and conceptual premises are out of step with those underpinning Europe's Judaeo-Christian Enlightenment; and thirdly to underline how such alleged moral deficiencies are once again being used for hegemonic purposes: namely to de-legitimize, and in some instances actively criminalize, the familial strategies deployed by entrepreneurially minded migrants seeking to challenge established patterns of Euro-American privilege by engaging in strategies of globalization from below. The contradictions precipitated by these developments are becoming more severe. Whilst Enlightenment-driven efforts to promote national homogeneity, reinforced by the impact of education, literacy and mass media, once led to a decline in ethnic plurality in Europe's nascent nation-states, the recent upsurge in migration 'from below' has subverted that tendency. Given that the majority of contemporary newcomers are carriers of non-European cultural traditions, and that most are Muslims to boot, the plurality to which their presence has given rise is particularly sharply articulated, and likely to remain so for the foreseeable future.

All systems of law, whether statutory, customary, or nominally universalist, are products of the social, cultural and ideological contexts from which they have emerged. If a given set of rules, conventions and expectations has been generated and applied within what appears to be a homogenous socio-cultural arena, then it will probably seem to its users to be of universal applicability. Moreover so long as the arena within which any given legal system is applied is as homogenous as its users believe, its etic (or non-universalistic) character will be of little significance. However the moment that presupposition is rendered false, either as a result of the recognition (or resurgence) of hitherto overlooked patterns of internal plurality, or as a result of newcomers' construction of ethnic colonies, or indeed of a general shift towards globalization, the parochial character of the conventional assumptions within which the system operates will have immediate consequences, especially for those who differ. In contexts of *de facto* plurality the imposition, indeed legal enforcement, of expectations of homogeneity and uniformity, even if implemented on nominally humanitarian grounds, will lead to many components of their everyday behaviour being identified as inappropriate at best, and as illegitimate, subversive or even criminal at worst. Such a situation is in no way compatible with equity or justice.

Approaching the issue from this perspective poses a very different set of questions to those which Poulter or Wikan confront. Philosophical questions about our capacity to tolerate diversity are no longer meaningful. The issues which current developments have thrown up are much more hard-nosed: how can legal systems currently based on implicit assumptions of homogeneity respond on an equitable basis to the existence of *de facto* patterns of ethnic and religious plurality? And if contemporary legal systems consequently have no alternative but to pluralize themselves, how can this best be achieved?

My core argument is that the most serious current obstacle to making progress on this front in Euro-American jurisdictions stems from a deep-rooted commitment to the philosophical assumptions of the Enlightenment, and the consequent, profoundly mistaken, assumption that the premises within which such jurisdictions operate are of universal validity. So long as lawyers and social policy makers remain committed to that position, any steps they take towards recognizing the legitimacy of ethnic plurality will encounter the tripwire set by their nineteenth century predecessors: that practices contrary to justice, equity and good conscience, in other

words to the premises of the European Enlightenment, will be deemed unacceptable. Indeed in a remarkable parallel with eighteenth century assumptions, the prospect of access to citizenship is currently being rendered dependent on the ability of applicants to manifest a sufficient degree of moral discernment before they can achieve such a status. Hence Baden- Württemberg has recently introduced what has come to be popularly described as a 'Muslim test' including such questions as:

- How do you view the statement that a woman should obey her husband, and that he can beat her if she doesn't?
- You learn that people from your neighbourhood or from among friends or acquaintances have carried out or are planning a terrorist attack - what do you do?
- Some people hold the Jews responsible for all the evil in the world, and even claim they were behind the attacks of 11 September 2001 in New York. What is your view of this claim?
- Imagine that your son comes to you and declares that he's a homosexual and would like to live with another man. How do you react?

If the applicant's responses are deemed inadequate, the naturalization request may be turned down. A similarly structured, albeit rather less blatant, has also recently been introduced in the UK. Hence a recently published document entitled *The Path to Citizenship* (Home Office 2008) not only requires all migrants to *earn* the right to stay, not least by learning to speak English, , obeying the law and contributing to the community, but also greatly extends what it describes as 'the path to citizenship' to include a substantial period of 'provisional citizenship' during which applicants must prove the moral, linguistic and behavioural *bona fides* in an implicitly homogenous British socio-cultural order .

**A Conclusion, Together with Some Vital Caveats**

How to best to move forward? In a world where processes of globalisation are becoming steadily more powerful, such statutory efforts to turn back the clock seem likely to be just as ineffective as King Canute's efforts to halt the rising tide. Our future, no less than our past, appears to be inescapably plural. In practical terms the unqualified promotion of methodological individualism within the context of an implicit assumption of methodological nationalism no longer holds water: it has passed its sell-by date. However there is no need to throw the baby out with the bathwater. There is much of value in the premises of the Enlightenment, just as there is in the more corporatist approach championed by Confucian and Indic traditions. The accommodation of plurality is likely to be a much less of traumatic experience than the unilateralist champions of myopic universalism currently fear: all that is required (although the scale of the task should not be underestimated) is a systematic effort to re-contextualize crucial aspects of established expectations, in order to take more adequate cognisance of the ever more plural character of the contemporary global order. If such an exercise were to be undertaken, it would be foolish to set down the precise premises on which those subject to its provisions should order their lives, especially in domestic contexts. Rather in legal as in so many other contexts the central objective of such an initiative should be to maximize the capacity of judges and juries to take cognisance of all relevant dimensions of the context within which the events in question took place, in a conscious effort to enhance the prospect of precipitating equitable outcomes in the course of the delivery of justice. In an English context this would not be a revolutionary commitment: as the common law tradition has always recognized, one size will most definitely not fit all.



This would not entail the abandonment of all normative imperatives: social order is unsustainable unless all participants agree some basic rules. Homicide is in all circumstances a criminal offence, as is rape and other forms of physical assault; and if only to ensure the safety of our persons and our property, there must be sanctions against such criminally anti-social acts as theft. However, the common law tradition has always taken it for granted that justice cannot be done without taking careful cognisance of the context in which things were said and done and led to charges being laid against the defendant. Such context-setting is, and must be, an empirical business. Efforts to define it by statute are clumsy at best, and misleading at worst. Nor is 'commonsense' of much utility in a society in which sub-sections of the population draw on differing conceptual premises to order their behaviour, and where members of the dominant majority readily apply stereotypical judgements to the behaviour of minorities.

For example, incidents of domestic homicide occur in all sections of the population, most usually because interpersonal relationships have got completely out of hand. The ultimate causes of those breakdowns (violent efforts of the powerful to impose their will, sexually grounded jealousies and betrayals, such that weaker members of such families find themselves driven to the end of their tether) are more or less universal, and the outcome is invariably tragic. But when such tragic incidents occur in South Asian families, why do they attract deeply pejorative labels such as 'honour killing', and in so doing lead to the invocation of statutory rules which insist that 'hate crimes' must of necessity attract exemplary punishment?

It is with such *humanitarian* considerations in mind that the tendency to uncritically entrench the premises of the contemporary discourse of human rights in statutory provisions must be regarded as double-edged. The discourse undoubtedly provides effective means whereby citizens of over-authoritarian states can mount legal challenges to tyranny. But however much this may promote individual liberty, it does nothing to prevent the launching of 'humanitarian initiatives' which nominally aim to introduce benighted others to the values of freedom and civilization; likewise it provides committed libertarians with a ready means of condemning corporately-oriented family structures as inherently oppressive patriarchies, such that those trapped therein are in urgent need of liberation. The issues unleashed in this context are far from purely legal in character; they are inescapably political, as is the double-edged sword of human rights. In such circumstance it is idle to assume that the discourse of human rights is everywhere and always an instrument of liberation: it can just as easily be deployed as a weapon of war.

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