Institute of Advanced Legal Studies
(University of London)
Charles Clore House
17 Russell Square
London WC1B 5DR
Telephone: 01-637 1731
Telex: 269 400 SH UL (ref. IALS)
Fax: 01-436 8824

W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

The Limits of Puralism - A Legal Perspective

Dr Sebastian Poulter
(University of Southampton)

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THE LIMITS OF PLURALISM

- A LEGAL PERSPECTIVE

Sebastian Poulter

Reader in Law

University of Southampton

INTRODUCTION

Recent years have witnessed an upsurge in the identification of many peoples with their particular ethnic groups or religious communities. An appreciation of their cultural heritage, a concern for the preservation of their distinctive customs and traditions and a commitment to maintain their deeply-held values and beliefs has led them to stake out claims upon the wider polity for greater recognition of their ethnicity. This ethnic (and religious) revival appears to be a worldwide phenomenon, with numerous illustrations to be found in all five continents, of which the following is merely a small sample.

In Africa, the long wars being fought by the Eritreans and Tigrayans in Ethiopia have received much publicity, but elsewhere ethnic rivalries often simmer just below the surface. In the Americas, the plight of the Indians in Brazil (and elsewhere) has led to concern about their very survival in the face of rapid economic development, while in the United States Hispanics, blacks and others increasingly reject the old notion of a 'melting-pot'. In Asia, there have been recent assertions of ethnicity on the part of Armenians, Azeris, Georgians and others in the USSR, by the Sikhs in India, by the Tamils in Sri Lanka, by the Kurds in the Middle East and by Muslim and Christian communities in the Lebanon. In Australasia, the celebration both of the bicentenary of white settlement in Australia in 1988 and of the 150th anniversary of the Treaty of Waitangi in New Zealand in 1990 have provided opportunities for aborigines and Maoris respectively to protest at the ways in which their cultures have been ignored or obliterated by the Crown. In Europe, attention has shifted during the past year away from long-standing campaigns by, for instance, the Basques and the Corsicans towards assessing the future prospects of the Lithuanians, Latvians and Estonians (in the USSR), the Serbs, Slovenes, Albanians and others (in Yugoslavia), the Hungarians in Romania and the Turks in Bulgaria. The conflict between Protestants and Catholics in Northern Ireland, of course, continues and there is no prospect of an early settlement of the divisions between Greek and Turkish Cypriots.

It is vital to come to terms with ethnic and cultural diversity in the modern world since there are now estimated to be at least four times as

many ethnic groups as states,[1] and a majority of the latter are by no means ethnically homogeneous in character, possessing deep religious, linguistic and cultural divisions.[2] Probably only a very small proportion of ethnic groups actually wish to become politically independent; typically, such groups have a well-defined territorial base and have enjoyed the status cf nationhood at some time in the past. Most ethnic groups strive instead for more limited objectives such as fair representation in decision-making bodies, an equitable share in natural resources, legal recognition of cultural traditions, religious freedom and language rights.

Britain's various ethnic minority communities now account for an estimated 2.75 to 3 million people (representing around 4.5 per cent of the population as a whole) and they are currently increasing at the rate of around 90,000 per annum, two-thirds of which is attributable to natural growth and one-third to net migration.[3] There are thought to be over a million Muslims living here and Judaism, Hinduism and Sikhism can probably each claim more than 300,000 adherents.[4] Recently, each of these four minorities has had cause to assert itself vigorously in protecting its fundamental values - Muslims over Salman Rushdie's book The Satanic Verses,[5] Jews in relation to a threat to remove their special rights to religious slaughter of animals,[6] Hindus in respect of the denial by the

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1 See 'Ethnicity in World Politics' (1989) 11 Third World Quarterly ix.

2 Smith, A, The Ethnic Revival (Cambridge, 1986), p 40.

3 See Shaw, 'Components of growth in the ethnic minority population' (1988) 52 Population Trends 26; Haskey 'The ethnic minority populations of Great Britain: their size and characteristics' (1988) 54 Population Trends 29.

4 There are no official figures for religious affiliation, merely rough estimates, because no questions on the subject are asked on census forms. For the basis of the estimates given here, see Poulter, S, English Law and Ethnic Minority Customs (Butterworths, 1986), p 206. Claims by Muslims to have 1.5 to 2 million adherents in Britain are wildly out of line with recent Labour Force Survey figures.

5 (Viking Penguin, 1988).

6 See Farm Animal Welfare Council, Report on the Welfare of Livestock When Slaughtered by Religious Methods (HMSO, 1985).

planning authorities of general public worship at Bhaktivedanta Manor temple in Hertfordshire[7] and Sikhs over a new legal requirement that all workers on building sites must wear safety helmets.[8] Hence, while discrimination on the basis of colour remains widespread in this country, in many respects the most important characteristics of Britain's minority communities today are not so much the (predominantly) brown or black skins of their members but their adherence to certain customs, traditions, religious beliefs and value systems which are greatly at variance from those of the majority white community.

2 THE CONCEPT OF A MULTICULTURAL BRITAIN

Modern Britain is often referred to in popular parlance as 'a multicultural society'. However, if this phrase is to be more than merely platitudinous, its underlying objectives in terms of social policy must be defined with some degree of clarity. It can be constructively employed to denote a general policy of respect for ethnic minority cultures (within certain very broad limits), coupled with a determination to promote equal opportunity for everyone and to eradicate all forms of discrimination based on race, religion or ethnic or national origin.[9] Such goals are not, of course, new. In 1966 when he was Home Secretary in the Labour Government, Roy (now Lord) Jenkins outlined precisely this target in a speech about integration in which he commented -

> 'Integration is perhaps a rather loose word. I do not regard it as meaning the loss, by immigrants, of their own national characteristics and culture. I do not think we need in this country a melting pot, which will turn everybody out in a common mould, as one of a series of carbon copies of someone's misplaced vision of the stereotyped Englishman ... I define integration, therefore, not as a flattening process of

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7 For the announcement of the final decision by the Secretary of State for the Environment see Hansard (Commons), vol 169, cols 600-1 (written answers, 20 March 1990).

8 Construction (Head Protection) Regulations 1989; Employment Act 1989, s 11.

9 See eg 'Education for All' (Swann Committee Report), pp 5-6.

> assimilation but as equal opportunity, coupled with cultural diversity, in an atmosphere of mutual tolerance.'[10]

In his view, if Britain was to be able to claim any sort of world reputation for civilised living and social cohesion it needed to come closer to the fulfilment of this goal than it was when he spoke. Now, more than twenty years on, many people would surely echo his remarks to the full.

It seems probable that the three objectives of 'equal opportunity', 'cultural diversity' and 'mutual tolerance' will constitute part of official Government policy towards the ethnic minorities for the foreseeable future, regardless of which party holds the reins of power. Naturally, significant differences of emphasis can be expected as well as varying degrees of commitment to the implementation of such policies. However, a reversion to the notion of wholesale 'assimilation'[11] (fashionable during the period 1950 to 1965), as a process that might be achieved through Government pressure, is now generally recognised as totally unrealistic, though some senior Conservative politicians still occasionally refer to the need for members of the ethnic minority communities to accept 'the social and cultural standards' of the 'host country'.[12] The speech by Douglas Hurd (then Home Secretary) at the Birmingham Central Mosque on 24 February 1989 (ten days after Ayatollah Khomeini's intervention in the Rushdie affair) can be seen as particularly significant, for it clearly represented a continuation of the approach

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10 Jenkins, R, Essays and Speeches (Collins, 1967), p 267.

11 For illuminating analyses of the contrasts between 'assimilation' and cultural pluralism, see Parekh, B, Colour, Culture and Consciousness (London, 1974), chap 15; Parekh, 'Britain and the Social Logic of Pluralism' in Britain: A Plural Society (CRE, 1990), pp 58-76.

12 John Biffen, MP, in The Independent, 5 October 1987. See also the comment of Sir John Stokes MP, reported in The Independent, 30 May 1989 - 'Those who settle here must obey our laws and customs.' Norman Tebbitt MP has also complained that '... in recent years our sense of insularity and nationality has been bruised by large waves of immigrants resistant to absorption', The Field, May 1990, p 78. No doubt, these sorts of sentiments are shared by a significant, if unquantifiable, proportion of the white population - see Swann Committee Report, p 6.

adopted by Roy Jenkins in the same office twenty three years earlier.[13] Mr Hurd emphasised the 'equal opportunity' aspect by referring to the need for ethnic minority children to acquire a fluent command of the English language as well as a proper understanding of British history, institutions and democratic processes if they were to achieve success here. He re-asserted the Government's determination to stamp out racial discrimination and pointed to the increasing numbers of Asians and Afro-Caribbeans who were playing a full part in British public life as magistrates, local councillors, police officers and Parliamentary candidates. So far as 'cultural diversity' was concerned, he expected the minorities to retain their religious faiths, traditions and mother-tongues and pass these on to their children. A portion of the Home Secretary's speech was also devoted to 'mutual tolerance' in stressing the necessity for everyone involved in protesting about Salman Rushdie's book to respect the rule of law and not to resort to violent demonstrations in the streets or to making death threats against the author or his publishers.

So far as the English legal system is concerned, its task in the promotion of equal opportunities lies largely in the successful enforcement of the Race Relations Act 1976 and the strengthening of some of its provisions[14] to try to ensure the eventual elimination of discrimination in such fields as employment, housing, education and the provision of goods and services. In terms of the maintenance of cultural diversity, the law's role is to allow and, where appropriate, facilitate the continued practice of ethnic minority customs and traditions. In a liberal democracy, such legal endorsement of pluralism can be supported by reference to fundamental beliefs about the need for individual freedom, religious toleration and social justice based upon equality of respect. Since the challenge

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13 The speech was reprinted in full in New Life, 3 March 1989. Similar views were expressed by John Patten, Minister of State at the Home Office, in a letter to leading British Muslims dated 4 July 1989 (see The Times, 5 July 1989 where the letter is reprinted).

14 See eg CRE, Review of the Race Relations Act 1976 - Proposals for Change (1985). There is also a need for Government and all public sector bodies to adopt stringent 'contract compliance' requirements for those providing goods and services - see eg Bhat, A, Carr-Hill, R, and Ohri S (eds), Britain's Black Population (2nd ed, 1988), chap 4.

presented by a policy of cultural pluralism may, on occasion, be a pretty stiff one the law can assist in the creation of 'an atmosphere of mutual tolerance' by being properly enforced, in an even-handed way, so that public order is preserved.

The overall objective which Britain should be striving to attain was well summarised in the Swann Committee Report on the education of children from ethnic minority groups in 1985 -

> 'We would ... regard a democratic pluralist society as seeking to achieve a balance between, on the one hand, the maintenance and active support of the essential elements of the cultures and lifestyles of all the ethnic groups within it, and, on the other, the acceptance by all groups of a set of shared values distinctive of the society as a whole. This then is our view of a genuinely pluralist society, as both socially cohesive and culturally diverse.'[15]

However, the Swann Committee also made it perfectly plain that in their view the ethnic minority communities could not be allowed to preserve unchanged all the elements of their cultures and lifestyles because this would prevent them from taking on the shared values of the wider society.[16] There are, therefore, limits to the acceptance of cultural diversity which need to be imposed in support of the overriding public interest in promoting social cohesion. Cultural tolerance cannot become a 'cloak for oppression and injustice within the immigrant communities themselves',[17] nor must it endanger the integrity of the 'social and cultural core' of English values as a whole.[18] It is quite impracticable to subscribe to a policy that holds that all cultural values have equal validity in modern Britain and that no cultural practices should ever be condemned or outlawed. Indeed, in a number of legal cases in which the question of respect for foreign cultural practices has been specifically addressed,

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15 At p 6.

16 Report, p 5.

17 Lester, A and Bindman, G, Race and Law (Penguin, 1972), p 18.

18 Patterson, 'Immigrants and Minority Groups in British Society' in Abbott, S (ed), The Prevention of Racial Discrimination in Great Britain (OUP, 1971), p 30.

English judges have emphasised that tolerance is bounded by notions of reasonableness and public policy and that foreign customs and laws will not be recognised or applied here if they are considered repugnant or otherwise offend the conscience of the court.[19]

3 CULTURAL PLURALISM IN ENGLISH LAW TODAY

Unlike many other Commonwealth countries, England possesses an essentially unified legal regime. Even so, within this monistic framework it is possible to identify several examples of separate and distinctive treatment and regulation being afforded to members of ethnic or religious groups, designed to give proper respect to their own cultures and traditions.[20] Many of these are summarised below in relation to the various branches of law concerned, together with some of the most striking instances of situations where English law draws the line and refuses to give recognition to cultural diversity.

(a) Family Law

(i) Marriage

The basic law governing the solemnisation of marriages in England is set out in the Marriage Acts 1949-86. These Acts lay down detailed rules concerning where a marriage may take place, who should conduct the ceremony, at what time of day it may occur and the nature of the celebration. However, two religious denominations are exempt from all these regulations concerning the formalities of marriage, namely Quakers and 'persons professing the Jewish religion'.[21] Their special privileges go back at least as far as Lord Hardwicke's Marriage Act 1753. As a result their ceremonies may occur at any hour of the day or night; they need not

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19 See eg Baindail v Baindail [1946] P 122 at 129; Cheni v Cheni [1965] P 85 at 99; Varanand v Varanand (1964) 108 SJ 693; In the Estate of Fuld (deceased) No 3 [1968] P 675 at 698.

20 See generally, Poulter, S, English Law and Ethnic Minority Customs, passim; Poulter, S, Asian Traditions and English Law (Runnymede, 1990).

21 Marriage Act 1949, s 26(1)(c), (d).

take place in any particular building; they do not require the presence of any official appointed by or notified to the state authorities; and the form of the wedding merely has to follow the usages of the Society of Friends or the usages of the Jews, as the case may be.[22]

English domestic law makes no concessions, however, to other laws or customs in relation to the question of capacity to marry. A marriage in which either party is under 16 years of age, or is within the prohibited degrees of relationship as defined in the Marriage Acts 1949-86, or is already married to someone else will automatically be void.[23] Although there has been no decided case on the subject, it is certain too that English law would disregard any prohibition falling outside its own rules, eg the Islamic ban on marriages between Muslim women and non-Muslim men and the Jewish prohibition forbidding Jews from marrying Gentiles.

Arranged marriages are treated as perfectly valid in themselves, although the immigration rules make it unnecessarily hard in practice for parties to such marriages to gain entry to the UK for purposes of settlement.[24] However, if an arranged marriage taking place in England is pushed to the point of compulsion so that it amounts to a forced marriage entered into under duress the marriage is voidable.[25] The unwilling party may thus escape from it by instituting nullity proceedings within three years of the marriage, provided it can be proved that his or her will had been overborne by the pressure or threats applied.[26]

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22 Ibid, ss 26(1), 35(4), 43(3), 75(1)(a).

23 Matrimonial Causes Act 1973, s 11. Concern about foreign marriages where the bride is under 16 or where the marriage is actually polygamous has also led to changes in the immigration rules designed to prevent such couples settling in the UK - see HC 306 of 1986; Immigration Act 1988, s 2; HC 555 of 1988.

24 For the notorious 'primary purpose' rule, see HC 169 (1982-83), as amended.

25 Matrimonial Cases Act 1973, s 12.

26 Hirani v Hirani (1983) 4 FLR 232; cf Singh v Singh [1971] P 226.

(ii) Divorce

The only way of obtaining a divorce in England is through a decree granted by a court of civil jurisdiction[27] on the basis of a finding that the marriage in question has irretrievably broken down.[28] Hence neither a Muslim divorce by talaq nor a Jewish divorce obtained by a get from the Beth-Din nor a purely consensual divorce arranged in accordance with Hindu, Chinese or African custom will be accepted as valid if it occurs within the British Isles.

(iii) Financial provision

The English courts possess a wide discretion, within certain statutory guidelines, to decide whether to make orders for financial provision upon separation and divorce and, if so, how large an amount should be specified.[29] In Brett v Brett[30] the wife, an orthodox Jewess, had obtained a decree of divorce from the English court on the ground of cruelty under the old law. However, she also wanted her ex-husband to deliver a get, without which she would not be free to re-marry under Jewish law. Upon her application for financial provision the court took account of this wish (and her ex-husband's adamant refusal to agree to it) by allowing him to pay a smaller lump sum than would otherwise be ordered, provided he delivered a get to her within a period of three months. In two other cases the English courts have been prepared to enforce contracts for the payment of deferred dower (mahr) by Muslim husbands upon divorce.[31]

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27 Family Law Act 1986, s 44(1).

28 Matrimonial Causes Act 1973, s 1.

29 Matrimonial Causes Act 1973, Part II, as amended by the Matrimonial and Family Proceedings Act 1984; Domestic Proceedings and Magistrates' Courts Act 1978.

30 [1969] 1 All ER 1007.

31 Shahnaz v Rizwan [1965] 1 QB 390; Qureshi v Qureshi [1972] Fam 173.

(b) Education

(i) Choice of school

Parents have a right to express a preference to a L.E.A. as to which school they would like their child to attend, but the authority is only bound to comply with the preference in so far as this would be compatible with the provision of efficient education and the efficient use of resources.[32] Co-educational schools now predominate and there is no guarantee that there will be places at all-girls schools for all those ethnic minority parents who might seek them.

Voluntary-aided status is available, together with substantial financial benefits, for denominational schools within the state sector,[33] but while there are a few Jewish schools in this category no other non-Christian faiths have had such status accorded to their schools.

(ii) Religious education

The Education Reform Act 1988 attempts to accommodate the needs of non-Christian pupils and their parents in a variety of ways.[34] Although all schools in the state sector must provide for daily acts of collective worship and for classes in RE, any parent who is apprehensive about Christian indoctrination may request that his or her child be withdrawn from either or both of these activities.[35] In LEA schools the collective worship has to be 'wholly or mainly of a broadly Christian character' when judged over a school term,[36] but schools may obtain exemption from this provision if the local Standing Advisory Council on Religious Education

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32 Education Act 1944, s.76; Education Act 1980, s.6(5).

33 Education Act 1944, ss.18-19.

34 For a detailed analysis, see Poulter 'The religious education provisions of the Education Reform Act 1988' (1990) 2 Education and the Law 1.

35 Education Reform Act 1988, s.9(3).

36 Ibid, ss 6,7.

(SACRE) decides that it would be inappropriate,[37] e.g. where there is a sizeable number of pupils of non-Christian faiths. The principal religious traditions of the local area have to be reflected in one of the four groups which is entitled to be represented on each SACRE.[38]

In LEA schools classes in RE have to follow an 'agreed syllabus' and must not be given in the form of doctrines that are distinctive of any particular denomination.[39] Many of the existing syllabuses are multi-faith and any new syllabus adopted after 29 September 1988 must 'reflect the fact that the religious traditions in Great Britain are in the main Christian, while taking account of the teaching and practices of the other principal religions represented in Great Britain.'[40] Parents who are not satisfied with their local agreed syllabus can request separate religious education for their children in accordance with their faith and the LEA must normally arrange this so long as the cost of such tuition does not fall upon the authority.[41]

(iii) Dress for school

Pupils cannot lawfully be refused admission to a school or be sent home for a breach of the school rules about uniform simply because they are complying with ethnic rules about dress.[42] Hence Sikh boys may wear turbans at school,[43] Asian girls may wear shalwar (trousers) and Muslim girls may wear dupattaas (headscarves).

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37 Ibid, s.12.

38 Ibid, s.11(4).

39 Education Act 1944, s.26 (as amended).

40 Education Reform Act 1988, s.8(3).

41 Education Act 1944, s.26(as amended); Education Reform Act 1988, s.9(4).

42 Race Relations Act 1976, ss 1,3,17.

43 Mandla v Dowell Lee [1983] AC 548.

(c) Religious observances

Members of religious minorities are legally entitled to freedom of worship;[44] to construct, own and manage their religious buildings;[45] to register such buildings[46] and claim exemption from liability for the payment of local rates;[47] to celebrate their religious festivals and to swear their own distinctive oaths in judicial proceedings[48] (whether as plaintiff or defendant, witness or juror). They are not, however, protected by the blasphemy laws against having their faiths reviled and ridiculed in a scurrilous or contemptuous fashion. Prior to the Salman Rushdie affair the precedents strongly suggested that the law only extended this safeguard to Christianity and the particular rituals and doctrines of the Church of England. In 1979 in Whitehouse v Lemon[49] (the 'Gay News' trial), Lord Scarman had declared -

> 'The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the Kingdom. In an increasingly plural society such as that of modern Britain, it is necessary not only to respect the differing religious beliefs, feelings and practices of all but to protect them from scurrility, vilification, ridicule and contempt.'[50]

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44 Liberty of Religious Worship Act 1855.

45 Subject, of course, to the planning laws. On 20 March 1990 the Secretary of State for the Environment announced that he would uphold the Inspector's decision, following two Public Inquiries, to ban large-scale public worship at Bhaktivedanta Manor, the Hindu Temple at Letchmore Heath in Hertfordshire. A two-year period of grace would be allowed for an alternative site to be found. Local residents had objected that planning permission for such worship had never been obtained and too much intrusion and disruption to their lives had been caused by worshippers. The pre-existing permission for the temple to be used as a residential college for the International Society for Krishna Consciousness remains in force.

46 Places of Worship Registration Act 1855.

47 Local Government Finance Act 1988, s 51 and sched 5, para 11.

48 Oaths Act 1978.

49 [1979] AC 617.

50 At 658.

However, he had then proceeded to indicate that the current law did not cover non-Christian religions because he added -

> 'I will not lend my voice to a view of the law relating to blasphemous libel which would render it a dead letter, or diminish its efficacy to protect religious feelings from outrage and insult. My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history.'[51]

Lord Scarman's comments on this aspect of the case were merely obiter dicta and it was not until the decision of the Divisional Court in R v Bow Street Magistrates' Court, ex parte Choudhury[52] that a decisive modern ruling was given on the subject. In that case application had been made for judicial review of the refusal by the chief metropolitan magistrate to grant summonses accusing Salman Rushdie and his publishers of blasphemy against Islam. The Divisional Court unanimously upheld the magistrate's ruling that the offence of blasphemy only related to Christianity and could not be judicially extended to other faiths.

After the decision in Whitehouse v Lemon the question of possible reform of the law was referred to the English Law Commission, where the detailed arguments and options were considered in a working paper (No 79) published in 1981 and a final report (No 145) published in 1985. Ultimately, the two members of the Commission who broadly agreed with Lord Scarman's views were outvoted by three Commissioners who recommended that the blasphemy law should be abolished altogether. However, in the four years that elapsed between the final report and the publication of The Satanic Verses no action was taken by Parliament, either to abolish the offence or to extend its ambit to other faiths.

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51 Ibid.

52 The Times, 10 Apr 1990.

(d) Employment

The Race Relations Act 1976 attempts to combat discrimination in the employment field by making both 'direct' and 'indirect' discrimination unlawful. Indirect discrimination involves practices and procedures which appear at first glance to be perfectly acceptable because they apply the same standard requirements to everyone (regardless of race, colour or origins etc.) but which on closer inspection have a disproportionately adverse impact upon members of 'racial groups'.[53] A 'racial group' is denoted by the Act as meaning 'a group of persons defined by reference to colour, race, nationality or ethnic or national origins'.[54] In outlawing indirect discrimination the Act is able to give protection to certain cultural practices and religious norms followed by members of such groups in circumstances where a similar protection would not be available to members of the majority community. Hence, in appropriate circumstances, Asian women are guaranteed the right to wear trousers at work when white women would not be[55] and Sikh men cannot be denied jobs simply because they insist on wearing turbans rather than the company's prescribed headwear, when white job applicants would certainly have no option but to comply with the company's rules and regulations.[56] Similarly, a Rastafarian cannot be refused employment merely because he is unwilling to cut off his dreadlocks.[57] It is important, however, to bear in mind that very few members of the ethnic minority communities actually win cases of alleged discrimination in practice and most of the indirect discrimination cases have been lost because the employers have been able to establish to the satisfaction of tribunals and appellate courts that their rules and

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53 Race Relations Act 1976, s 1(1)(b).

54 Ibid s 3(1).

55 Malik v British Home Stores (1980, unreported).

56 Kamaljeet Singh Bhakerd v Famous Names Ltd (1988, unreported).

57 Dawkins v. Crown Suppliers (PSA) (1989, unreported).

regulations concerning dress or appearance are 'justifiable' within the Act - often on grounds of hygiene or safety.[58]

Recently it has been made compulsory for virtually all persons working on construction sites to wear suitable head protection in the form of a safety helmet.[59] However, a specific statutory exemption from this requirement has been created for turbanned Sikhs[60] in the light of the knowledge that around 40,000 Sikhs are currently employed in the construction industry. Furthermore, any employer who refuses to employ a Sikh on a construction site simply because he is unwilling to wear a safety helmet in place of his turban will be barred from being able to argue that such a policy is justifiable on grounds of safety under the indirect discrimination provisions of the Race Relations Act.[61]

(e) Criminal Law

(i) The question of guilt

In criminal proceedings it has long been the general approach of the courts to apply a uniform and consistent standard to all those who are accused of offences, regardless of whether or not they have foreign origins.[62] Since the main purpose of the criminal law is to impose certain minimum standards of behaviour for the benefit of the community as a whole, it has seemed logical to apply, in the vast majority of circumstances, a universal set of principles to determine who is guilty and who is innocent.

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58 See eg. Singh v. Rowntree Mackintosh Ltd [1979] IRLR 199 and Panesar v. Nestle Co Ltd [1980] ICR 144 (no beards allowed in confectionery factories), Kuldip Singh v British Rail Engineering Ltd [1986] ICR 22 (hard hat, not turban, to be worn in engineering workshop).

59 Construction (Head Protection) Regulations 1989.

60 Employment Act 1989, s 11.

61 Ibid, s 12.

62 See eg R v Esop (1836) 7 C & P 456; R v Barronet and Allain (1852) Dears CC 51.

This pattern of uniformity has been followed in a number of cases where the conduct of the accused was at least partly explicable and sometimes even justifiable in terms of his or her cultural background. There have been convictions of several Asians of kidnapping and false imprisonment for snatching relatives pursuant to family feuds,[63] of an African mother of assault for scarifying the cheeks of her young sons,[64] of a West Indian father of assault arising out of his overzealous punishment of his son,[65] of Rastafarians of the misuse of drugs for possessing marijuana,[66] and of an Indian Muslim under the Education Act 1944 for failing to send his teenage daughter to a co-educational school.[67]

In addition certain alien customs and traditions have been specifically outlawed by statute. For example, all forms of female circumcision are banned by the Prohibition of Female Circumcision Act 1985 and polygamy constitutes the crime of bigamy under section 57 of the Offences Against the Person Act 1861.

(ii) Special statutory exemptions

There are, however, fields in which Parliament has legislated specifically to exempt adherents to particular minority faiths from certain statutory provisions. First, under the Shops Act 1950 a 'person of the Jewish religion' may open his shop on Sundays without being in breach of the Sunday trading laws, provided he registers with the local authority and keeps the shop closed on Saturdays.[68] Secondly, under the Slaughter of Poultry Act 1967 and the Slaughterhouses Act 1974 Jews and Muslims may slaughter animals and poultry in accordance with their traditional methods

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63 R v Dad and Shafi [1968] Crim LR 46; R v Moied (1986) 8 Crim AR (S)44.

64 R v Adesanya (1974, unreported).

65 R v Derriviere (1969) 53 Crim AR 637.

66 R v Williams (1979) 1 Crim AR (S) 5; R v Daudi and Daniels (1982) 4 Crim AR (S) 306; R v Aramah [1983] Crim LR 271.

67 Bradford Corporation v Patel (1974, unreported).

68 Shops Act 1950, s 53.

without having to stun them first, provided the meat is for consumption by Jews or Muslims, as the case may be.[69] Thirdly, under the Road Traffic Act 1988 Sikh motorcyclists are excused from the requirement to wear a crash helmet, provided they are wearing turbans.[70]

Apart from these three instances, the legislature has recently made indirect provision for Sikhs to continue to be able to wear their kirpans (religious daggers) in public places without being guilty of an offence. New legislation designed to penalise those carrying knives and other sharply pointed articles specifically provides that it is a defence for the accused to prove that he had the article with him in a public place 'for religious reasons'.[71]

(iii) Discretion in sentencing

When considering the appropriate sentence to impose upon a convicted person the English courts are prepared to take account of a variety of factors of a cultural nature which may result in mitigation of the punishment imposed. The defendant's foreign origin, adherence to ethnic or religious customs or traditional values, ignorance of English law and English mores and difficulty in adjusting to life in a novel environment are all matters which a court may properly take into account at this stage in the process.[72]

(iv) Rights of prisoners

Although prisoners have few 'rights' enforceable through the courts, they are accorded certain privileges and can expect certain standards to be

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69 Slaughter of Poultry Act 1967, s 1(2); Slaughterhouses Act 1974, s 36(2).

70 Section 16(2), replacing the original exemption which was contained in the Motor-Cycle Crash Helmets (Religious Exemption) Act 1976.

71 Criminal Justice Act 1988, s 139(5)(b).

72 See eg R v Rapier [1963] Crim LR 212; R v Bailey [1964] Crim LR 671; R v Byfield [1967] Crim LR 378; R v Derriviere (1969) 53 Crim AR 637; R v Bibi [1980] 1 WLR 1193.

followed in the light of various sets of circular instructions issued to prison establishments by the Home Office. The current guidelines allow, inter alia, orthodox baptised Sikhs to wear the five symbols of their religion, together with a turban; Muslim women to wear clothes which fully cover their bodies; Hindu women to wear saris; and Rastafarians to keep their dreadlocks.[73] Religious dietary taboos are also generally respected, as are religious festivals in the sense that they are recognised as days upon which no work is required to be done by prisoners of the faith concerned.[74]

(f) Local authorities

The right of travellers (gypsies) to maintain their nomadic lifestyle has been endorsed through legislation which imposes a duty upon local authorities to provide adequate sites for gypsy encampments.[75] Unfortunately no time-limit was set for the completion of this task and opposition from local residents, coupled with weak enforcement mechanisms, has meant that today far fewer sites have been established to meet the needs of travellers than was intended when the legislation was enacted in 1968.[76] One estimate suggests that there is still a national shortfall of at least a third, with many thousands of gypsy families having no lawful place to camp.[77]

4 AN APPRAISAL

It will be evident from these illustrations that English law has been adapting its provisions on an ad hoc basis, responding to the social needs

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73 Home Office Circular Instruction No 2 of 1983. See generally, Directory and Guide on Religious Practices in HM Prison Service (Prison Service Chaplaincy, London, 1988).

74 Ibid.

75 Caravan Sites Act 1968, Part II.

76 See generally Forrester, B, The Travellers' Handbook (London, 1985).

77 Hyman, M, Sites for Travellers (London, 1989), pp 8-9.

and pressures of the time. No coherent official strategy has yet been formulated, whether in the form of a white paper or a Law Commission report. However, the British Government has not reacted positively to all requests for the law to be made to conform with the values of minorities. In particular, Ministers have not been willing to put before Parliament two particular pieces of legislation suggested to them by Muslims. The first, initially proposed during the 1970s, would have introduced a separate system of Islamic personal law to govern the affairs of all British Muslims.[78] The second, promoted passionately in the aftermath of the publication of Salman Rushdie's book, The Satanic Verses, would have extended the current blasphemy laws to cover faiths other than Christianity.

If the general philosophy behind, for example, statutory protection for turbanned Sikhs is that Britain is now a multi-cultural society, in which recognition of cultural and religious diversity is required as part of the tolerance expected in a liberal democracy, it is incumbent upon those who support this position to explain why the line between what is legally acceptable and what is objectionable is drawn at one place rather than another. This is especially important at a time when Britain is being brought into ever closer union with continental Europe (as with the creation of the single EC market in 1992). Arguments are currently being raised about the possible loss of national identity in the 'supra-sovereignty' of the European Community. It is therefore an opportune moment to ask precisely what it means to be 'British'. What are the fundamental values of English society today which are worthy of preservation and which define both the relationships between the various ethnic groups comprising our national community as a whole and our role in a wider European context?

(i) The human rights dimension

In seeking to frame suitable guidelines for Parliament and the courts in defining more precisely what British core values entail in regulating a

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78 See Why Muslim Family Law for British Muslims (Union of Muslim Organisations, 1983).

multicultural society and where exactly the limits are to be set, on public policy grounds, with respect to the toleration of diversity, there is a strong case to be made for bearing in mind the human rights dimension.[79] In most democracies the answers to profound questions involving core values, individual liberty, religious freedom, the balancing of competing interests, the protection of minorities and major public policy considerations are to be located in written constitutions containing a bill of rights. In the absence of such a constitution in Britain, it seems reasonable to suggest that reference should be made instead to those international human rights treaties to which the UK is a contracting party, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Although they are not directly binding in the English courts, the judges pay careful attention to them,[80] both because they constitute international obligations and because they furnish important indications of public policy.[81] It is significant that powerful support for the domestic application of international human rights law was given at a colloquium of senior Commonwealth judges in 1988 in the form of the 'Bangalore Principles'.[82]

If a 'human rights approach' were to be adopted in framing suitable provision in English law for cultural pluralism, specific answers would need to be given to two questions of principle. The first would be whether a particular ethnic practice demanded legal recognition because to refuse it would be tantamount to a denial of human rights. The second would be

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79 See Poulter, 'Ethnic Minority Customs, English law and Human Rights' (1987) 36 International and Comparative Law Quarterly 589 at 594-5.

80 See eg Ahmad v ILEA [1978] QB 36; Home Office v Harman [1983] AC 280; R v Maze Visitors ex parte Hone [1988] AC 379 at 392-4; Re KD [1988] AC 806 at 823-5; Attorney General v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 at 640, 652, 660.

81 See eg Blathwayt v Lord Crawley [1976] AC 397 at 426; Oppenheimer v Cattermole [1976] AC 249 at 282-3; Attorney General v BBC [1982] AC 303 at 354; Schering Chemicals v Falkman Ltd [1981] 2 All ER 321 at 331; Attorney General v Guardian, Observer and Times Newspapers [1987] 1 WLR 1248 at 1296-7, 1307.

82 Developing Human Rights Jurisprudence (Commonwealth Secretariat, 1988).

whether an ethnic tradition required automatic non-recognition because the practice itself constituted a violation of human rights. On the basis of the second principle it is clearly appropriate to outlaw such practices as slavery, female circumcision and barbarous punishments (such as the severing of limbs),[83] while the first principle requires the provision of general guarantees of freedom of worship and freedom from discrimination, as well as, for example, the more mundane commitment to supply an interpreter for a defendant in a criminal trial who does not understand the English language.[84]

It is arguable that, on human rights grounds, Muslims should not be allowed to operate a system of Islamic personal law in England because of the risk that the rights of women will be violated in a discriminatory fashion[85] through eg polygamy, talaq divorces and forced marriages. On the other hand, it seems almost impossible to justify the archaic English law of blasphemy in human rights terms. Even if it is regarded as operating as a legitimate limitation upon the right to freedom of expression in protecting the 'rights of others',[86] it functions in a discriminatory fashion by confining its protection to Christianity and appears to involve a clear violation, for example, of the European Convention on Human Rights.[87] The offence of blasphemy should either be abolished altogether, as recommended by the majority of the Law Commission in 1985,[88] or extended to other faiths as advocated by the minority, as well as by Lord Scarman in Whitehouse v Lemon.[89]

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83 See eg ECHR, arts 3 (inhuman or degrading treatment), 4 (slavery).

84 See eg ECHR, arts 6(3) (interpreter), 9 (religion), 14 (discrimination).

85 See eg ECHR, arts 12, 14; International Covenant, art 23(4); International Convention on the Elimination of All Forms of Discrimination Against Women, art 16.

86 ECHR, art 10(2); Gay News v UK (1983) 5 EHRR 123.

87 ECHR, art 14; Belgian Linguistic Case (No 2) (1979-80) 1 EHRR 252 at 283.

88 Law Commission Report No 145; 'Offences against religion and public worship' (1985).

89 [1979] AC 617 at 658.

(ii) The question of differential treatment

Whenever ethnic minorities are accorded favourable treatment by the law which is not identical to the treatment accorded to members of the majority community, some of the latter are liable to argue that this represents unwarranted 'privilege'. These 'assimilationists' are likely to draw attention to the well-known adage, 'When in Rome, do as the Romans do', which seems to be elevated by some on the political Right to a central article of faith in modern Britain. If ethnic minorities do not conform and if English law allows them to 'get away with it' then, it is often suggested, this amounts to discrimination against the majority. Non-discrimination is, of course, a cardinal principle of international human rights law and it is therefore vital to clarify the position in this regard. Legal departures from the general pattern of uniformity of treatment do not offend against fundamental principles of equality if they guarantee minorities genuine equality in the form of equal respect for their religious and cultural values. This is often preferable to mere formal equality which can have a tendency to undermine these values by simply affording identical treatment to all, regardless of religious and cultural differences. Special differential treatment is a well established concept in international human rights law, dating back at least as far as the League of Nations[90] and reflected in the International Covenant on Civil and Political Rights[91] and decisions of the European Court of Human Rights.[92] Legal distinctions may properly be made between different groups in society, provided a legitimate aim is being pursued and the distinction possesses an objective and reasonable justification. It is these requirements which demonstrate the contrast between special differential treatment and apartheid, with which it is, sadly, all too often confused in the popular mind. The latter doctrine, apart from being coercive, is discriminatory because the distinctions it makes are based on colour and

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90 See eg Minority Schools in Albania Case, PCIJ (1935), series A/B, No 64.

91 Art 27.

92 See eg Belgian Linguistic Case (supra); Marckz v Belgium (1980) 2 EHRR 330; Abdulaziz, Cabales and Balkandali v UK (1985) EHRR 471.

hence are arbitrary and irrational. On the other hand, the desire of communities with distinctive cultural and religious traditions to ensure that these are preserved affords an entirely rational justification for making some distinctions in the legal field. Hence, while the hallowed principle of 'equality before the law' (which has been cherished as part of 'the rule of law' since Dicey[93] first wrote about it in 1885) generally requires English law to be colour-blind, it certainly does not require it to ignore important religious and cultural differences.

(iii) The future direction of English law

To date, the only pressure for English law to move in the direction of a full-bodied legal pluralism has come from Muslim groups seeking a separate system of personal law. Partly in view of the practical problems which this would entail (eg which system of Islamic law should be applied and by whom?) and partly because of the risk of human rights violations, it is suggested that this path should not be followed.[94] There are dangers of creating serious social divisions not only between Muslims and non-Muslims but also between the different Muslim communities in Britain themselves. However, this should not be taken as implying that much valuable and constructive work in the settlement of family disputes cannot be achieved through the application of Islamic principles by means of mediation and conciliation involving Muslim community welfare organisations. A sharia 'court' already functions informally in London (as indeed does a Jewish rabbinical 'court'), though without the power to enforce its decisions.

The wisest course would be to retain the present policy of adapting an essentially monistic structure on an ad hoc basis so that the reasonable religious and cultural needs of the ethnic minority communities are satisfied. Reference should be made to international human rights standards as part of this process, for three reasons. First, this will inject some consistency into the uncertain domain of 'public policy'.

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93 See now Dicey, A, An Introduction to the Study of the Law of the Constitution (10th ed, London 1959).

94 See further, Poulter, 'The claim to a separate Islamic system of personal law for British Mulims' in Mallat, C, and Connors, J, (eds), Islamic Family Law (London, 1990).

Secondly, it would furnish useful guidelines for the resolution of any conflicts between the three central objectives of equal opportunity, respect for cultural diversity and mutual tolerance. Thirdly, it may assist in the rebuttal of any charges of ethnocentricity which may be levelled when English Law repudiates certain unacceptable cultural practices, by appealing to notions of universal (or near-universal) values reflected in widely ratified international conventions.[95]

In very broad terms, the process of having regard to the human rights dimension in working out the details of a legal policy on ethnic minority customs and traditions should lead to a system of justice which is tolerant of and sympathetic towards cultural pluralism. Only comparatively rarely would such customs and traditions have to be denied legal recognition, such as some of those in the field of Muslim family law outlined earlier. The International Covenant on Civil and Political Rights not only has a provision on religious freedom along the same lines as that in the European Convention[96] but also proclaims boldly in article 27 -

> 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

So far as action on the part of the ethnic minority communities themselves is concerned, they should ensure that they not only campaign for legal changes on specific matters relating exclusively to their own needs but also make their voices heard when more general issues of law reform arise, so that their cultural values influence the broader content of English law for the better.[97]

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95 For consideration of the degree to which human rights norms have attained universality in international law, see Meron, T, Human Rights and Humanitarian Norms as Customary Law (Oxford, 1989), chap II.

96 ICCPR, art 18; ECHR, art 9.

97 See further, Poulter, 'Divorce reform in a multicultural society' (1989) 19 Fam Law 99.

5 CONCLUSIONS

To espouse a legal policy of 'cultural pluralism within limits', as advocated in this paper, may leave its author exposed to attack from both assimilationists and cultural relativists, for such a stance seeks unashamedly to capture a part of the 'middle ground'. Although it takes up a position quite close to the endorsement of full legal support for the maintenance of cultural diversity, it falls well short of it in practice. Moreover, it lacks the comforting capacity to respond with certitude on various controversial issues because the exact limits to toleration cannot always be precisely defined in advance. It thus appears vulnerable to assaults from those who feel able to adopt more absolutist positions.

At one end of the spectrum can be found the assimilationist who simply insists upon the conformity of the minorities with majority values and standards because they have chosen to live here. Yet the assimilationist cannot seriously want the English legal system to be employed to force such compliance even in such personal matters as religious belief and worship or in the regulation of every aspect of family and social life. Yet, once the assimilationist concedes that a 'private domain' can be carved out and excluded from such policies of conformity, it becomes plain that there are huge difficulties in drawing the line between public and private spheres.[98] Where does the education and upbringing of children belong, for example, and to which category should the role of women in society be allocated? Feminists and others have recently expressed considerable disquiet at the manner in which the law is prone to marginalise women's concerns by confining them to a private or domestic sphere.[99]

The cultural relativist, by contrast, spurns the temptation to be judgemental about any of the values and practices of those from other societies and is quick to brand as cultural 'imperialists' those who would

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98 For an attempt to construct a 'public/private' dichotomy for this purpose, as well as an appreciation of its limitations, see Rex 'The concept of a multi-cultural society' (1987) New Community 218.

99 See generally, O'Donovan, K, Sexual Divisions in Law (London, 1985).

outlaw even a handful of alien traditions in England. Literally 'anything goes', no minimum standards are recognised, and any criticism or rejection of other cultures is regarded as taboo because it carries connotations of 'superiority' and must perforce emanate from a 'colonialist' mentality. However, if consistency is to be maintained the cultural relativist has to eschew any vision of social progress and ignore blatant examples of oppression and inequality which would be wholly unacceptable if perpetrated by members of the white majority community. Nor can the beliefs and practices of a minority community be safely confined to its members, for their repercussions may directly affect the population at large - as the furore over The Satanic Verses amply demonstrated.

It is surely idle to believe that future relations between the white majority community and the various ethnic minority communities will be free from cultural conflict, though it seems probable that the Salman Rushdie affair represents the high-water mark of inter-community confrontation over a legal issue and that in general terms ethnic tensions are lower here than they are, for example, on the other side of the Channel. The task for legal policy-makers is to achieve a proper balance between two competing considerations. On the one hand, there is the need to appreciate clearly the immense benefits (cultural, social and economic) which accrue to the the members of the ethnic minority communities themselves through the maintenance of their values and traditions. These benefits contribute, directly and indirectly, to the well-being and prosperity of society at large. The law must therefore buttress and support the cultures of these communities so that they flourish and thrive. They constitute a substantial national asset.[100] On the other hand, very occasionally, it will be necessary for English law to interfere with alien practices, usually in the interests of protecting vulnerable members of those communities (especially women and children) and hence in support of the welfare of the public as a whole. Of course, all cultures are dynamic and many unacceptable customs are probably in terminal decline in any event.

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100 See further Parekh 'Britain and the Social Logic of Pluralism' in Britain: A Plural Society (CRE, 1990) 58 at 68-70.

There is certainly no reason why members of the ethnic minority communities should feel that they must always be on the defensive so far as the English legal system is concerned. English law is flexible and adaptable and several campaigns on behalf of the minority communities have already brought about significant reforms. No doubt, the long-standing rivalry between the West and Islam will continue to be prominent for some time and perhaps even intensify now that both the era of colonialism and the period of the Cold War are virtually at an end. However, in future no one should be too surprised at the clash between such profoundly different ideologies.[101]

In the final analysis it needs to be acknowledged on all sides that 'unity through diversity' is a perfectly viable option in a liberal democracy where the cardinal values of freedom, justice and tolerance provide the necessary protection for the maintenance by separate ethnic groups of many other values which are <u>not</u> shared by all members of society. Pluralism should not be seen as representing a divisive threat but rather as a positive asset. If it is viewed in the same fashion as a mosaic, blending together diverse parts in an elaborate design to form a harmony, it can surely be treasured for its own intrinsic worth and as the emblem of a truly civilised community.

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101 See eg Kabbani, R, <u>Letter to Christendom</u> (Virago, 1989), chap 1.