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Ethnic Minorities Net

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1. Introduction

Ethnic Minorities Law Net is a project funded by the UK Centre for Legal Education and Liverpool John Moores University. The project aims to create a resource that will provide for the development and dissemination of good practice in relation to learning and teaching in a wide range of areas of law as they relate to ethnic minorities

2. Ethnic minority legal studies

Compared to the sociological and political aspects of ethnic minority presence in Britain, the related legal issues have received only scant attention in law faculties and in the literature. Ethnic minorities, often with poor English language skills and encumbered with the `baggage' of their cultural and personal law, face and create many complex legal challenges but such conflict scenarios have interested only few legal academics (see in particular Pearl, 1972, 1986; Poulter, 1986, 1987, 1989 and 1998, Jones and Welhengama, 2000). One major reason for this lies in the dominant conceptualisations of `law', apart from the fact that assimilationist assumptions about ethnic minorities in their relation to the law have prevented lawyers from studying `the others' and their norm systems.

Surreptitious attempts to de-culture the debates about legal recognition of ethnic minority patterns of life suggest that we are moving in circles of confusion. Little progress has been made in the past twenty years or so in the field of ethnic minority legal studies in Britain (notable exceptions include Menski at SOAS and Shah. SOAS, Kent and Queen Mary) - in stark contrast with the vigorous development of British immigration law and anti-discrimination law, (Shah, 2000). These now separate legal fields seem to have prospered because they have accepted the challenge of legally sponsored racism. It is the intention of site to provide a resource for all legal academics and students wishing to consider how ethnic minority legal studies and to refocus the debate. This web site will provide a unique resource for such materials. It will provide a series of stepping stones, to enable the debate between a wide range of groups to the flow. The site is aimed to provide a resource not only for those involved in learning and teaching ethnic minority law but for all legal academics and students whose subjects are being affected by ethnic minority issues. In our text (Jones and Welhengama, 2000) whilst concentrating on the legal process we also draw on issues from the criminal law, employment law, welfare law and family law.

In our text (Jones and Welhengama, 2000) we provided a detailed examination of the approach of English law to the challenges posed by the migrant and the subsequent generations of ethnic

minority groups resident in this country. We aimed to provide a detailed examination of the approach of English law to some of the challenges posed by migrants and the subsequent generations of ethnic minority residents in Britain. The responses of the judiciary show significant inconsistencies, judicial analysis in the cases tends to be shallow, and there is a notable lack of conceptual awareness to facilitate a comprehensive strategy for accommodating different norms and customs.

We have examined extensively education, training and attitudes to the values of ethnic minorities (Jones and Welhengama, 2000) and we can merely comment briefly here, (Gibson, 1994). It is our view that considerable progress needs to be made in the development of effective education and training at all levels from undergraduate legal education through to the key workers in the legal system. The paucity of legal texts and the low numbers of courses offered in institutions concerned with legal education is evidence that of neglect in this area. To repeat, little progress has been made in the past twenty years or so in the field of ethnic minority legal studies in Britain - in stark contrast with the vigorous development of British immigration law and anti-discrimination law. These now separate legal fields seem to have prospered because they have accepted the challenge of legally sponsored racism.

The project team are in contact with those institutions at present offering such studies and actively seeking the co-operation of these teaching teams in the running of the resource. For example Dr. W. Menski (University of London, SOAS) has agreed to run the main publications arm of the site.

3. Attitudes of the key legal workers

In our text we have highlighted extreme judicial attitudes, for example Judge Ingeborg Bernstein at Liverpool County Court referred to Valentine Reid, a mixed-race defendant, as a "Nigger in a woodpile" (*The Times*, 7 February 1996). Despite `ethnic' training, some judges rightly or wrongly believe that there is still the option of enforcing conformity to the predominant culture. In some older cases, judges openly took the view that it was necessary to educate migrants and their descendants about how they should live in this country "according to our way of life" (*Mohamed v Knott* [1968] 2 All ER 563, at p. 568) or how they should conduct themselves "without violating the ethos of Christendom" (see *Baindail (otherwise Lawson) v Baindail* [1946] 1 All ER 342 CA, at p. 344-5). Today, such assimilationist comments would not be voiced openly. However, the widespread belief that education of the young members of ethnic minorities will lead to a weakening of traditional customs still carries much weight among the legal profession.

Ethnic minority claims for the retention and recognition of customary practices arise particularly in family law cases, causing conflict with a judiciary unwilling or unable to understand differing cultural values. Particularly English courts have struggled with issues of polygamy, marriage solemnisation and validity and divorce involving ethnic groups (for detail see Jones and Welhengama, 2000, chp.4). As concerns children it is widely acknowledged that the best interest concept in relation to children, now found in s.1 of the *Children Act* of 1989, is at best indeterminate and at worst deeply ambiguous. We illustrate the problem as expressed by the judiciary themselves. Brenan J commented in *Secretary, Department of Health and Community Services v JMB and SMB*, FLC 92-93 at 79, 191 [1992]: "In the absence of legal rules or a hierarchy of values the best interests approach depends upon the value system of the decision maker". Recent initiatives include work undertaken by Judicial Studies Board and the Ethnic Minorities Advisory Committee (EMAC)

4. Objectives

To raise the profile of English law and ethnic minorities within legal education:

- To create an on-line resource of bibliographic materials.
- To provide opportunities for publishing for both students and faculty
- To create a resource of learning and teaching materials including the development sets of case

studies.
- To forge links
- To maintain on-line conference facilities
- To provide a focus for the development of seminars and conferences

5. Methodological Approaches - Analysis of Law and its Development

Adopting a methodology from feminist jurisprudence (Barnett, 1997) the resource will challenge the perceptions that, law is neutral, legal reasoning is unproblematic and that laws have fixed objective meanings.

The stages in the recognition of the failing of English law can be summarised as -

Stage 1

Law is inherently racist

- "But then, as people about the courts know, people of your origin never admit anything, well, hardly anything"

Stage 2 - Law is inherently white

 In *Mohomad v Knott* [1968] 2 All ER 563) Lord Parker seemed to have a misconception about puberty and physical development of teenagers in the African Continent. Lord Parker believed that young girls of African countries develop earlier than their European counter-parts. He states, 'it is certainly natural for a girl to marry at that stage. They develop sooner, and there is nothing abhorrent in their way of life for a girl of thirteen to marry a man of twenty-five' (p.568).

Stage 3 - Law is inherently racial

In feminist literature Carol Smart has argued: *"We can begin to analyse law as a process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects."* (Smart, p191)

So instead to of the law being applied to a pre-existing subject, the law actually creates the subject. The law does not reflect the concepts of the dominant and minority culture, it actually creates them.

6. Methodological Approaches - Assimilate vs. Pluralism.

There has long been an expectation and an assumption that ethnic minorities would assimilate into English law allowing their own values to fade. The political debate in the post-world-war period had a significant impact on the attitudes of both the judiciary and jurists in matters involving ethnic minorities, their customs and their personal laws. Customs were ridiculed or looked upon with disdain and suspicion, personal laws of ethnic minorities were branded by some leading politicians as "insanitary or uproarious" or described as coming "straight from the field" (Lord Elton 1965: 66). Particular disdain was reserved for the customs of migrants of Indian origin for they, unlike migrants from the Caribbean, were unable or unwilling to adhere so readily to English norms.

Ethnic minorities, understandably, had no wish to discard their traditions, customs, laws and value systems, often built up over centuries. In the early years following the mass migration of the 1950's and 1960's, customs and personal laws were practised secretly and were not generally a matter of common knowledge. It is now more common for later generations to be open in their demands for recognition of their customs. Rastafarians were more active than other Afro-Caribbean's in asserting

their ethnicity. Hindus adopted a lower profile campaign than Muslims and Sikhs. Yet demands for recognition are often interpreted not as a wish to maintain valued customs but as a claim for preferential treatment at the expense of the indigenous white community, questions are then raised as to why particular ethnic minorities' customs should be awarded a special place in the English legal system.

A small number of academic have advocated that as am alternative to an expectation of assimilation the legal system should become more pluralistic. The concept of legal pluralism is borrowed from sociologists, and has only recently been introduced to legal studies (Van den Berg 1992: 451; see further McLennan 1995). It has never been encouraged in Western European countries, where the predominant view is that different legal systems cannot exist within the one-nation-state structure. The administration of justice and government has been structured and developed within a monistic structure, pluralist ideas were considered dangerous to this establishment. Yet this reluctance to accept pluralist theory did not prevent European jurists and policy makers from encouraging former Afro-Asian colonies to practise legal pluralism (Hooker 1975). Recently some scholars have attempted to interpret obligation patterns of sub-groups in industrialised societies in terms of pluralism (Merry 1988: 872: Van den Bergh 1992: 451). Legal pluralism stands in contradiction to the notion that the law is a single, monolithic, unified sets of rules flowing from the State's hierarchy. Progress towards and acceptance of pluralism has been hampered by the difficulty of finding a sufficiently robust definition of legal pluralism (Griffiths 1986). Griffiths (1986: 1) defined legal pluralism as the "presence in a social field of more than one legal order" (see further Merry 1988: 877; Pospisil 1971; Van den Bergh 1992: 451). This does not mean that more than one rule is applicable to the same situation. The state's laws still have a role to play in regulating individual behaviour whilst allowing personal laws and customs to be used in matters specific to particular communities. Van den Bergh (1992 :451-454) suggests that pluralism should be viewed not as a situation but as a process that develops over time, a complex pattern of continuous interactions. Many sub-orderings operate independently, often interacting with each other, most evidently in contemporary multiethnic and multi-religious systems. The upsurge in the number of ethnic groups of Asian and Afro Caribbean origin in the last four decades has not led to a doctrinal debate on legal pluralism that could inform the thinking of the judiciary. There has been little enthusiasm amongst English lawyers for the doctrine of legal pluralism. The literature is sparse. Of those alluding to the issue many are content with superficial references to the topic (see now Menski 1993: 242). Many of those who have engaged in the debate have done so from a westernised perspective of the role and functions of law. In consequence there has been a tendency to reduce the significance of customary laws by arguing the universal applicability of western law, and to misunderstand and misrepresent the customs operating within the migrant communities. This then leads to the adoption of an inappropriate methodology in analysing both the validity of customs and their interactions with the dominant law. Menski is critical of English lawyers' refusal or inability to recognise these emerging laws and processes. English lawyers, in his opinion, stick to the notion that the unified legal system is the best way forward to deal with disputes and crimes; they continue to peddle the myth that western cultures and legal systems are superior to those of non-western laws; and continue to believe that English law alone should be followed as the law of the land (Menski 1993: 242). A more positive view of such customs of both Afro-Caribbean's and Asians is that they have continuously been developing and adapting to the needs of new legal and social environments. As one of the pioneering scholars of legal pluralism in British context, Menski's contribution to the debate on the legal pluralism was not only helpful in destroying the traditional myth about the personal law of ethnic minorities, particularly of Asian background, but also by identifying the areas in which the development of personal laws of ethnic minority groups has taken place.

The role of the project will be to provide not only insights into the assimilation vs. pluralism debate but to provide examples of how law students, traditionally schooled in the centralist western forms of jurisprudence can be introduced to pluralistic approaches. An obvious approach would be to take adopt strategies used by the courts when attempting to deal with conflicts of cultural approaches, this included the use of expert witnesses to provide insights into the ethnic laws, These approaches are already used by some academics although not without its difficulty, as Shah comments (2002),

"I have, however, used expert reports with students to enable them to discuss how legal pluralism could work in practice or, as one colleague recently remarked, that is how one can do legal pluralism. While some students have grasped the equity issues involved here, not all have seen the relevance of such work. Some especially continue to be concerned about minorities being seen to get special treatment in line with concerns expressed by Poulter. I am tempted to interpret this as a result of years of indoctrination about legal uniformity, particularly in the criminal law sphere, where the `ethnic' penalties can indeed be severe."

7. Methodological Approaches - Technology

This project aims to provide a resource for all legal academics and students wishing to consider how to address ethnic minority legal studies and to refocus the debate. A key element of the resource will to use multi-disciplinary resources and methodologies to avoid the development of simple assimilationist techniques when ethnic minority issues are addressed in core aspects of legal education.

The resource aims to provide guidelines for those wishing to incorporate such material into their teaching. These guidelines will not only include the substantive material but also how such material should be approached. In this sense the resource will provide guidelines similar to the guidelines provided by the Web Accessibility Initiative (WAI) *http://www.w3.org/WAI* for universal access the web irrespective of disability.

(Web Content Accessibility Guidelines

1. Provide equivalent alternatives to auditory and visual content.

2. Don't rely on color alone.

3. Use markup and style sheets and do so properly.

4. Clarify natural language usage

5. Create tables that transform gracefully.

6. Ensure that pages featuring new technologies transform gracefully.

7. Ensure user control of time-sensitive content changes.

8. Ensure direct accessibility of embedded user interfaces.

9. Design for device-independence.

10. Use interim solutions.

11. Use W3C technologies and guidelines.

12. Provide context and orientation information.

13. Provide clear navigation mechanisms.

14. Ensure that documents are clear and simple)

8. Methodological Approaches - Principles

We imagine the general tenor of the guidelines for teaching and learning materials will be based around the following -

a. choice of topic, does the topic have the potential for bicultural analysis.

b. materials should validate differing perspectives all teaching materials, resource packs, reading lists and essay guidelines should validate different perspectives.

c. format there is requirement that the concept of race be central.

e. assessment - competences judged might be inappropriate, assessment criteria should be checked for cultural and other bias. - anonymous marking, reading scripts to provide feedback on use of language, the providing of a range of assessments to do justice to peoples aptitudes.

The project will provide a web site that we hope will be an exemplar in the presentation and use of such materials, further funding is allowing us to investigate general web design features and web interactions that are not culturally biased.

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