

# Transnational Hindu law adoptions: recognition and treatment in Britain<sup>\*</sup>

Prakash Shah

Department of Law, Queen Mary, University of London

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## Abstract

*This article examines how the adoption of children under Hindu law in India is regarded by British private international law and immigration law. Through an analysis of case-law, it focuses particularly on how British judges regard the legitimacy of exclusion by the British immigration control system of children who have been adopted under a 'foreign' legal system which essentially permits private adoption arrangements. Examining the background to the regime of Indian Hindu law adoptions (which applies to Sikhs as well as Hindus), and the private international law and immigration rules which apply to such adoptees in the UK, the article finds some evidence in the judicial decisions of a more activist, human-rights-based, plurality-conscious position being taken. However, tracking the case-law further, the article concludes that such activism has not been followed through in more recent decisions leaving the conflictual position between transnational adopters and British legal systems largely unresolved.*

## Introduction

This article examines how British immigration law treats the admission of Indian children adopted under Hindu law.<sup>1</sup> It specifically examines how British judges regard the legitimacy of exclusion by the British immigration control system of such children who have been adopted under a 'foreign' legal system which essentially permits private adoption arrangements. British private international law and Immigration Rules have been framed in such a manner as to rule out the admissibility of children adopted through Hindu law save in exceptional circumstances, but recent case-law relying on the European Convention on Human Rights (ECHR) has provided a potential opening through which such adoptees may be admitted. While the focus is on case-law emerging in recent years, the subject matter discussed here is of wider relevance. It evokes many of the tensions inherent in the ways British legal systems handle legal questions arising out of the establishment of transnational communities which seek to regulate their own affairs by working through multiple laws.

Although the focus of this article is on immigration control law, considerations of family law and family life are inevitably entangled within its radius. Understandings of the proper scope respectively of public and private regulation are particularly at stake in the sphere of immigration control, especially where transnational family relations are placed under the scrutiny and judgment of British officials and judges. Immigration control is not a neutral ground on which 'distinct cultural institutions' (Hoekema and van Rossum, 2006), such as Hindu adoption, are legitimated within British legal systems. Rather, that ground becomes a site for declaring the illegitimacy of such forms of 'private ordering' (Galanter, 1981). In this sense immigration laws have become a critical

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1 While speaking of the Hindu law as applied in India, it should be pointed out that the relevant legislation regards Sikhs, Jains and Buddhists as falling under an umbrella definition of 'Hindu'. It will be seen that some British judges have begun to refer to 'Sikh law', while the cases considered in this article frequently involve Sikh litigants.

arena where patterns of transnational, private ordering encounter the dominant nationalist methodology (Glenn, 2003) of modern state legal systems. One does not have to restrict oneself to adoptions effected under Hindu law in India, since similar issues are also often at stake in so-called *kafala* arrangements by Muslims, and relative fostering by African families.<sup>2</sup> How far should states respect and give effect to the kinship decisions and arrangements made by and among transnational or minority families? Put in this way, the question raises not just the legal arrangements effected with respect to children but covers a range of other situations, notably marriage and divorce, for which transnational and minority communities arrange, and are sometimes compelled to arrange, their affairs in ways not accepted by British legal systems.

Such developments are interlinked to calls by some academics, religious leaders and judges to consider whether aspects of the laws of minority groups are worthy of protection and respect. Writing from the perspective of an academic family lawyer, John Murphy spotlights the consequential challenges faced by legal systems when he says:

‘English family law has had to broaden its horizons in recent years to deal adequately with the myriad of novel issues raised by migrant single adults, migrant families and migrant children. Indeed, there can be no doubt that for a significant minority of people either resident or domiciled in this country, the traditional boundaries of family law (at least so far as it is taught in English law schools) fail to accommodate or give adequate emphasis to what are now crucial international dimensions.’ (Murphy, 2005, p. 2)

While not claiming fully to address the challenges raised by Murphy, this article provides some illustrative material of the ‘international dimensions’ to which he refers as well as some methodological critique of how existing processes deal with such dimensions. In a notable discourse shift Eekelaar (2006) now speaks about ‘personal law’, incorporating older notions of personal laws as specific to a *nomoi* group, such as a religious or ethnic community, as well as the ‘law’ which is personal to an individual. The Canadian scholar Shachar (2001) has also been arguing for greater respect to be accorded to *nomoi* group norms, a position which has been found worthy of emulation in the case of British Muslims, albeit to slightly differing extents, by the Archbishop of Canterbury, Dr Rowan Williams (2008), and by Lord Phillips (2008). While these commentators agree that a level of acceptance and domestication of distinct *nomoi* group norms *within* a jurisdiction is justified, the terrain examined by this article poses more complex problems since it deals with the prospect of so doing when the official order is presented with further degrees of ‘foreignness’. Not only are the adopters in the case scenarios discussed here, to some extent, marked by their ‘foreignness’ because they belong to ethnically distinct minority communities,<sup>3</sup> they also act to effect adoptions in a ‘foreign’ jurisdiction – India – which recognises Hindu personal law, for which they then seek recognition before the British authorities.

2 A more submerged question is the extent to which adoptions within communities of Indian origin from East Africa are affected by the restrictive position of British immigration law. It appears to have been the practice to plead Hindu law in the East African courts, even though British colonial legislation had apparently ‘ousted’ the application of Hindu law for adoptions (see Derrett, 1963, pp. 544–46). The writer has been informed of cases in which intra-relative adoptions were made often without going through official procedures. In the post-colonial era, insofar as official law was invoked, such adoptions appear to have been dealt with by relatively simple court procedures under relevant legislation (e-mail exchanges by the author with Ramnik Shah, 9–14 November 2008). Research in East Africa and other places of Indian settlement seems overdue. On fascinating data on contemporary transnational fostering among African families migrating to different parts of Africa, see Whitehouse (2009).

3 The image of British ethnic minorities and their legal practices as ‘foreign’ is not as far-fetched as it may seem. In *Gandhi v. Patel* [2002] 1 FLR 603, Park J, at para. 45, referred to a Hindu marriage ceremony as being one according to a ‘foreign religion’. For a case involving an unregistered Muslim marriage where the same terminology is adopted see *A.M. v. A.M.* [2001] 2 FLR 6, per Hughes J at para. 56.

This article first explains the rules for adoption in Indian law, with particular reference to adoptions under Hindu law. Despite the existence of a substantial jurisprudence on Hindu adoption law, it is a little-known area outside India. The article then outlines the framework for recognition of overseas adoptions in private international law and immigration law in Britain and explains why Hindu law adoptions in India have not been recognised under that framework. It then embarks on a more detailed discussion of practice-relevant issues and recent British case-law, considering the extent to which judges are showing greater signs of flexibility and plurality consciousness in the post-2000 era of human rights.

## The Hindu law on adoptions in India

Several Indian statutes are relevant to adoption. One such statute is the Guardians and Wards Act 1890 dating from the Anglo-Indian period. The procedures under this Act are not for 'adoptions' as such but rather represented (and possibly still represent) a facility for guardianship orders to be made for persons from communities where their personal laws do not recognise adoptions or for any other relevant purpose. In recent decades this Act, as supplemented by guidelines issued by the Indian Supreme Court, and more elaborate procedures involving state and voluntary bodies, became the primary facility used for so-called inter-country adoptions by prospective 'adopters' from abroad of Indian children (Manooja, 1993: 77–79; Lilani, 1995; Apparao, 1997). While there is a tendency among writers to refer to 'foreigners' or 'foreign nationals' (see e.g. Manooja, 1993: 77–79), strictly speaking, those adopting under Hindu law – i.e. members of the Indian diaspora – may also include such non-Indian nationals who would not necessarily have used the provisions of the 1890 Act. It appears that section 41 of the Juvenile Justice (Care and Protection of Children) Act 2000 eventually added a power for the Juvenile Justice Board, as well as other courts, to give a child in adoption for 'such children as are orphaned, abandoned, neglected and abused'. The same section of the 2000 Act, while building upon the elaborate pre-existing structures ensuring that inter-country adopters could adopt fully under Indian law, also refers to adoptions by 'non-institutional methods' and of children who have been 'surrendered' by parents.

More relevant to the subject matter of this article is the *Hindu Adoptions and Maintenance Act 1956* (hereinafter 'HAMA'). There is a considerable level of writing dedicated to the pre- and post-HAMA legal situation (see e.g. Saksena, 1958; Derrett, 1963, pp. 92–135; Gupte, 1970; Misra, 2005, pp. 437–583; Desai, 2007, Vol. II, pp. 533–86; Diwan and Diwan 2007, pp. 227–51). While this is not the right place to review it in any detail, certain interesting elements of the writing deserve brief comment. In contrast to the long-accepted restrictive position in Christian canon law and English civil law,<sup>4</sup> Hindu law not only recognised adoption since ancient times, but also developed a prolific jurisprudence on the issue (Derrett, 1977, p. 35). It should be noted that the pre-HAMA situation was extremely fluid since Hindu adoptions were basically governed by custom, although there is much discussion about how the old text writers saw adoption, and of the case-law that built up during the Anglo-Indian period.<sup>5</sup> Contemporary positivism is unfortunately projected backwards in time,

4 The Latin maxim *Deus solus heredem facere potest, non homo* ('God alone, and not man, can make an heir') is frequently cited. Pollock and Maitland (1923, p. 399) in their only reference to adoption write: 'we have no adoption in England'. The difficulty of securing adoption in English civil law is now virtually ignored, particularly since modern legislation superseded it. For England, this is the Adoption of Children Act 1926. Islamic restrictions on inheritance mirror the Jewish law (on which see Gold, 1994), the canon law and old English civil law positions. See further Pollack, Bleich, Reid and Fadel (2004) on Jewish, Christian canon and Islamic laws.

5 An early conflict between Hindu and British visions of adoption took place in the middle of the nineteenth century. To secure the line to the throne, the Raja of Jhansi, Gangadhar Rao Newalkar, adopted a son by Hindu custom. On the latter's death, the Rani of Jhansi, Lakshmi Bai, sought to install her adopted son onto the

which often means that the older evidence is not always as carefully scrutinised in the light of prevailing sociolegal realities, which are admittedly hard to assess with hindsight. Thus one finds that the pre-colonial Hindu textual sources are interpreted as if they represented 'the law' in a positivistic sense although, somewhat contradictorily, most writers also manage to communicate the continuous variability of local customs. Thus, while one assumes that adoption was premised on the desirability only of sons, in the very next breath we can find an admission that Tamils have known all along about the adoption of daughters!

Much confusion appears to have been caused during the colonial period when assumed textual norms were reflected in judgments, creating 'bogus' law (Derrett, 1977, p. vii), but which also influenced a whole generation of post-colonial thinking about the state's claims to having reformed the existing law. In that context, assertions about the extent to which later legislation like HAMA 'changes' the pre-existing Hindu law also need to be read with caution. The modern Hindu law 'in the books' may well differ, therefore, from the practices of individual families involved in adoption, and it may be noted in passing that this scenario is hardly unfamiliar in other familial contexts such as marriage or divorce. In other words, families may well take decisions or behave in ways that framers of statutes or legal writers, who generally take a positivist and modernist perspective of their legal systems (Menski, 2003, pp. 3–11 for India), do not account for or have simply not anticipated. Indeed, there continue to be cases where adoptions are conducted in ignorance of the HAMA provisions or in ways that show that new customs are generated constantly.

Some writers (e.g. Misra, 2005; Diwan and Diwan, 2007) are concerned about whether Hindu law adoptions are or remain 'religious' and whether they have become 'secular' as a result of HAMA. This preoccupation, which one does not encounter at all in textbooks on English family law any more, betrays some India-specific debates. The claim that Hindu adoptions are now entirely secular (e.g. Diwan and Diwan, 2007, p. 229) keys in to wider discussions about the desirability of emulating modern, Western law-making models by enacting a Uniform Civil Code for all of India's citizens. The converse of this view is that different personal laws applicable to people of different communities are undesirable in a modern 'secular' republic and, worse, a sign of backwardness of legal development. The lack of a single adoption law in India is put down to the objections of some sections of different communities, notably Muslims, Parsis and tribal groups. For Muslims, it was claimed that their personal law does not allow for adoptions. Previous attempts at securing all-India adoption legislation have foundered on the basis of views expressed by objectors from those communities (Manooja, 1993, pp. 79–80; Agnes, 1999, pp. 99–100). This experience indicates that a huge and diverse country like India finds it impossible to regulate its entire population by a singular, secular family law system (Menski, 2001) and, if this is so, it puts even more into question alleged global uniforming claims based on international law. It should also be noted that some Muslims, too, admit of adoption, and the prevailing image of Islamic law as not allowing for adoption needs to be somewhat qualified. Meanwhile, it appears as though the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006), now allows Indian judges to sanction adoptions for 'orphan, abandoned or *surrendered* children'. With little publicity, therefore, the Indian state has moved to allow the option of 'secular' adoption to members of all communities.

The term 'Hindu' under HAMA covers those who are Hindus, as well as Sikhs, Jains and Buddhists. In all the cases discussed here, the adoptive parents used the facility which would officially come under HAMA, at least if viewed from a legal centralist perspective. In sociolegal reality, the customary familial norms may well have a primary role in informing the parties'

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throne, but Lord Dalhousie, Governor-General of India, refused to recognise the adoption and decided to annex Jhansi under the doctrine of lapse. This led to protracted, and eventually bloody, conflict causing the Rani to join in the Indian uprising of 1857 (Ray, 2008).

decisions. It is notable too that, while attempting to alter partially the older practices, HAMA 'by and large continues the old practices and processes concerning adoption in a modified form' (Manooja, 1993, p. 77). The influence of the earlier uncodified regime is seen in the post-HAMA procedures for effecting adoptions. Thus HAMA partially reflects an ancient Hindu formulation consisting of two stages. The first, which the statute regards as mandatory, involves the giving and taking of the child, although this follows no uniform format, and the custom of the family or group concerned may be followed, thus also allowing for considerable variation of practice. The giving of the adoptive child in the lap of the adoptive parents is a common form of such a ritual. The second step is a ritual, variously termed *datta homa* or *dattahomam*, which has a sacramental character. It has never been considered essential in all communities and it is not considered essential for validity under the statute. Where performed, however, both steps may well be built into one overall ritual. Adaptations of this ritual appear to be practised by Sikhs who feature prominently in the cases discussed here. The procedures for a valid adoption are entirely determined by custom, while state sanction, at best, offers a secondary mode of confirmation, but does not affect the essential validity of a customary adoption. HAMA does not therefore make registration with a court compulsory but, if done, that would act as a presumption that the adoption has been made in compliance with the Act and that the necessary ceremonies have been performed. Adoptions recognised under the Act are furthermore considered irrevocable.

In some cases considered here, the adopting parents were otherwise childless and some may have undergone fertility treatment or sought adoption in other ways before considering the Indian Hindu law route. Fieldwork by Manooja (1993) also revealed that a majority of adopters had waited more than ten years after marriage before adopting. While childlessness is therefore a scourge that is commonly felt by those who opt for adoption, it is evident that there are some culture-specific South Asian elements which frame the desire to adopt, and which take the phenomenon of Hindu law adoptions beyond the narrow configuration of childlessness. Although now statutorily recognised, it is evident that adoption ceremonies may also carry a sacramental significance. As noted, old textual sources betray the expectation that the adoptee would be male. In the absence of male issue, adoption of a male child was considered by old text writers as necessary so that the sacrament of the last rites could be performed for the adoptive parents. Without male offspring to perform this essential rite, they considered that a parent would not attain release from the earthly domain. A male child may also be considered essential to continue the family lineage, to perform rites for departed ascendants, and he could normally also be entrusted with the collective property of the joint family, with obligations to other persons liable to be maintained through that property. In fact, since the British period and continuing into the post-colonial period, the Indian case-law on adoptions has been overwhelmingly concerned with property. This is particularly the case where women or widows have adopted in order to safeguard their own interests in property as against other kin who may exert pressure for the property of a childless couple to vest with them. While Lilani (1995, p. 24) regards son preference as still being evident, Manooja's fieldwork in Punjab showed that roughly equal numbers of sons and daughters were adopted and, in the cases reviewed here, the adoption of both boy and girl children is a feature.

From an Indian or South Asian perspective children are born into corporate families where there is a distribution of child-rearing responsibilities. Adoption represents a rearrangement of patterns of reciprocity within the larger corporate family. In this context, a central concern appears to be about the *dharma* of bringing children up to adulthood.<sup>6</sup> Bearing this perspective in mind, the decision in the case of *Radhika Sharma* seems to be incorrect.<sup>7</sup> It concerned the adoption of a girl child whose

6 I am grateful to Roger Ballard for suggesting this explanation.

7 *Radhika Sharma v. Entry Clearance Officer (New Delhi)* [2005] EWCA Civ 89.

natural parents already had a daughter and a disabled son, and were hoping for another boy. The relative adopters had no daughters but had three sons. The decision to reject the application for entry clearance was, at all levels, overwhelmingly influenced by formalistic criteria and based on the interpretation that the natural mother was rejecting her daughter and that the adoption was therefore not motivated by the inability to care for the child, but her unwillingness to do so. This stereotypical framing of the facts undermines a reading which could have more sensitively taken into account the distribution of child-rearing responsibilities among relatives.

Manooja's (1993) fieldwork also uncovered the fact that the vast majority of adopters were relatives and that there was not a marked preference for adopting on the maternal or paternal side. While older notions of preference for the adoption of children of relatives are still present, HAMA does not reflect this. One of the cases discussed here indicates that relative-only adoption is not always chosen, although in that case it could be argued that a sort of fictive kin relationship had already developed as between the natural and adoptive parents. Often two children, a son and daughter, are adopted, a situation which HAMA consciously facilitates, although that Act also stipulates that only one male and one female child may be adopted. However, section 41 of the Juvenile Justice (Care and Protection of Children) Act 2000 now allows 'parents to adopt a child of same sex irrespective of the number of living biological sons or daughters', and that provision may well have been placed there to get around the limitation of one son and one daughter under HAMA.

## The British private international law and immigration law contexts

The only text dedicated to how adoptions are dealt with under British immigration law was published by Claudia Mortimore (1994). In that book, Mortimore highlights the difficulties then faced by relative adopters, most commonly affecting South Asians. The UK Immigration Rules make provision under the paragraphs relating to the admission of adopted children, but the main obstacle is that those rules only make provision for countries 'whose adoption orders are recognised by the United Kingdom'.<sup>8</sup> This involves a reference back to the private international law on 'overseas adoptions' as regulated by the Adoption Act 1976. The South Asian countries of India, Pakistan and Bangladesh are not listed as 'designated countries' in secondary legislation made under the Adoption Act (although Sri Lanka is).<sup>9</sup> This has meant that, in turn, adoptions effected in those countries are not recognised. As shown above, until recently Indian law did not have a codified system of adoption but, in fact, allowed adoptions on the basis of personal laws specific to cultural and religious groups. As Mortimore explains:

'Indian civil law has recognised the legality of adoptions, however, the procedure for making such orders has never been fully codified. This, of course, means that India is not recognised as a "designated country" for the purposes of recognition of foreign adoptions under UK law.' (Mortimore, 1994, p. 9)

The list of countries made under the Adoption Act 1976 is still effective under the updated Adoption and Children Act 2002 (s. 87), thereby continuing the earlier regime of exclusion for Indian Hindu law adoptees.<sup>10</sup> As we see in more detail below, British and Indian laws on adoption are based on different cultural assumptions. For the UK, O'Halloran notes:

8 The current Immigration Rule is at para. 310(vi)(a).

9 The list appears in the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19. For the full list of countries see Seddon (2006, p. 1529).

10 The current provision is in para. 310 of the Immigration Rules.

'In the UK adoption now exists only as a legal process, delineated and regulated by statute, culminating in proceedings that are judicially determined. Legislation addresses the rights and the obligations of the parties concerned, defines the roles of those mediating bodies with roles in the process, sets out the grounds for making an adoption order and states its effect.' (O'Halloran, 2006, p. 8)

While statutory regulation and judicial oversight are key aspects of British adoption laws, it is worth pointing out that, essentially, the role of the state in defining and regulating adoption is accentuated. Adoption in British legal systems is therefore a state-centred process. Problems arise when adoptions which take place on quite different cultural premises, often involving minimal state intervention, as with Hindu law, are then presented to the British authorities. Not only that, British state-centred laws are also imposed on those adopting in countries and people which do not base their laws on the same assumptions, entailing risks of Eurocentrism and legal imperialism.<sup>11</sup>

While some South Asian Muslims are also involved in adopting the children of relatives, British laws have taken the position that adoptions by Muslims were not allowed under Islamic law (Mortimore, 1994, p. 9; McKee, 2005, para. 13-03).<sup>12</sup> This Muslim concern is now also reflected in the context of domestic adoptions by section 115 of the Adoption and Children Act 2002, which refers to 'special guardianship', which is arguably a British concession to the Muslim concept of *kafala* (Menski, 2008, pp. 57–58).<sup>13</sup> In the immigration context, meanwhile, a category of de facto adoption was eventually recognised by the Immigration Rules,<sup>14</sup> although this may involve having to prove (mainly for Muslims), with substantial evidence, that a de facto adoption took place, although it may well not be recognised by the official Muslim law of the country of origin of the child.<sup>15</sup> The current de facto adoption rule also requires that the adoptive parents must have lived abroad together with the child and must have assumed parental responsibility for an eighteen-month period and, additionally, must have lived together for the twelve months immediately preceding the application for entry clearance. An Asylum and Immigration Tribunal (AIT) decision takes the view that that rule:

'is probably not intended to facilitate the entry of children by themselves: it is probably intended to ensure that, if a number of members of the family are to come to the United Kingdom together, a child who has been living as a child of the family with the parents for some time is not left behind.'<sup>16</sup>

11 The problem of Eurocentrism is not one which has escaped the notice of alert British judges. In *NS v. MI* [2006] EWHC 1646 (Fam) at para. 37, where Munby J stated in the context of a discussion about forced marriage: 'We must be careful to ensure that our understandable concern to protect vulnerable children (or, indeed, vulnerable young adults) does not lead us to interfere inappropriately – and if inappropriately then unjustly – with families merely because they cleave, as this family does, to mores, to cultural beliefs, more or less different from what is familiar to those who view life from a purely Euro-centric perspective.'

12 This view may be in the process of change, however, if the statement by the Asylum and Immigration Tribunal in *SK ('Adoption' not recognised in the UK) India* [2006] UKAIT 00068, at para. 28, is anything to go by. Meanwhile, an earlier case in the US Board of Immigration Appeals, *Khatoon #2975* (decided 31 July 1984) takes the blanket position that adoptions are not permitted under Muslim law in India, *even under custom*.

13 On moves by American Muslims to provide *kafala* for Afghan children, see Roby (2004, pp. 311–12).

14 This followed the case of *R. v. Immigration Appeal Tribunal Ex p. Ali (Tohur)* [1988] 2 FLR 523. The current de facto adoption rule is found at para. 309A of the Immigration Rules.

15 For an illustration of the difficulties inherent in proving de facto adoption, see *R. v. Immigration Appeal Tribunal Ex p. Haque (Mohammed Enamul)* [1994] Imm. A.R. 39 (a promise to look after child did not amount to de facto adoption).

16 *MN (Non-recognised adoptions: unlawful discrimination?) India* [2007] UKAIT 00015, date notified 12 February 2007, para. 13.

The living-together and residence-abroad requirements in any case make it effectively prohibitive for adoptive parents who normally live in the UK to achieve compliance.

Other aspects of the Immigration Rules have remained, or were made, restrictive enough to work against the admission of relative adoptees, thereby affecting the admission of children adopted under Hindu law in India, as well as those from the other South Asian countries. A 1994 amendment to the Immigration Rules expected that the child was 'adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents' and the child 'has lost or broken ties with his family of origin'.<sup>17</sup> Therefore, besides the non-recognition of India in the aforementioned list of countries, it remains difficult for relative adopters to establish that the inability of the natal parents or other carers motivated the adoption or that the adoption involves a breakage of ties with the family of origin. McKee (2005, para. 13-03), an immigration judge, observes that the breakage-of-ties requirement is 'not consistent with modern good practice for adoptions in this country'. One could therefore interpret the failure of the drafters of Immigration Rules to keep up with such 'good practice' as a further indication that they are rather motivated by immigration restrictionism. McKee (2005, para. 13-19) also criticises the inability-to-care aspect of the Rules, *inter alia*, on the ground that 'it ignores (for example) the custom of giving up a child to childless relatives' and advocates 'Home Office reflection on the justifiability of this and other restrictive requirements'.

The Rules further provide a facility for a child to be admitted as joining relatives in the UK. A major obstacle that faces adopted children under this provision is the requirement that there exist 'serious and compelling family or other considerations which make exclusion of the child undesirable'.<sup>18</sup> Nevertheless, the non-recognition of Hindu law adoptions has meant that adopted children are sometimes considered, and even 'squeezed', under this Rule. The Hindu law adoption in such cases will still not be recognised and adoption procedures would have to be started in the UK after admission. It is, however, possible to apply to a court in England and Wales for an adoption to be recognised by 'common law'. Indeed, in the recent case of *D & D*, the Family Division of the High Court recognised the legality of the Indian Hindu law adoption of two children.<sup>19</sup> However, the facts in that case are different from the more usual scenario in that the adopted children were not relatives, the adoptive parents had gone through the formalities for adopting destitute children as recognised by India's Central Adoption Resource Agency, the adoption was then formalised by an Indian court under applicable Hindu law procedures, and the children were already present in the UK during the proceedings. This case therefore presents a 'hybrid' scenario and remains as yet untested in the immigration law context. However, the adoptive parents' aim in seeking an order from the family court was that they could then regularise the immigration position of one of the children who did not already have indefinite leave to remain. The case therefore illustrates that parallel structures for facilitating recognition in British legal systems may well result in their operating at cross-purposes; while the immigration law prevents recognition, the family courts may well rule in favour of it.

17 The Statement of Changes in the Immigration Rules HC 395 (1994), various paragraphs. The wording quoted remains the same in more recent versions of the Immigration Rules, although the sub-paragraph numbering has been altered. The provision in the current Immigration Rules is at paras. 310(ix) and (x), 311(ix) and (x), 314(viii) and (ix), and 316(vi) and (vii).

18 Currently para. 297 of the Immigration Rules.

19 *D & D* [2008] EWHC 403 (Fam). The Adoption and Children Act 2002, section 66(1)(e) defines 'adoption' as including an adoption recognised by the law of England and Wales and effected under the law of any other country, and was interpreted in *D & D* as allowing the recognition of a foreign adoption by common law rules where an adoption order is neither a 'Convention adoption' nor an 'overseas adoption'. The Adoption and Children (Scotland) Act 2007 does not have a similar provision, however, and one assumes that a Scottish court will not be able to act in a similar manner.



Other Immigration Rules are also relevant in the overall context of adoptee admissions. While not directly relevant in the present context, they tend to be viewed by decision-makers in juxtaposition to the method of Hindu adoptions, and are compared favourably to the latter. First, there is a provision for a child to be admitted to the UK for the purpose of being adopted there, which is preconditioned by statutory rules that UK procedures for adoption be started prior to admission, and continue thereafter.<sup>20</sup> A second way by which a child already adopted abroad, or to be adopted in the UK, can be brought into the UK is through the Immigration Rules which recognise the consequences of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. These rules also envisage prior state authority and exchange of information by both ratifying states before a child is either adopted abroad or is brought to the UK to be adopted. Where adoption has already been effected abroad by a British citizen parent, a child is also recognised as a British citizen, and therefore does not have to comply with immigration formalities.<sup>21</sup> The UK ratified the Hague Convention in June 2003 and India did so in October 2003.

Implicitly or explicitly, there is an expectation in British Immigration Rules and legal decisions that inter-country adopters should follow these preferred routes. Indeed, throughout the structure of the rules applicable to overseas adoptions there is a marked understanding that only adoptions that conform to the predetermined standards of British state law should be given validity. In turn, the level of state involvement, or even interference, in decisions to adopt relative children goes against the ethos of such adoptions since they are at the outset arrangements among families. Although those rules have been formulated in part to guard against abuses of transnational adoption and to secure the interests of children, it is far from clear that relative adoptions should be subject to the same rigid criteria, and no case has ever been made to justify excluding or restricting the recognition of relative adoptions. While it is clear that Hindu law adoptions are excluded through the interplay of the rules of private international law for the recognition of overseas adoptions and British immigration law, in the next section we turn to some distinguishing features of British practice with respect to Hindu law adoptions which determine the ways in which issues are later brought to the courts.

### Some observations about legal practice

Generally speaking, British officials have not thought it relevant to contest the *validity* of the adoptions as under the Hindu law, but have either assumed or conceded it. They have rather stood by the general prohibition in the Immigration Rules as the basis of their decisions to reject admission. It is not uncommon for immigration law to set up hurdles which are *additional* to those expected at the level of private international law, and this is manifested in adoption as in other areas of family relationships such as marriage (Sachdeva, 1993). Thus, although the parties concerned may have taken steps to conform to the requirements of the foreign law, they may well be told that British immigration law cannot recognise their relationships. Menski (2007) discusses one case in which the immigration officials and courts and the family courts gave divergent opinions about the validity of a Gujarati divorce and subsequent re-marriage. Such cases show how different forums may well take divergent positions, and demonstrate a lack of joined-up-thinking which, in turn, produces confusing results.<sup>22</sup> Of course, it does not help that legislation on British private international law is also framed so as practically to frustrate common law recognition. This is

20 Currently para. 316A of the Immigration Rules. This is effectively the recognition in immigration law of statutory rules in and made under the Adoption and Children Act 2002.

21 The relevant current Immigration Rule is found at para. 316D.

22 This situation is not helped by the fact that the English Court of Appeal appears to approve of such divergences: see *R (Shamsun Nahar) v. Social Security Commissioners* [2002] EWCA Civ 859.

evident in the list of countries of which adoption orders are recognised, a list from which India is excluded, and upon which the Immigration Rules are premised. Frequent judicial utterances about the need for international comity, the potential for which is ironically still preserved by the facility for family courts to recognise validity by common law (see the case of *D & D* above), are therefore counteracted by statutory attenuation of judicial freedom of decision-making.<sup>23</sup>

While British officials and courts have avoided questions of validity under Indian law, there is some evidence that such questions have come up in North American jurisdictions. In the foreword to Manooja's (1993, p. vii) fieldwork study on adoptions in Punjab, the retired Chief Justice of the Punjab and Haryana High Court, R.S. Narula, stated:

'The Indian law of adoption is assuming more and more importance in the domestic as well as international field because of its application to the question of determination of the factum and validity of adoptions of intending Indian immigrants to foreign countries on the sponsorship of their adoptive parents settled in those countries, particularly in the USA and Canada.'<sup>24</sup>

Validity questions could potentially arise also in British jurisdictions, particularly in the light of the wider scope for legal argumentation opened up by the ECHR. Meanwhile, it should be noted that, although this writer has not seen much evidence of validity issues being raised directly, British lawyers in practice will often seek reassurance from experts that the foreign law has been complied with. This means that knowledge of Hindu adoption law, although not easily accessible, remains relevant in practice. Riles has recently commented on judging activity in private international law contexts in the United States:

'judges receive little guidance from existing methodologies as to how to decide what is "fair" in a case of cultural conflict, or what the parties might have come to legitimately expect of their bargain, where expectations are the product of one's cultural environment, or what might further the needs of the international system in a clash of cultural values.' (Riles, 2008, p. 275)

It is thus possible to argue that, in the course of legal actions before courts and tribunals, and even when issues of validity are not directly at stake, the input of experts might help to cast some light on the sociolegal contexts in which familial decisions are being taken. As we see further below, however, judges are not agreed on how far their rulings should incline towards respect for difference.

While the macro concerns about the preservation of the values upheld by national legal systems and of the integrity of national immigration control systems are strongly evident, also at stake in this contested terrain are other floating concerns such as the 'best interests of the child', familial and kinship interests, and the proper balance among them. In particular, the best interests of the child concept is now embedded within a surrounding theology of human rights which appears to gloss over the problem of how universalisable any particular standard of bringing up children and of establishing their welfare can really be. The larger society now includes substantial transnationally active communities, and is characterised by segmented norm systems regarding how best a child's interests can be balanced with wider familial and kinship concerns. By definition, then, we have

23 Ehrlich (1917), an early exponent of judicial freedom of decision-making in the light of prevailing sociolegal realities (what one might nowadays call judicial activism), favoured the English approach as compared to the continental, where he thought the judges were being far more constrained by statutory rules. It may be wondered whether judges in contemporary Britain feel as free to act and think as justice demands.

24 The (late) Chief Justice's concern is justified by the way in which the US Board of Immigration Appeals decided an early case of adoption, *Dhillon*, #2620 (decided 27 October 1977), where the Board took a very technical approach based on a wrongly prepared adoption deed, but entirely neglected the customary basis of the adoption. Another example of excessive formalism, this time on the basis of age difference between the adopter and adoptee, is found in the Canadian case, *Avtar Singh Khara v. The Minister of Citizenship and Immigration*, 28 May 2007, Immigration and Refugee Board, IAD File No. VA6-02156.

plural and non-uniform ways of conceptualising child welfare. The rise of 'private placement' bypassing statutory agencies has already been noted in the United States (Charney, 1985) and in the Republic of Ireland (O'Halloran, 1992, p. 69). Likewise, Hindus may also justifiably feel that their *dharma*, a concept central to Hindu law, and which is emblematic of its non-positivistic basis, provides them with a legitimate basis for 'privately' combining and balancing responsibility towards children with an eye to the future of the corporate family as a whole. Indicating the contrast between such Hindu legal constructs and positivist legal assumptions, Francavilla (2006, p. 233) ends his study on Hindu law by the seemingly radical statement that 'every Hindu is potentially an interpreter' of *dharma*.<sup>25</sup>

As seen in this article, however, the predominant, and Eurocentric, message being sent out through the administration of British immigration law is that an adopted child's welfare is only met when the allegedly universal but essentially British/Western state-mandated adoption procedures are complied with. The existence of international arrangements, most notably in the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (1993), is thereby postulated as providing the optimum method by which overseas adoptions can be transnationally legitimated. This ignores the fact that the Hague Convention is a response to inter-country adoptions arising out of quite different sets of circumstances from those which the families engaged in Hindu law adoptions encounter. Those circumstances would seem to include preventing 'the abduction, the sale of, or traffic in children'.<sup>26</sup> At the time when the Hague Convention was being drafted, the UK government was also engaged in an inter-departmental review of adoption law (Department of Health, Welsh Office and Scottish Office, 1992). The main issue providing some urgency to the review was the considerable number of privately arranged adoptions of children from Romania and Latin America. While it was also known that there were some relative adoptions taking place, notably from the Philippines and South Asia, the review basically paid lip service to 'cultural issues' but then went on to assert the importance of international standards and the 'higher' level of UK practice (Department of Health *et al.*, 1992, pp. 48–56).<sup>27</sup> As noted, India, too, became a party to the Hague Convention as of October 2003, but that does not significantly alter the position of Hindu law adopters.<sup>28</sup>

The full force of such Eurocentrism is attenuated by the ways in which the higher courts have occasionally seen fit to rule on the legitimacy of excluding culture-specific forms of child adoption. Some judges have evidently become super-conscious of the plurality of ways of life and norms

25 Defining *dharma* has challenged scholars of Hindu law, unsurprising if one takes into account Sharma's (2005, p. 41) observation that 'any attempt at definition would drain the idea of its creative flexibility'. Nevertheless, Sharma's explanation of the concept is useful, as is Menski's (2003, pp. 94–130; 2006, pp. 209–237). Menski (2006, p. 209) defines it as: 'correct or "good" action of all individuals, at any moment in their life'. This action-, as opposed to theory-oriented perspective is quite important as a contrast to dominant assumptions of Western law. On the contrast between the 'performative' and 'theoretical' tendencies respectively in Asian and Western cultures, see Balagangadhara (2005).

26 Preamble to the Hague Convention, para. 4. The Convention on the Rights of the Child 1989, Article 21 also appears to be premised on similar concerns and does not take into account the practice of relative adoptions. The removal in September 2008 of the reservation, in matters of immigration and citizenship law, which the UK had entered upon ratification in 1991, is therefore likely to have minimal impact, unless viewed in light of the other Articles of the Convention.

27 Murphy (2005, pp. 184–86) also notes the prevalence of adoptions from Eastern Europe and Latin America by the early 1990s, amidst the international growth of inter-country adoptions, which then led to the Hague Convention. As for the numbers, official figures indicated that between 1984 and 1991, 15 relative adoptees were issued entry clearance from the Philippines, 14 from India and 9 from Pakistan. Out of a total of 468 adoptees, some 19 percent or 87, had been relatives (Department of Health *et al.* (1992, section on 'Inter-country adoption in the UK', pp. 1–2). More recent figures have not been found by the present writer.

28 The list of State Parties to the Hague Convention can be found in Seddon (2006, p. 1528).

present in contemporary British society. This has led them to be critical of the restrictive immigration law position. Instead, they have used human rights norms to support their thesis that family life in a plural society involves adjustment of prevailing monochromatic legal positions to accommodate the 'other's' ways of doing things. This sort of position was notably taken in *Pawandeep Singh v. ECO, New Delhi*,<sup>29</sup> described by leading immigration law practitioners as a 'landmark decision' (Macdonald and Webber, 2005, p. 440) by the Court of Appeal of England and Wales, in which the judges made findings favourable to the child applicant under Article 8 of the ECHR. Such signs of criticism by some British judges underline the essentially double-edged and/or porous nature of human rights discourse in contemporary Britain. Human rights can be interpreted by 'plurality-conscious' (Menski, 2006) activist judges to accommodate multiple perspectives on adoption, and children's and familial interests, or they can be used as a means of furthering either individual-centred or state-centred kinship denying agendas whilst remaining inherently sceptical and even condemnatory of non-Western 'others' (Ballard, 2009).

The *Singh* case acted as a spur to later applicants who then used it to mount challenges to refusals based on the otherwise restrictive position of the applicable UK Immigration Rules. In examining these cases, one of the chief aims is to analyse whether and to what extent *Singh*, and cases subsequent to it, substantially changed the legal landscape concerning the admission of children adopted under Hindu law. The relative indeterminacy of judicial decisions thereby uncovered may well be indicative of a wider internal divergence in legal and judicial circles about how far to accommodate plural and transnational practices within the field of British legal systems. This divergence provides grounds for creative lawyering and creates spaces for pluralist legal activism, albeit with continued risks of setting up genuine adopters to fail despite legal interventions. For the purposes of this article cases have been selected on the basis that: (1) there has been a refusal of admission of adopted children in the British immigration law system, with subsequent litigation in the British courts; (2) the adoptions have been effected through the customary norms applicable under the rubric of Hindu law in India; and (3) the adoptions were generally by relatives (though with one exception) who were normally living in the UK.

### ***Singh v. ECO, New Delhi: human rights and plurality consciousness***

In the *Singh* case, the adoptive father's cousin was the natural father of the child, Pawandeep. The adoptive parents lived in the UK, the mother being an Indian citizen with indefinite leave to remain in the UK and the father a British citizen. They ran a successful family business and also had a grown-up and married daughter, but wished to have a second child. They had unsuccessfully tried fertility treatment. Pawandeep's adoption took place in December 1996 'according to the religious laws and practices of the Sikh faith',<sup>30</sup> within some three months of his birth. A deed of adoption was also executed the following January and was registered under HAMA in Jalandhar, Punjab, and the deed was subsequently recognised by an Indian civil court as a legal and genuine document. It is a remarkable feature of all the British immigration cases reviewed here, including *Singh*, that the validity of the adoption in Indian law was not in question at all, even where evidence of the procedure and law in India was sometimes commented upon as being rather bare. It therefore seems fully accepted that Hindu adoptions can indeed be effected under Indian law with full legal validity under that legal system. What remains in question is the extent to which British legal systems must accord such adoptions recognition within their sphere of operation.

29 [2004] EWCA Civ 1075.

30 Dyson LJ, at para. 2.

Pronounced on 30 July 2004, the judgment of the Court of Appeal came after a long series of court battles fought by the family. In this sense, the case mirrors many other immigration and non-immigration cases whereby an ethnic minority individual or family must face a long road to recognition of a distinct legal institution, if recognition is eventually forthcoming at all. A first series of appeals to an immigration Adjudicator and the Immigration Appeal Tribunal (IAT) were dismissed on the grounds that the Indian adoption was not recognised under the Rules, and that it also fell foul of the other criteria, namely the inability of the natural parents to care for the child, and that there was a breaking of ties between the child and his natural parents. Although the child was going to a school decided upon by his adoptive parents, he continued to live with his natural parents and three natural siblings in India. A plea for permission to appeal to the Court of Appeal was refused in turn by the IAT and the Court of Appeal. It had been argued before the Court of Appeal that the requirement to have broken ties with the natural family was contrary to Article 8 of the ECHR, although that argument was not accepted in the refusal of permission.

However, Pawandee's adoptive parents had a strong legal team who would not give in and tried other avenues of challenge within the background of a changing legal context. An application made in July 2000 to the European Court of Human Rights (arguing breaches of Articles 8, 12, 13 and 14), was declared admissible (under Articles 8, 13 and 14) in September 2002. While this event is not given much weight in the subsequent domestic litigation, it may be considered to have implicitly conditioned the eventual decision by the Court of Appeal.<sup>31</sup>

Even prior to the European Court's admissibility decision, a second application was made for entry clearance soon after the entry into force of the Human Rights Act 1998 (on 2 October 2000), which made the ECHR binding on public authorities in the UK, including the immigration authorities. That application was rejected, but on appeal the Adjudicator found that the requirements of the Immigration Rules were not met, and that since Pawandee had a home, family support and education in India, the serious and compelling factors test was also not satisfied. However, she nevertheless found that the decision to refuse had caused an interference in breach of Articles 8 and 14 of the ECHR, since there was in existence a 'private and family life' given all the contacts between Pawandee and his adoptive parents, whom he regarded as his natural parents. She also held that the interference based on the legitimate aim of regulating immigration had a disproportionate impact on their family life. The Adjudicator also concluded that because of the discriminatory treatment of Indian nationals (and those from other countries excluded from the list) there was a breach of Article 14.

On further appeal by the Entry Clearance Officer (ECO), the IAT reversed the Adjudicator's decision. It is crucial to note that the ECO's appeal was predicated on the argument that Article 8 was not engaged at all, but it was *conceded* that if it were held to be engaged, then a breach of the Article would follow. No stress was consequently laid on whether the refusal of admission was justifiable under Article 8(2). The rest of the litigation, including the further appeal to the Court of Appeal, was therefore concerned only with whether Article 8 was engaged at all. In hindsight this was an important concession, since it allowed decision-makers in later cases to rely on the argument that the *Singh* case was only concerned with the narrow point of whether there was an interference with family life in denying admission to Pawandee, and not of whether the exclusion was justified. It has barely been considered in those later cases that the ECO (and therefore the Home Office) had actually already conceded the point that if it was shown that Article 8 was engaged then a violation must follow. This shows how litigation tactics involving challenges to the higher courts resting on very narrow points of interpretation mean that there is often a failure to resolve the larger policy questions, in this instance the legitimacy of excluding a whole swathe of culturally specific transnational adoption arrangements.

31 Macdonald and Webber (2005, p. 440) cite the admissibility decision as *Singh (Pavitter) v. UK* (60148/00), 3 September 2002, unreported.

For its part, the IAT relied on the 1977 Commission admissibility decision in Strasbourg in *X and Y v. UK*, whose facts were noted to be 'strikingly similar' to Pawandeeep's case.<sup>32</sup> In that case the Commission had found the application to be manifestly unfounded and, on that basis, the IAT too felt that no family life could be argued to have been constituted between Pawandeeep and his adoptive parents, crucially because no cohabitation had been established. The IAT also referred to some international guidelines on adoptions and noted that they had not been complied with.<sup>33</sup> It noted:

'Manifestly, however, it did not meet those important international standards. Specifically, the adoption was effected, albeit according to Sikh custom, not because the natural parents were unable to care for the respondent but because of the desire of the sponsors to have another child to bring up given their inability to have further children of their own. There is no evidence that the sort of intervention by the state envisaged in the articles referred to above in in-country adoption occurred, let alone consideration and compliance with the important requirements for inter-country adoptions, including the vital issue of ensuring the right of entry of the child into the country of his adoptive parents.'<sup>34</sup>

This statement strongly indicates that since one system of standards, as opposed to another officially preferred set of norms, had been chosen by the parents, no recognition should be forthcoming and that, effectively, Article 8 would not be engaged. This, of course, involves a value judgment about one set of standards being hierarchically superior as against the other. This is a theme that returns in, and indeed runs through, the post-*Singh* cases.

As noted, the Court of Appeal's decision represented a fresh approach to the issue of family life under Article 8. Dyson LJ and Munby J in particular went through a range of ECHR case law on the matter, including adoption-related decisions in Strasbourg. Specifically, they found that the IAT had too restrictively interpreted the importance of the *X and Y* decision as necessarily entailing the conclusion that 'an adoption recognised by the courts of India cannot give rise to family life'.<sup>35</sup> Both judges also distinguished the type of adoption in the present case with inter-country adoptions where the fear of neglect of the interests of the child had led to international standards being adopted. They also took into account the facts of the case, namely that Pawandeeep saw his adoptive parents as *his* parents, that he was even unaware of the adoption, that he could not understand why he was separated from them, and that this was not an arrangement of convenience. The Court's reading of the situation comes close to accepting that recognising the fact of family life as between Pawandeeep and his adoptive parents in this case would best protect the interests of the child. It is notable how much focus was given to the question of the best interests of the child. Although a narrow reading of Article 8 should have necessitated a finding only on the question of *existence* of family life, the surrounding concerns about international adoptions shifted the legal debate in this case to a consideration of whether the adoption was one in which the child's best interests had been considered or whether admission of the child to join his parents would be in his best interests. This pushed the bar up fairly high, albeit that the Court of Appeal in this instance viewed the arrangements favourably enough to warrant recognition. In later cases, where Article 8(2) justifications for interference are also at issue, one sees that the additional lurking consideration of the efficacy of immigration control creeps in.

32 *X and Y v. UK* (1978) 12 D & R 32.

33 Among other documents, the IAT specifically mentioned the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placements and Adoption Nationally and Internationally, adopted by the UN General Assembly Resolution 41/85, 3 December 1986.

34 Quoted by the CA at para. 14.

35 Dyson LJ at para. 6.

While both the longer judgments in the Court of Appeal – by Dyson LJ and Munby J – reveal a real effort to accommodate adoptions under Hindu law in India, albeit with due attention being paid to the individual facts of the case, the judgment by Munby J is especially notable for the way in which he tackles the problem of recognition of a plurality of family forms and, in particular, adoptions emerging from non-Western cultural contexts. His judgment is replete with important statements about how decision-makers must recognise the changing social context and, consequently, the plurality of family forms now encountered within family law. He therefore states:

‘Quite apart from the fact that the form the family has until recently tended to take in Protestant northern Europe differs in certain respects from what would until recently have been familiar in Catholic Mediterranean Europe, we need to remember, as Professor Lawrence Stone’s great works have taught us, that what we currently view as the traditional or conventional form of family is itself a comparatively modern development. Moreover, and perhaps more to the point, we have to recognise that there have been very profound changes in family life in recent decades.

... there have been enormous changes in the social and religious life of our country. The fact is that we live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Our society includes men and women from every corner of the globe and of every creed and colour under the sun.’<sup>36</sup>

He goes on to note that, ‘The law, as it seems to me, must adapt itself to these realities, not least in its approach to the proper ambit of Article 8’.<sup>37</sup> Speaking of the case at hand he stated:

‘The narrow question for decision is whether, in the specific circumstances of this particular case, the relationship between this little boy and his adoptive parents constitutes “family life” for the purposes of Article 8 of the Convention. But there is no shirking the fact that, however narrow and technical the question we have ultimately to decide, the case before us cannot be viewed in isolation from its particular social, cultural and religious setting. And there is, I am afraid, a hard truth that we have to face. The question we are required to answer would never have been raised but for one fact: this boy and his adoptive parents come from a society and embrace a faith which hold to a view of adoption sufficiently different from our own that our law refuses to afford recognition to what I have no doubt was in their eyes, as in the eyes of their community generally, a ceremony of the most profound emotional, personal, social, cultural, religious and indeed legal significance. The consequence is that they have been put to the indignity of having to justify themselves in litigation which, on top of everything else, has, for one reason or another, been the subject of quite unacceptable delays and become quite shamefully protracted.’<sup>38</sup>

This is evidently an extremely poignant acknowledgement by a senior judge of the indignity of subjection to interrogation by a legal order before which the adoptive parents had had to justify themselves and their reasons for having pursued the course they had. It also appears to recognise the cultural context providing the basis for the ‘subjective perspective’ (Chiba, 1998) of the adoptive parents. There are other passages in the judgment also worthy of note but too long to quote here – as such, the detail of judgment is worth examining closely. Taken as whole, Munby J’s judgment demonstrates the potential of official legal decisions to be kept in consonance with a changing social context, but this can be done only when judges are sensitive enough to that context and its

36 Munby J, at paras. 61–62.

37 Munby J, at para. 65.

38 Munby J, at para. 57.

dynamically plural nature.<sup>39</sup> The plurality consciousness evident in this judgment later gets occluded from view when other decision-makers judging other cases want to reach a different result and, indeed, the scope of the *Singh* decision is interpreted very narrowly.

### **Post-Singh: initial optimism and reversion to old ways**

In the period after the *Singh* decision there was a glimmer of hope that the restrictive approach hitherto adopted by the UK Immigration Rules, and the assumptions that they had built upon, would not be so tenaciously defended. I was subsequently asked to provide expert evidence in a case of a post-earthquake adoption in the Kutch area of Gujarat in India, in which the adoptive parents followed virtually the same customary and court procedures under Hindu law. The girl child's natural mother had died in the earthquake that had struck parts of South Asia including Gujarat. The place of residence of the girl's natal family was near to the epicentre of the earthquake in Bhuj, Kutch. The adoptive father was the brother of the girl's natural father. Only the adoptive father was present for the adoption ceremony and subsequent registration with the court in Gujarat. The adoptive parents had wanted a second child and her natural father was not able to look after the girl. While the case went on, the girl was being looked after by her paternal aunt. The ECO's initial refusal was based both on the grounds that the requirements for adoptees had not been met and that the applicant did not qualify for admission as a child of relatives. The appeal took place after the pronouncement of the Court of Appeal's judgment in *Singh* and the *Singh* decision formed part of the submissions in the appeal to the Adjudicator which was subsequently allowed under Article 8.<sup>40</sup>

A subsequent reported decision, again involving a Sikh intra-family adoption, is *SK ('Adoption' not recognised in the UK) India*, decided by the AIT on 1 September 2006.<sup>41</sup> Here the child was thirteen years old by the time of the adoption. She was adopted formally under Hindu law procedures in 2003 and the 'religious ceremony' was conducted soon thereafter. The child was the natural daughter of the adoptive mother's brother, who had three other children. The adoptive parents were undergoing fertility treatment at the time of her birth in 1993, and from the outset there appears to have been some understanding among the relatives that the child would be given to the adoptive parents. The adoptive parents made financial provision and arrangements were made for caring by someone described as a 'guardian', not the natural parents. Frequent visits to India were made by the adoptive parents to be with the child. Typically, again, there was no real issue about the validity of the adoption and the Asylum and Immigration Tribunal (AIT) assumed that it was valid according to Hindu law under HAMA. The AIT also recognised that the instant case bore similarity to the *Singh* case.

The challenge to the Adjudicator's decision, rejecting the initial appeal, rested on a composite argument that there was no lawful, rational, proportionate or non-discriminatory basis for excluding an Indian adoption from recognition as a valid adoption in English law, too, and that the adoptee should either be considered as admissible under the de facto adoption rules or under the main adoption rule and that the refusal to so admit was discriminatory and failed to promote the interests of parents and children in conducting their family life together. In effect, the grounds of appeal were pregnant with an Article 8 and 14 ECHR ethos and the discrimination argument was prominent. The AIT dealt with the discrimination point by first arguing that the Immigration

39 Extra-judicially too, Munby J (2005) has offered a similar analysis building on his judgment in the *Singh* case.

40 The case is not reported and it was not the practice to report cases below that of the IAT (under the pre-2005 regime) and, currently, decisions are not reported except after reconsideration by the Asylum and Immigration Tribunal (AIT), and then only in certain circumstances when authorised by the AIT.

41 [2006] UKAIT 00068.



Rules were based on a pre-existing concept of adoption which could not be governed by considerations of immigration law. It went on:

‘Adoption involves a change of status. From the earliest times such changes have been subject to legal regulations, because they are of more than private importance. In Roman law *adrogatio* or the adoption of a person *sui juris* was subject to regulation at the highest level, precisely because the effective extinguishment of one family by its adoption into another was a matter of public interest. In English law adoption is a pure creation of statute, the earliest such statute being as recent as 1926.

Adoption appears to be regulated everywhere. The greater the effects of the adoption, the more likely the regulation is to be intense. In English law, as in many other countries, the legal consequences of adoption are very substantial, affecting status, marriage, succession and social security benefits. Any country asked to attribute legal consequences to a private arrangement is entitled to enquire into the process of their acquisition, simply because the arrangement is not a natural, but purely a legal process.

There is no *jus gentium* or natural law right to adopt or be adopted, and no *jus gentium* or natural law right to have the rights which in a particular state accrue from adoption. There can be no “human right” to enjoy in any particular state the consequences of adoption, unless the adoption is one recognised as such in that state.’<sup>42</sup>

Thus far, the determination of the AIT essentially regarded the Immigration Rules as being grounded in the general assumptions behind the official adoption law in England and the UK, thus justifying the strict controls on recognition of adoptions, whether in immigration law or otherwise. The reference to the old Roman law, which indeed saw adoption as a rare and exceptional situation and strictly limited it, anticipated the restrictive and Eurocentric position that would be adopted by the AIT.

Significantly, in the subsequent passages of its determination, it went on to explain why Indian adoptions could not be granted recognition:

‘As we understand it, the position in India, Pakistan and Bangladesh is that adoption is regarded as a private arrangement between families, with no public effects or need for public scrutiny. In the absence of evidence we can take no firm view on the issue, but we incline to the view that, if that is so, it would be a proper reason for exclusion from designation.

It follows from what we have said above that nobody is entitled to say that an adoption is entitled to worldwide recognition in each individual state simply because it is an adoption recognised by the laws of some other state or the customs of some other culture. As the effects of adoption vary from state to state, there is nothing surprising, or wrong, or disproportionate, or irrational in saying that the legal requirements for adoption in the state in which the adoption is asserted must be met before the adoption will be recognised there. Nobody is entitled to say “I have adopted (or been adopted) according to my rules; therefore you are obliged to recognise the adoption as entirely valid under your rules”. Unless an Indian adoption can be found to be subject to the same requirements and the same intentions, and to have the same effects as an adoption in the United Kingdom, there would appear to be no reason why it should be treated as though it were a United Kingdom adoption. And if it is not to be treated in general as a United Kingdom adoption, there is no reason why it should be treated as a United Kingdom adoption for the purposes of the Immigration Rules. The truth of the matter is that adoption means different things in different countries. The fact that the same word is used does not mean that the effects are, or ought to be, the same.’<sup>43</sup>

<sup>42</sup> Paras. 20–22.

<sup>43</sup> Paras. 23–24.

Essentially the AIT appears to say that private arrangements do not merit recognition and that the simple fact that an adoption arrangement may be valid somewhere in the world does not make it cognisable in the UK. Indeed, it appears to premise recognition upon sameness, and conversely rejects the otherness of different ways of adoption. Taken to its logical conclusion, the AIT's argument would entail non-recognition of virtually every familial institution not bearing essential similarity to British legal institutions. The AIT thus tried to deflect the wholesale challenge to the discriminatory premises of the Immigration Rules on adoption, and distinguished *Singh* on the basis that that case related to the establishment of family life, not whether interference with it was justified. Assuming that family life was present, it went on to say that interference with it would not be disproportionate. In asserting the supremacy of Western or British legal assumptions about adoption the AIT totally neglected the plurality-conscious passages made in *Singh*, particularly by Munby J, confining that case to a narrow ambit.

Despite having said all of this, however, the AIT went on to distinguish the arrangements made by the family in the present case from the child-trafficking type of case, as had been done in *Singh*. In so doing, it considered the admission of the child under the 'relatives' rule and found that, for a number of reasons, including the sponsors' inability to have children, the fact that it had long been thought that the child would be adopted, and the long history of visits, there were 'serious and compelling family or other considerations' making the child's exclusion undesirable. It therefore held that the admission of the child should have been considered under the 'relatives' rule and that not to admit the child under that rule would constitute a breach of Article 8(2).

This decision therefore demonstrates that, on the one hand, the AIT refused to countenance a general attack on the scheme for recognition of Indian Hindu law adoptions and to accept the argument that not to include such adoptions within the scheme of the Immigration Rules was discriminatory. On the other hand, where relatives are concerned, as in this case, and where the appellate authorities are sufficiently moved by the family circumstances, the case shows that a child could be admitted under the 'relatives' rule. Hindu/Sikh adoptions can thereby be nudged into the ambit of the 'relatives' rule short of their full recognition for English law purposes. To be recognised as a child of the family under English law, adoption procedures would then presumably have to be initiated after admission into the UK.<sup>44</sup>

## The eclipse of *Singh*?

The next and most recent case considered here, *MN*, which also reached the Court of Appeal, concerns a Punjabi adoption effected among between persons who were not directly related.<sup>45</sup> The adoptive father had been previously married and had three children from that marriage, all now adults, and with whom he had not remained in contact. He visited India regularly, where members of his family lived, and one of the servants of the family had a daughter, the adoptee, born on 10 May 1994.<sup>46</sup> Her natural father died on 2 June 2002 and the servant was herself not in good health. The adoptive father had paid for the servant's medical treatment and also for her daughter's school fees and costs of boarding at a hostel linked to her school. In about the year 2000, the sponsor met a woman in India who was to become his wife. In September 2002 there was a 'formal ceremony'

44 As noted, the *D & D* [2008] EWHC 403 (Fam) decision now leaves the door open for argument to be made for common law recognition.

45 This case history is based on the AIT's determination: *MN (Non-recognised adoptions: unlawful discrimination?) India* UKAIT 00015, date notified 12 February 2007 and the Court of Appeal's judgment: *MN (India) v. Entry Clearance Officer (New Delhi)* [2008] EWCA Civ 38, judgment date 5 February 2008. We are not told whether the child, the adoptive or natural parents were Sikhs or Hindus.

46 The AIT's determination reads '19 May 1994' at para. 2.

during which the girl's natural mother 'symbolically placed her in Mr D's lap in the presence of witnesses'.<sup>47</sup> She would live in the adoptive father's home when not at school and his wife-to-be also came to be more involved in her care, even when the adoptive father was in the UK. They eventually married in the UK in 2003, after which she returned to India several times to care for the adopted child. In July 2003 an Indian adoption deed was effected by both the sponsor and his new wife as the joint adoptive parents. The application for the child's admission to the UK was rejected in March 2004 and the ECO's explanatory statement prepared in January 2005 showed that the refusal was grounded on the fact that the adoption was not recognised in UK law, that ties with the family of origin had not been broken, and that it had not been shown that the adoption was not one of convenience to facilitate admission to the UK. The child's natural mother had died on 4 April 2004. Further legal proceedings were undertaken in India before a Guardian Judge, who in September 2005 appointed the adoptive father's wife as the legal guardian of the child.

On appeal to an Immigration Judge, and indeed throughout the litigation, it was again accepted that the adoption was valid according to Indian law. By that time the child's natural mother was ill and her death or inability to look after her was foreseeable. The Judge accepted that the child and her adopted parents had 'established the start of family life', but went on to hold that interference with those rights would not be disproportionate since they had not lived together on a full-time basis, they had already demonstrated their willingness and ability to make arrangements for her care and education in India, and they could always make a formal application to adopt by first having a home study report completed. The Judge's finding therefore suggested that the fact that all three could continue their family life in India meant that the interference was not disproportionate, and was further coloured by the expectation that they could always go ahead and adopt under the formal British procedures and then have the child admitted for the purpose of adoption in Britain, even though it could not be assumed that that adoption would be approved. This expectation also coloured the holding in the further appeal to the AIT.

The same bench presided in the AIT as had sat in the *SK* case already considered. At the outset, therefore, it appears unlikely that the appeal could have succeeded since the only grounds on which the AIT had accepted admissibility of the child in *SK* was the 'relatives' rule, which could not apply in the present case (and that rule was not in fact considered). Predictably, therefore, the AIT, drawing heavily from the passages in *SK* which are quoted above, also reached the conclusion that the Rules did not prevent a child being admitted for the purpose of admission to the UK and that, therefore, the Immigration Judge had not been wrong to dismiss the appeal on the Article 8 argument.

However, before the AIT, the argument of discrimination on racial grounds, based both on the Race Relations Act 1976 and Article 14 of the ECHR, was pursued more strongly. The AIT dealt with the discrimination point on both legal bases in a composite way, reaching the view that:

'We are not dealing here with an unjustifiable discrimination between the treatment of comparable individuals: we are dealing instead with individuals whose status is not comparable, and who are therefore treated in different ways for a reason which is obviously justifiable on any ground of public policy. We do not need to consider whether the Secretary of State or the Entry Clearance Officer has a statutory defence to a claim of racial discrimination, for there is no racial discrimination. The appellant is treated differently from a person who was adopted in a country whose adoptions are recognised in the United Kingdom because, for very good reasons, United Kingdom law does not regard her as having acquired the status of the sponsor's daughter. She is at liberty to acquire that status by an adoption in a country which treats the process of adoption in a manner comparable to that in which it is treated in the United Kingdom, and whose

47 Wilson J in the Court of Appeal, para. 6.

adoption orders are accordingly recognised here. She is not at liberty to acquire that status in any other way, and the refusal to allow her to do so is not unlawful discrimination.<sup>48</sup>

The AIT therefore considered the existence of any differential treatment vis-à-vis Indian adoptions as justifiable for reasons of the public policy governing adoptions in general. Again the strong implication was that only adoptions made in conformity with the standards anticipated by the UK adoption laws would be acceptable.

This view also strongly conditioned the Court of Appeal's dismissal of the further appeal to it. It was clear that the appellant child did not fit within any of the Immigration Rules relevant to adoptees, and the Court took the position that the avenues otherwise available under the Immigration Rules should have been pursued by the adoptive parents. It was argued in the grounds of appeal that the Immigration Judge had not considered that the best interests of the child lay in being allowed admission to the UK to live with the adoptive parents, as had been done in *Singh*. However, while accepting that the *Singh* case had 'a number of parallels with ours',<sup>49</sup> that case was again distinguished on the basis that it was 'of no direct relevance'<sup>50</sup> since it concerned whether family life under Article 8 was engaged and not whether refusal of admission was disproportionate. Wilson LJ noted that there was no independent evidence, the child's own views had not been sought and no professional checks 'which under our law are regarded as elementary to an analysis of whether a child's interests are served by living as an adopted child in the home of others had been undertaken'.<sup>51</sup> The judge emphasised that such checks were an essential part of inter-country adoption procedures under the Hague Convention, which India, too, had ratified in October 2003. The judgment does not indicate that the observations in the *Singh* case – that such rules may not be applicable in cases of intra-family adoptions – were taken into account, although it was noted that going through those procedures may not be possible in India given that, under Indian law, there was already an effective adoption (and they could not have been pursued in the lead-up to the adoption since India had then not yet ratified the Convention). The sole issue on appeal being whether the refusal of admission was disproportionate, it was held that the Immigration Judge's approach had not been wrong.

The decisions in this case therefore place a lot of emphasis on: (1) the fact that the officially established procedures for adoption had been bypassed by the parties; and (2) that the parties had shown that a level of family life could be continued in India by maintaining frequent contact. Although the *Singh* judgment had indicated that the best interests of the child ought to be a factor in an evaluation under Article 8, it appears that the import of that decision was read considerably narrowly, and the onus of proving that the best interests of the child lay in living with her adoptive parents was placed on those parents. The decisions indicate that of the many factors which could inform the extent of the legal obligation on the state to respect the parties' decisions, the existence of other, albeit more cumbersome, adoption procedures and the need to effectively maintain immigration control in essence win out as the primary motivating factors.

## Conclusions

There are obvious differences and conflicts between legal traditions or distinct legal institutions on adoption demonstrated here. How best those conflicts or differences should be resolved is not obvious from the decisions examined. Rather, the case-law presents a shifting canvas of

48 AIT's determination, para. 19.

49 Wilson LJ at para. 29.

50 Wilson LJ at para. 29.

51 Wilson LJ at para. 32.

considerations. There appears to be a strong contrast between Hindu law adoptions which are basically regarded as private, mostly intra-family arrangements on the one hand, and the assumption of strong state control in British norms of adoption on the other. Where the proper balance lies is unresolved and ever-changing it seems, although there is a strong tendency to assert the primacy of state control with Western tradition and international consensus being used as a justification. While the validity of Hindu law adoptions under Indian law is generally (and as yet) uncontroversial, this general assumption of validity also prevents discussion of the alternative basis of Hindu law adoption decisions, also thereby preventing a deeper comparison of Hindu and British/Western laws. By contrast, British/Western assumptions receive more airing, even though the presuppositions behind them are not discussed in any depth. However, there is a prevailing assumption that they are culture-free and their supremacy is taken for granted. International discourse and law-making is largely influenced by such assumptions, also giving them an air of universal validity.

Besides family life and its plurality, there is a range of floating concerns, including the risks involved in allowing too free access to transnational adoptions, given the possibilities of abuse and trafficking and the need to safeguard the best interests of children. However, it is not made clear how the best interests of the child should be assessed and who should be establishing them. This lack of a clear articulation of the best interests of children in plural contexts, underpinned by mere lip service to cultural practices, opens up the real danger that cultural givens are used as standards to be applied universally. There is a serious risk, as demonstrated by the cases discussed in this article, of such hegemonic assumptions and practices overriding appropriate respect for non-Western laws and traditions. On the one hand, one can point to many examples of judicial statements, particularly in private international law contexts, urging a respectful stance of foreign laws and institutions. On the other hand, as this article shows, such respect is demonstrated only occasionally, with judges generally unwilling to challenge obstacles put in place by means of statutory rules and official practices. The issue then appears to rest upon, not whether judges have the *capacity* to be flexible enough in responding to the demand of the non-Western, ethnic 'other', but upon their *willingness* to do so. There may be resentment about, or opposition to, ethnic minorities claiming exceptions to generally applicable rules which are perceived to place them at an 'advantage' in comparison to other adopters, who may not be able to use the Hindu law norms, and must go through the established state-sanctioned procedures for effecting legally valid inter-country adoptions. Tied to this is the fact that a foreign system of law allows individuals to take decisions privately about their familial affairs, counter to the premise of state-regulated effecting of such decisions in British law.

Discrimination-based arguments also challenge the whole system of differently positioned countries of origin in immigration law and, more specifically, the denial of Hindu legal institutions observed by whole groups of transnationally active people. Such challenges are never easily accepted and tend to be dismissed very sharply. There is therefore a reversion to the assumption that such differential treatment, if not unlawful discrimination, tends to be a regular part of the immigration control process, as well as an integral part of the way in which recognition of different family forms operates. As Mortimore (1994) makes clear, the politicised nature of immigration in the UK gives a further, arguably inappropriate, colouring to the manner in which intra-familial adoption decisions are treated by official law. Evidently, there are concerns about immigration control as represented by the tight regulatory scheme for the entry of adoptees, and also by the frequent invocation of the necessity of effective firm immigration control as a ground of justification under ECHR Article 8(2). The other previously mentioned criteria are also invoked to justify or back up the immigration argument. However, it is never clearly spelt out how much weight should be given to immigration concerns when dealing with cases of adopted children, and even how much of an immigration issue adoptions really represent in terms of their magnitude or problematic nature. In adoption and other family reunification/formation contexts, the immigration authorities frequently rely on the possibility of family life being

continued elsewhere than in the UK as an argument to reject claims. How that squares with the best interests of children is never discussed, however.

Some ten years after the study by Mortimore (1994) the judgment by the Court of Appeal in *Singh* appeared to promise a liberalisation in the attitude of official decision-makers to the whole question of relative adoptions, and in particular those effected under Hindu law in India. A plurality-conscious approach desiring to respect a multiplicity of family forms obviously informed the *Singh* decision, particularly the judgment by Munby J. In that case, the human rights arguments, based on Article 8 ECHR, provided an important justification for the argument that the concept of family is now very diverse and that such diversity needs to be respected. *Singh* also demonstrates the potential of human-rights based plurality-conscious 'activism' by individual judges, the consequences of which may not, however, be lasting. Conversely, given the ambit of discretion inherent in judging human rights claims it is equally possible that, in a climate heavy with 'neo-assimilationism' (Castles, 2007), it can lead to a more restrictive, monistic approach being adopted. While the present analysis demonstrates the considerable elasticity in judicial law-making, it also appears that when the elastic is not held in place by a firm commitment for respect for the 'other', it reverts back to its default Eurocentric position.

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