

MULTICULTURALISM, LAW AND THE RIGHT TO CULTURE

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I INTRODUCTION

This is a brief paper on a complex subject. In it I note that there are at least three types of justifications for the right to culture. One is grounded in notions of fair treatment; another in the harm caused to individuals if there is a failure of cultural recognition; and a third in the importance of the inclusion of minority groups for the health of a democracy. I argue that when law is asked to protect cultural practices, the first type of justification is ever-present, while the third offers more guidance than the second. In developing these ideas, I am not speaking about the right to culture in general terms, but only in the context of Australian multiculturalism. I commence by explaining what follows from this limitation. I conclude with some suggestions about changes to the *Australian Constitution* ('Constitution'). But as the approach taken in this paper is that multicultural issues are better dealt with by law, if at all, at the level of everyday politics, these suggestions for constitutional change are modest in scope.

II MULTICULTURALISM FOR US

In present day Australia, the issues of multiculturalism come before us in a particular way. The term multiculturalism can be and has been used elsewhere to include the claims of *any* group that sees itself in opposition to the dominant culture – among others, women, gays, and Indigenous groups. However, for us at present, multiculturalism has a more specific meaning. It refers to the claims of ethnic or cultural groups that have immigrated here (particularly since World War II) from non-English speaking parts of the world. The politics of multiculturalism is a way in which these newer migrant groups press their demands against older established immigrants from the United Kingdom and

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Ireland; demands that at times are based upon a shared linguistically and often religiously based culture developed elsewhere.¹

While Indigenous groups share an interest with immigrant groups in preserving their culture, their position is significantly different, for it can be said that migrants accepted the basic political, legal and social arrangements in place at the time of their arrival. Apart from asylum seekers, they chose voluntarily to come here. But too much should not be made of this point, for once migrants become citizens, they have as much right as anyone else to have a say about these arrangements. The issues raised by multiculturalism are not well thought of as matters in which there are *our* views on the one hand and *their* views on the other. How we deal with multiculturalism is something *we* co-determine.

Of more significance for the difference between Indigenous and migrant groups are differences in the history of discriminatory treatment. For Indigenous groups, the legacy of oppression in this country is highly relevant to present-day problems. But with migrant groups, we are not dealing with persons for whom we feel a sense of historical guilt or even national shame. The White Australia Policy, of course, is nothing to be proud of, but largely because of it there is no cultural group here that suffers from its effects. We treated the Chinese badly, particularly in the 19th century, but since then they have as a group succeeded here. Compared to other countries, we have not had a history of treating migrants as second-class members of our community. We do not live alongside second or third generation 'guest workers'. Migrants by and large came here as permanent residents with an easy path to citizenship. While there may well be present discrimination (that should be addressed), how migrant groups have been treated here over the past 200 years is not a significant factor in our thinking on this issue.

Finally, multiculturalism for us is not about 'national minorities' that have been involuntarily incorporated into a larger state.² We are not dealing with groups in the position of the Basques in Spain or the Flemish in Belgium. Apart from the absence of long-term grievances, no ethnic group here is concentrated within a particular territory. Undoubtedly, there is a degree of social segregation; a result of the push of external hostility and the pull of local community and services. But we have no ethnic groups in a position to claim self-government over a particular territory.

III WHAT DEMANDS MIGHT BE MADE?

Australian governments have an interest in managing the problem of multiculturalism. How to bring these groups into mainstream life? How to deal with grievances and resentments? How to make a shared public culture out of

1 National Multiculturalism Advisory Council, *Australian Multiculturalism for a New Century: Towards Inclusiveness*, Report (1999) [1.2]. While this report attempts to include Indigenous interests within the vocabulary of multiculturalism (see [2.6]), to date Indigenous Australians have not noticeably put their demands in these terms.

2 Will Kymlicka, 'American Multiculturalism in the International Arena' (1998) 45(4) *Dissent* 73-9.

plural ways of living? How, in short, to stabilise social life? The recent government report on multiculturalism³ argues that all Australians benefit from living in a community that is 'productively diverse'. And as we all have an interest in dealing with diversity peacefully, what is called for are (more) government initiatives both informing us about other cultures and encouraging us to a higher degree of tolerance. Worthy aims, no doubt, but not the only perspective to take on this change to our social life. For multiculturalism is not just a social problem. It also raises questions as to the justness and moral appropriateness of some of our legal and political arrangements. What does state neutrality or even-handedness mean in this context? Should there be legal protection for particular ways of life? Should there be a right to culture? Do we need constitutional change to better promote or protect these interests?

Immigrant groups may demand 'a fair go'. They may consider themselves oppressed because of a lack of material goods or because of discrimination in the opportunity to compete for the goods of life. This is the stuff of interest group or class politics and is understandable in the familiar language of equality of treatment. Of course, the norm of equality at times may involve different treatment for particular groups of people – in their access to education, employment or government services. This can be seen as no more than the play of granting real equality of opportunity to all, or perhaps an attempt to neutralise the effects of widespread prejudice and the disadvantages associated with this. And while the claims about discriminatory treatment may be made in the context of group-based comparisons, the basis of the claim is arguably that *individuals* have a right to equal treatment.

When persons affirm their group identity for political purposes, they are more likely to be making a different claim, one that cannot be put in individual terms – the claim that *the group has a right to practise its own culture*. It is said that this claim is not well understood in the vocabulary of equality of treatment for at least two reasons. First, it is a claim to be recognised, to have one's identity understood, as a member of a *particular* group whose values and collective goals are *not* shared by all. Second, cultural rights have a symbolic dimension and are not directed at access to material things. But, granted these points, the norm of equality remains relevant. For one thing, it is not always possible to separate claims for cultural protection from claims for equal treatment. Special measures in place to allow access to government services both help to promote the group and are a matter of what is fair in the circumstances. For another, the claim to an entitlement to culture is not just self-regarding, as it assumes the idea that everybody has this right. Further, in ways to be discussed below, the notion of *political equality* is important for understanding the right to culture.

Understood as a right to speak a language, take part in festivals, wear distinctive dress and eat certain foods, the right to culture, one would hope, is uncontroversial. Clearly it would be wrong of our state to attempt to suppress cultural differences such as these. And this aspect of the right is protected by the traditional liberal freedoms (the right to religion, association and free speech).

3 See National Multiculturalism Advisory Council, above n 1.

Inevitably, however, the claimed right extends beyond these matters. For no state can be neutral on cultural matters. While it is possible to have no official state religion, it is not possible to have *no* state culture. There will be an official language (for law and administration and schooling), an official calendar and holidays, official 'symbols', a policy on tax concessions, an official educational policy and approved curriculum. And, inevitably, there will be a particular way of life underpinning areas of law, such as family law or criminal law. All of this will work to the advantage of members of the majority culture and possibly burden or exclude minority groups.

In these circumstances, the group may call for political and legal initiatives in order to protect its culture. It might ask for a relaxation of the ordinary laws, for example, so that ashes can be strewn in rivers, or animals slaughtered in a certain way, or so that bike riders can be turbaned, or children withdrawn from parts of the school curriculum. Second, it might ask for government benefits to support language programs or cultural events, or to help settle newcomers into the country or fund special schools. Third, it may seek assistance as a group for greater representation in government, not necessarily at the level of lawmaking, but on relevant public boards or appointed committees, task forces, political parties, consultative processes and so on; or acknowledgment by government of its interests, through 'impact statements', for instance, built into bureaucratic decision-making. Fourth, it may seek a degree of self-government so that the group can run its own affairs with regard to education or, for example, family law or succession law.

IV HOW SHOULD THESE DEMANDS BE UNDERSTOOD?

In an influential account of these matters, Charles Taylor argues that respect for and preservation of a group's culture is of vital significance for the personal identity of its members.⁴ The self-formation and self-worth of these members depends on the value placed upon the group's culture by others. Self-respect requires positive recognition. Failure of recognition leads directly to individual harm. The right to culture is in this way associated with 'the politics of recognition'.

But an approach that is grounded in the personal need for recognition is not obviously helpful. Granted that great harm can be done if one internalises a negative view of one's way of life, taking this as a basis for legal intervention would seem to encourage too much intervention. Negative cultural stereotypes are harmful and should be addressed by educational programs and possibly specific legal measures such as racial vilification laws. But the problem of individual self-esteem cannot be the principal basis for promoting and protecting minority cultures, for it grants too much to the group and provides too little guidance for evaluating competing interests. From the perspective of the politics

4 Charles Taylor, 'The Politics Of Recognition' in Amy Gutman (ed), *Multiculturalism* (1994).

of recognition, there is nothing we should not do to promote the crucial goal of self-worth, short of denying basic rights to others.

A more surefooted way of evaluating law's role is to consider these problems from the perspective of the needs of a working democracy. If our aim is to have a community of discussion between political equals, multiculturalism would have us rethink this goal. We want to bring immigrants into Australian political and social life while respecting their differences. Multiculturalism, unlike policies of assimilation, does not have the aim of pressuring people to give up their cultural differences. But, going in the other direction, we want to allow for the alteration of these arrangements, to allow people to leave their group or for there to be overlapping groups. Membership should be voluntary and not enforced through inside pressure or outside hostility. Nor should the group be propped up by government support. For if a culture is not reproduced over time, this may be cause for regret but it is not unjust.

When considering the justice of our legal arrangements, we should ask: what might be done to bring this cultural group into public discourse? Not: what should be done to make sure that this cultural group survives? If the health of public discourse is taken as a goal, then whatever is proposed can be assessed in the context of relevant practical considerations; for example, the size of the group and its present circumstances (is it under attack?), the effect of the proposal upon other groups and the importance of the proposal for present-day members.

And this democratic perspective brings to the fore the obligations that accompany this right. For if public discourse is to be organised in ways that are more open to immigrant groups, these groups, for their part, have to be willing to put their demands in ways that can be publicly debated.⁵ But, it might be asked: how can basic elements of a culture be put in a 'negotiable' way? This is a difficult point, for there is an obvious bias in asking one group to use the vocabulary of another. But the requirements of deliberative democracy do not need to go this far. We need a willingness to listen to each other and learn from each other. And we can have this conversation without prior agreement as to what counts as a rational argument. The obligation is to make articulate the cultural beliefs that inspire and shape political engagement. These, for example, do not have to be put in secular terms; they can remain religious political reasons.⁶

V AN APPROPRIATE FRAMEWORK

If we return to the specific claims set out above, we now have a more instructive framework and can see better the different considerations at issue.

5 Jeremy Waldron, 'Cultural Identity and Civic Responsibility' in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (2000).

6 Here I disagree with Waldron, *ibid*.

With each claim, the standard of equal treatment remains relevant. But I suggest that the democratic perspective is also a legitimate approach to take into account.

Should we relax the ordinary laws at times to respect cultural difference? Where possible, different cultural practices should be tolerated and thus permitted. But many considerations come into play: the nature of the practice, the importance of the practice for the group in question, the size of the group involved and the effect of different treatment upon non-members, as well of course as the point of the 'ordinary' law. These considerations help us with our thinking on this issue. As does whether acknowledging the practice would be a gesture that would help bring the group into political life.

This last point is more clearly of relevance when the government is considering subsidies or ways of including immigrant groups in administrative decision-making. There is a need for mediating institutions that allow the interest of cultural groups to be heard in political life; and possibly a need to further open up the bureaucracy to these ideas. But with the focus upon the democratic benefits that flow from this, we also see the risks, for in any immigrant group there will be: 'identifiers, quasi-identifiers, semi-identifiers, non-identifiers, ex-identifiers and anti-identifiers'.⁷ Promoting particular 'identifiers' or office bearers of the group may work to promote one view of the group's culture over others. And what is intended as a promotion of democracy may turn out to inhibit this process within the cultural group itself. For this reason, it might be better to bring in immigrant groups via their peak bodies (Ethnic Affairs Councils, Multicultural Advisory Groups, etc) rather than the particular groups themselves.

That there are diverse views within the group is obviously a concern when evaluating any claim by a group to run some of its affairs free of legal interference. Adults may agree to have their lives ruled by particular cultural mores in addition to the normal law. But if the law withdraws from regulating family law for Jews or Muslims, say, then all Jews and Muslims are potentially subject to the *one* presently prevailing view of these mores.

VI CONCLUSION

I have presented the issues connected with the right to culture – exemptions from the law, subsidies or inclusion on government boards – as matters of everyday politics, not constitutional politics. There is, on this approach, no call for a differently understood constitutional right to culture or for new political arrangements to be introduced at the constitutional level. If constitutional change is required, it is of a modest sort. We should improve the haphazard way in which the Constitution presently safeguards cultural diversity from flagrant discrimination at the hands of government. By this, I mean that we could extend the basic liberal rights so that they are effective against all levels of government. Whether equality of treatment should be constitutionally protected as in other

7 Christian Joppke and Steven Lukes, *Multicultural Questions* (1999) 10.

similar democracies is a more controversial possibility. But in either extending basic constitutional rights or ‘constitutionalising’ equality of treatment, we would be simply refurbishing our basic structure of individual rights and equality of citizenship, which is arguably, something we should do for other reasons.

And while on the subject of constitutional change, for multicultural reasons and other reasons, we should make the Constitution more ours by removing the references to a foreign monarch. And if there is to be a new preamble, multiculturalism should be acknowledged as one of our aspirations. Clearly, these are not pressing concerns for present-day immigrant groups. However, multiculturalism is to do with symbols, and these two changes, it could be argued, would acknowledge better the society we have become. Finally, and of more relevance to migrants rather than citizen migrants, we should re-understand the scope of the aliens power so that it is less quarantined from rights based arguments.⁸

8 In other words, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 should be revisited; a process possibly initiated by *Re Patterson; Ex Parte Taylor* [2001] HCA 51 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 6 September 2001).