

Equal Justice and Cultural Diversity

— The General Meets the Particular

Cultural Diversity and the Law Conference

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This paper concerns the ideas of equality before the law and equal justice and their intersection with cultural diversity including the difficulties of accommodating cultural diversity in the substantive law and the importance of responding to it in the administration of the justice system.

Justice is frequently depicted as a woman holding a sword and a set of scales and wearing a blindfold. The origins of that depiction have been traced back to the Egyptian Goddess Ma'at, the Greek Goddess Themis, and the Roman Goddess Justitia. It is taken today as a representation of the idea of equality before the law which, in its formal sense, is blind to difference including cultural attributes not expressly or impliedly accommodated by the law.

Equality before the law, therefore, is not a guarantee of equal justice. A law of general application may have adverse discriminatory outcomes because of the different circumstances and attributes of those to whom it applies. That kind of law is summed up in the time-honoured statement of Anatole France:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.¹

¹ Anatole France, *The Red Lily (Le Lys Rouge)* (1894), ch 7.

A related category is a law which expressly precludes flexibility in its application to different cases and circumstances. The law requiring the imposition of a mandatory minimum sentence of imprisonment for a particular offence is a leading example. It gives effect to a policy according a high priority to the norms which it enforces, such as the sanctity of life or the protection of vulnerable classes of person. It provides certainty of outcome, but a certainty which may be achieved at the price of serious injustice in some cases. That is because such laws require that the same punishment be applied to an offender regardless of that offender's level of moral culpability and the gravity of his or her conduct. There is no room for the accommodation of cultural diversity in the application of such laws, even if it affects moral culpability. Such laws, however, are consistent with equality before the law in a formal sense. In this country they are not beyond the limits of legislative power. In 2013, a constitutional challenge was made to a Commonwealth law providing for a mandatory minimum sentence of five years on the crewmen of vessels transporting non-citizens with a view to their unauthorised entry into Australia. The law was challenged in *Magaming v The Queen*² on the basis that it required courts to act inconsistently with the exercise of the judicial power of the Commonwealth in imposing punishments disproportionate to the circumstances of the offender. That challenge was unsuccessful.

Another class of law may be expressly discriminatory and yet meet the requirement of formal equality before the law. For example, a law may provide benefits to a defined class of people. As Kelsen put it, the principle of equality before the law in such a case would be 'a logical consequence of the norm's general character which commands that some given individuals must be treated in a given way in the given circumstances.'³ That kind of reasoning can be seen in a series of decisions of the Supreme Court of Canada in the 1970s concerning the application of s 1(b) of the *Canadian Bill of Rights* which guaranteed the 'right of the individual to equality before the law'. The Court held that the provision did not require that all Federal statutes apply to all individuals in the same manner.⁴

The Australian Constitution authorises the Commonwealth Parliament to make laws for the people of any race for whom it is deemed necessary to make special laws.⁵ That

² (2013) 252 CLR 381.

³ Alfonso Ruiz Miguel, 'Equality before the Law and Precedent' (1997) 10 *Ratio Juris* 372–91, 373 citing Hans Kelsen 'Justicia y derecho natural' in *Crítica del derecho natural* (Elías Díaz trans and ed) (1966) (Madrid: Taurus 1st ed. 1959) 29–163, 85.

⁴ *Bliss v Attorney-General of Canada* [1979] 1 SCR 183, 194.

⁵ Constitution s 51(xxvi).

power authorises laws which discriminate on the grounds of race. In its origins it contemplated adverse discrimination.⁶ The 1967 Referendum amended the power to bring Aboriginal people within its scope. The purpose underlying the amendment was beneficial, namely to enable the Commonwealth to make laws with respect to Aboriginal people. Like laws conferring benefits on defined classes of people, laws made under the race power would not offend against a principle of equality before the law. By the same logic a law which provides an exemption for, or mitigation of, its application on cultural grounds would not offend against the notion of equality before the law.

In its 1992 Report on Multiculturalism and the Law, the Australian Law Reform Commission discussed cultural exemptions from the application of particular laws and referred to examples of religious exemptions. They include conscientious objection to voting, the authorisation of the slaughter of animals for human consumption in accordance with religious ceremonies which would otherwise violate laws relating to the meat industry, and exemptions from the requirements to wear motor cycle helmets.⁷ Similar exemptions may be found in other countries. Laws creating such exemptions generally fall into the same category as laws which are applicable to defined classes of people. They do not offend the principle of equality before the law because the law itself defines those to whom it applies. Whether they are a good idea is another question entirely. The Commission suggested that that judgment requires consideration of:

- the rights and interests protected by the law absent the exemption;
- the harm which the law seeks to prevent;
- the beliefs or practices which are at stake; and
- the extent to which an exemption if granted would undermine the law's effectiveness.⁸

⁶ RS French, 'The Race Power: A Constitutional Chimera' in HP Lee and G Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2010) 180.

⁷ Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [8.3].

⁸ Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [8.20].

The Commission proposed that laws should make allowance for individual religious and cultural freedoms only where the significance to the individual of upholding that freedom outweighs the harm the law seeks to prevent and where recognition of that freedom by the law poses no direct threat to the person or property of others.⁹

There has been much debate about whether such exemptions should be granted at all. There are those who argue that there is nothing inherently unfair about a general law which has a different impact on different people. Others argue that a readiness to consider exemptions based on culture or religion may favour articulate, well-organised, well-funded and well-connected groups seeking such exemptions over others who do not have those advantages.

Jeremy Waldron has justified the use of exemptions in favour of minority ethnic or religious groups saying:

It is based on the belief that the state law provision will have a special kind of impact on one's life, which it will not necessarily have on the lives of others.¹⁰

He took the case of a person who is under a socially enforced burden, which is part of his or her actual way of life, a burden grounded in the actually existing and well-established regulation and condition of social affairs afforded by a religion or a cultural tradition. Those who would claim an exemption simply on the ground of personal liberty or conscience may not be under a comparable burden.¹¹

The idea of cultural defences to criminal liability is closely related to that of cultural exemptions from certain obligations or prohibitions. Objective criteria for liability in the criminal law, such as reasonableness, may be applied from the perspective of what can be called 'the dominant culture'. They may disadvantage individuals from different cultural backgrounds who have different values. An obvious answer to that concern is that there are certain standards or values to which all who enter Australian society are expected to conform

⁹ Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [8.20].

¹⁰ Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 *Washington and Lee Law Review* 3, 24.

¹¹ *Ibid.*

and if that is a reflection of the dominant culture, it is the price of the benefits which Australian society confers. The Commission concluded in its 1992 Report:

a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups would lessen the protection afforded to all by the criminal law.¹²

There has been some discussion of this issue in the context of the defence of provocation which is framed by reference to the responses of an 'ordinary person' to the alleged provoking conduct. In *Stingel v The Queen*,¹³ the High Court said:

The principle of equality before the law requires ... that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.¹⁴

On the other hand, Justice McHugh in *Masciantonio v The Queen*¹⁵ considered the application of the ordinary person's standard in a multicultural society in which he described the notion of an ordinary person as 'pure fiction'. He went on to say:

Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.¹⁶

The merits of that observation, in the context of provocation, need not be considered here. It offers a perspective on the way in which the phenomenon of cultural diversity may intersect

¹² Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [8.38].

¹³ (1991) 171 CLR 312.

¹⁴ Ibid 329.

¹⁵ (1995) 183 CLR 58.

¹⁶ Ibid 74.

with and raise difficult questions about the application of a general law. It is perhaps in this area that tensions arise because of concerns for the protection of society and vulnerable persons, particularly women, from violence.

A law may have a degree of flexibility and build in a discretion in the way in which it is applied to individuals. The exercise of the discretion may take into account differences between people which are relevant to the scope and purpose of the law. The leading example is the exercise of sentencing discretions. Here, equality before the law can be consistent with the concept of equal justice. In 2001, Gaudron, Gummow and Hayne JJ observed in a sentencing case:

Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.¹⁷

In 2011, 10 years after that observation Justices Crennan, Kiefel and myself, in another sentencing case, observed in similar vein:

'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law. ... It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.¹⁸

As appears from the preceding discussion, the idea of 'equal justice' may be seen as a more demanding standard than that of formal 'equality before the law'.

In 2013, in *Bugmy v The Queen*¹⁹ the High Court considered an argument that sentencing courts in New South Wales should take into account the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender. It was also argued that courts should take into account the high rate of

¹⁷ *Wong v The Queen* (2001) 207 CLR 584, 608 [65] (emphasis in original).

¹⁸ *Green v The Queen* (2011) 244 CLR 462, 472-73 [28] (footnotes omitted).

¹⁹ (2013) 249 CLR 571.

incarceration of Aboriginal Australians. In the course of argument some reference was made to Canadian decisions.²⁰ Those decisions however, had to be viewed in light of a section of the Canadian Criminal Code which provided:

all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.²¹

There was no equivalent reference to Aboriginal offenders in the *Sentencing Act*²² in New South Wales. The High Court said:

An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.²³

The plurality in the Court also quoted the observation by Brennan J in *Neal v The Queen* in 1982 that:

The same sentencing principles are to be applied ... in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.²⁴

The passage from the judgment of Brennan J in *Neal* was again quoted in *Munda v Western Australia*,²⁵ judgment in which was given on the same day as *Bugmy*. The Court also quoted an observation by Eames JA that regard to an offender's Aboriginality seeks to

²⁰ *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

²¹ Criminal Code, RSC [1985], c C-46 s 718.2(e).

²² *Crimes (Sentencing Procedure) Act 1999* (NSW).

²³ (2013) 249 CLR 571, 592 [37].

²⁴ *Ibid* 593 [39] citing *Neal v The Queen* (1982) 149 CLR 305, 326.

²⁵ (2013) 249 CLR 600, 618 [50].

ensure that a factor relevant to sentencing which arises from the offender's Aboriginality is not 'overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.'²⁶ The High Court in *Munda* added that it would be contrary to what Brennan J said in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities:

To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.²⁷

The proposition that the Aboriginality of a particular offender may be considered, not as a mitigating factor itself, but as a means of identifying the circumstances of that offender that are relevant to sentencing is applicable to ethnicity or culture, which in a similar way may shed light upon the existence or non-existence of factors traditionally regarded as relevant to the exercise of sentencing discretions.

Equal justice is an idea which extends well beyond the field of sentencing for criminal offences. That leads into the general question of the extent to which the notion of equal justice requires the legal system to respond to those differences between persons which are embraced by the term 'cultural diversity'. The search for general answers to that question is likely to be lengthy and contentious. It will not be answered by what is sometimes called 'top down reasoning'. An understanding of the general problem and approaches to its solution are likely to arise from consideration of particular engagements between cultural diversity and the justice system. The question requires attention to be paid to the substantive law which creates rights and duties, powers and privileges and imposes liabilities, penalties and punishments. Within the framework of that substantive law the question — how do we

²⁶ Ibid 619 [52] citing *R v Fuller-Cust* (2002) 6 VR 496, 520 [80].

²⁷ Ibid 619 [53].

achieve equal justice in a culturally diverse society — directs attention to the procedural laws and practices which affect access to justice and effective engagement with the legal system. Beyond that, and most importantly in an immediate and practical sense, it directs attention to the way in which justice is administered by judges, court officials and ancillary service providers, lawyers, regulators, prosecuting authorities and law enforcement agencies including, importantly, police services. Debates about the substantive law and the extent to which it can or should accommodate cultural diversity are important. However, it is not easy to change the substantive law because of the difficulty in reaching agreement on how and in what circumstances such changes should be made. Moreover, much of the law and the legal system is what happens on the ground in its actual day to day administration. That is something upon which the participants in that administration may have a direct and beneficial effect without the fraught debates that surround law reform in this area generally.

In that context, the establishment of the Judicial Council on Cultural Diversity, chaired by Chief Justice Wayne Martin, is to be welcomed. The Council will be an important new source of research, education and advice to members of the Australian judiciary trying to do equal justice in a culturally complex community. The Council has the support of the Council of Chief Justices of Australia and New Zealand and of the Migration Council of Australia, which was instrumental in its establishment. It will provide advice to the Council of Chief Justices. On 3 March 2015, the Federal Government announced the allocation of \$120,000 over two years to support the development by the Judicial Council of a national framework, guidelines, protocols and training to ensure more effective and consistent administration of justice for culturally and linguistically diverse women and their families. The development of that framework will be conducted under the auspices of the Judicial Council and the Migration Council. The media release issued by the Prime Minister and the Minister Assisting the Prime Minister for Women recognised that a 'one-size-fits-all' approach to dealing with family and sexual violence will not address the unique challenges faced by different groups of women in Australia.²⁸ That observation is a particular application of the more general principle described above. Equal justice accommodates a variety of laws and approaches to the administration of justice. It does not require a one-size-fits-all approach which ignores diversity.

²⁸ Prime Minister, Minister Assisting the Prime Minister for Women, 'Support for Culturally and Linguistically Diverse Women' (Media Release, 3 March 2015).

Any consideration of the administration of justice, civil and criminal, in a culturally diverse community should involve some reference to the relevant demographic context. The Australian Census in 2011 disclosed that 26% of Australia's population was born overseas and that a further 20% had at least one parent born overseas.²⁹ The Census revealed that about 4 million people in the Australian population at 2011 spoke a language other than English at home.³⁰ The number of people reporting a non-Christian faith now accounts for 7.2% of the total population. According to the 2011 Census a little over 475,000 people or 2.2% of the Australian population are Muslims. The spectrum of countries of origin has shifted significantly. The proportion of the overseas born population originating from Europe declined from 52% in 2001 to 40% in 2011. The proportion of migrants born in Asia increased from 24% of the overseas born population in 2001 to 33% in 2011. The largest growing groups between 2001 and 2011 came from India and China.³¹

The Census figures delineate the bare bones of demographic difference in Australia. They encompass but do not disclose in any meaningful way, the particular dimensions of difference relevant to the administration of justice. Those differences are brought together under the rubric of 'cultural diversity'. To identify them, it is necessary first to consider that term. Any practical discussion of cultural diversity should be informed by some working definition and, on the basis of that definition, working principles to guide the way in which the justice system responds to that diversity.

The starting point is the idea of culture. Its definition and the approach to its definition are contested. While social scientists may disagree about it, there is a significant literature from which some cautionary propositions, summarised by Susan Armstrong in the *Journal of Judicial Administration* in 2011, have emerged:³²

²⁹ Australian Bureau of Statistics, *Cultural Diversity in Australia - Reflecting a Nation: Stories from the 2011 Census*, (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>>.

³⁰ Australian Multicultural Council, *The Australian Community: The Australian Multicultural Council's Report on multiculturalism and social cohesion in Australian neighbourhoods* (2013) 9.

³¹ Australian Bureau of Statistics, *Cultural Diversity in Australia - Reflecting a Nation: Stories from the 2011 Census* (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>>.

³² Susan Armstrong, 'Accommodating culture in family dispute resolution: What, why and how?' (2011) 20 *Journal of Judicial Administration* 167.

- Culture cannot be defined as a static set of attributes. It is more a process of meaning making than a thing. It is remade continually and its content is dynamic, often contested and heterogeneous. One poignant example of this is the emphatic rejection by Aboriginal women of any suggestion that domestic violence has anything to do with indigenous culture.
- Culture is not definitive of a person's identity or conduct. Identity and conduct can also be connected to psychology, class, ethnicity, religion, language, race, gender, sexuality, ability and age in specific historical, social and political contexts. Membership of a particular culture is consistent with multiple identities and affiliations.
- The dominant culture in a society is a construct. Just because it is dominant it is not thereby to be assumed to be natural or normative.³³

All that having been said, 'diversity' must be attached to a core meaning of 'cultural' and, with appropriate caution in application, it should be sufficient to adopt as a working definition that of the Oxford English Dictionary which speaks of 'the distinctive ideas, customs, social behaviour, products, or way of life of a particular nation, society, people, or period.' In the Australian setting that enables the application of the term to subsets of the population who by reason of their history and ancestry share in varying degrees distinctive ideas, customs, social behaviours and ways of living.

The recognition and protection of particular cultures is a norm of international law reflected in Art 27 of the International Covenant on Civil and Political Rights which has been seen as part of a general movement in international law towards the universal norm of ensuring legal respect for cultural differences.³⁴ It may be coupled with Art 18 relating to freedom of thought, conscience and religion, and Art 26 which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

³³ Robert Smith, 'Culture as Explanation: Neither all nor Nothing' (1989) 22 *Cornell International Law Journal* 425, 428.

³⁴ Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press, 1998) 118.

Consistently with the international norms which have been adopted by Australia as a party to the International Covenant on Civil and Political Rights and other Conventions, it is entirely appropriate that those involved in the administration of justice in various ways should ensure so far as they can that people are not disadvantaged in their access to or interaction with the justice system by reason of their culture. With the very significant shift in the composition of the Australian population and the many countries of origin from which Australians now come, the potential for misunderstanding and misinterpretation, by people of different cultures, concerning the working of the justice system and the potential for misunderstanding and misinterpretation of those people by those involved in the justice system is real. The Australian Government recognised this possibility as long ago as 1989 when it proposed a National Agenda for a Multicultural Australia as a statement of its policy response to the changing ethnic composition of Australia.³⁵ One of the key aims of that Agenda was to examine:

the implicitly cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians.

It was following the adoption of that Agenda that the Australian Law Reform Commission was given its reference to consider whether Australian family law, criminal law and contract law were appropriate for a multicultural society.

The necessity for sensitivity to issues of diversity on the part of judges was pointed out in 2006 by the former Supreme Court and Federal Court Judge and President of the Human Rights and Equal Opportunity Commission, the Honourable John von Doussa, who said:

The justice process assumes an 'equality of arms' between the parties. Inequality arising from ignorance, language difficulty, misunderstanding, ill-health or from poor communication distorts a balanced outcome.

It is part of a judge's function to ensure, as far as possible, that there is equality between the parties to litigation. At times this requires careful and sympathetic

³⁵ Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57 (1992) [1.1].

assessment of the potential disadvantage suffered by a party, and intervention to achieve a fair balance. None of this is possible unless the judge in a particular case is made aware of, or recognises, factors that might produce inequality.³⁶

Judicial awareness of the significance of cultural diversity is a key area of concern. Another is the unconscious influence on a judge of underlying assumptions or attitudes based on race, religion, ideology, gender or life style which are irrelevant to the case which the judge is hearing.

In Australia we have seen equal treatment benchbooks for judges developed in a number of the States. Their premise, as Michael King has described it, is the overriding obligation of judges and magistrates to adhere to the judicial oath to do right to all manner of people. They seek to provide judges with knowledge and to suggest processes which they can use in appropriate cases.³⁷ Taking the Queensland Benchbook as an example, some of the particular and practical insights which it offers include the following:

- In Chinese and Vietnamese families, it may be the case that support for family members accused of crimes is expressed through absence from court, as it is too shameful to the family's honour to publicly support the individual.
- In many cultures direct eye contact is considered rude or challenging, whereas in Anglo-Australian culture a failure to maintain eye contact might be seen as evasive or suspicious on the part of a witness.
- There are a number of cultural barriers to effective communication between Aboriginal and non-Aboriginal people including family and kin loyalty, the unfamiliarity of direct questioning and gratuitous concurrence and suggestibility.

³⁶ John von Doussa, Launch of the *Supreme Court Equal Treatment Benchbook* (Speech delivered at Banco Court, Supreme Court of Queensland, 15 February 2006)

³⁷ Michael King, 'Realising the Potential of Judging' (2011) 37 *Monash University Law Review* 171, 181–82.

The object of the Equal Treatment Benchbooks can be summed up as the achievement of equal justice, which is more than mere equality before the law in the sense described by Anatole France.

Benchbooks can only go so far. The reading of the printed word is one way of learning. Engagement in active discussion and workshopping of the challenges faced by the justice system in responding appropriately to cultural diversity is a much more powerful way of developing the necessary awareness of problems as they arise in the day to day tasks of hearing and deciding cases.

The judges are by no means the only players in the system whose awareness of, and response to, cultural diversity is of importance. The jury which decides a case in which cultural questions are relevantly in play may need careful and clear instruction about how such factors may properly inform their decision-making. The lawyers who are acting for or against persons from culturally diverse backgrounds should have as part of their continuing legal education a developed awareness of the issues and professional standards which ensure that none are tempted to take unfair advantage of culturally based misunderstandings or misinterpretations of the legal process. The same is true for Registry staff, court officers and support people who attend courts to assist those caught up in the system, whether as parties or witnesses.

As the history of the literature and the governmental responses to the question of cultural diversity demonstrate, there is a significant level of awareness of the issue in the Australian legal system. Much has been done, but much remains to be done. In that connection the Judicial Council has undertaken a significant responsibility. On behalf of the Council of Chief Justices of Australia and New Zealand I look forward to the advice we will receive from the Judicial Council.