# THE RULE OF LAW, BICULTURALISM AND MULTICULTURALISM

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I do not regard the policies for bicultural or multicultural development as mutually exclusive. I think they address different things. Biculturalism is about the relationship between the state's founding cultures, where there is more than one. Multiculturalism is about the acceptance of cultural difference generally. Both policies may be seen to point to the need for a new legal framework to define the relationship between the state and its constituent peoples. I suggest that the framework is already under construction although the design is not yet clear. For thoughts about the design I think one could do no better than to read Will Kymlicka but at some risk I will mix in perspectives of my own.[1] Mostly I seek a perspective that considers the development of the rule of law in light of social changes since Dicey's lectures were published in 1885.

As a phrase, the rule of law captures some of our most treasured visions of democracy, equality and liberty. Government must not be capricious but must act according to law. All are equal before the law and the law is the protector of individual liberties. However in Dicey's world, where these thoughts grew, there were only two actors to be concerned about, the individual and the state. The social order was so homogenous that there was no need to consider particular cultural groups. The sociological concept of nation, as a people of common history and tradition, and the political concept of the state, as the government of a large, defined territory, were either fused in fact, or were fused as an ideal. That was probably not the case for most of the world at that time. It is certainly not the case for many states today. Bosnia and Rwanda, for example, have shown that peace requires that groups too should be accommodated within the state.

Moreover, the recognition of only the state and the individual was rarely possible in the New World, where invariably, more than one culture was involved in the formation of the state. From the 1830s the Native Americans were provided for in the United States as domestic, dependent nations. The description of them as nations was undoubtedly correct, sociologically, although the term is now politically inconvenient because of the confusing conception of the nation state. On the other hand, Canada developed concepts of inherent rights of autonomy coupled with fiduciary obligations. Australia turned to the doctrine of aboriginal rights. New Zealand grafted on a concept of partnership through the development of a treaty jurisprudence. In the New World the founding cultures of the modern state were not necessarily limited to two, like the indigenous and

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1 W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). I have also considered A Bartley, and P Spoonley, 'Constructing a Workable Multiculturalism in a Bicultural Society' in M Belgrave, M Kawharu, and D V Williams, (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005); S Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round' (2003) 14 Public Law Review 148 and S C Idleman, 'Multiculturalism and the Future of Tribal Sovereignty' (2004) 35 Colum Human Rights Law Rev 589.

the British. For example, the French Canadian and Métis were founding cultures in Canada, as also were the Afrikaners in South Africa.

However, that which most distinguishes Dicey's world from the world of today is the predominance of multicultural states as a result of globalisation. Moreover, where multiculturalism, along with affirmative action, was once tolerated as temporary and awaiting incorporation, it is now celebrated. It is here to stay. Indeed, it has the backing of international human rights law. I refer to the right of persons who belong to an ethnic, religious, or linguistic minority, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language of that minority.[2]

What we need to note, however, is that the rights claimed for each category of cultural group are not the same. We might start with the founding cultures beginning with that of say, the British in New Zealand. The first concern is for the maintenance of cultural identity. This may not be openly addressed in a sober way but can erupt in crude comments as in references to the number of Asians on Queen Street. The second concern may be to maintain the inherited system of government to which all citizens are expected to subscribe. That too is a particular form of cultural manifestation. So far, the New Zealand system of government is not constitutionally entrenched.

The prospect of identity loss is likely to be more pressing for such founding minorities as the French Canadians. However, their concerns have now been recognised, and having been recognised they can now be provided for in ways that will hopefully provide some relief.

The indigenous have a bundle of distinctive claims that may be seen as the natural consequences of their indigenous status. Indeed for most legal purposes their rights derive not from their culture but from their existence as political entities before the state's establishment. Accordingly they claim rights of self-government within the state. They seek respect and support for their customs and culture, not merely state indifference or tolerance. In the multi-cultural environment of today they are further unique in that they have no safe, cultural base, no mother country where their culture is perpetuated as the norm.

Australia and New Zealand are also hosts to unique cultural groupings from the Pacific Islands. It is likely that the culture of some of these groups will survive only on our soil, especially with global warming. Their culture is like an endangered species although unfortunately, multiculturalism is not always appreciated in the same way as biological diversity. These island groups could present another claim again that capitalises on our claims that we are all part of one Pacific polity. If that is our perception, then arguably, these are our indigenous people too.

Accordingly the concerns of these groups that make up the founding peoples of the state are not only different from each other, but as a group they are different again from the concerns and claims of the more recent cultural immigrants. Generally, the recent immigrants may claim the right to practice their culture but do not contend that the culture must be maintained by the state. The issues that arise from the practice of the culture are not easy nonetheless. Even a matter as straightforward as dress, can cause serious complications. May the hijab or Islamic scarf be worn in secular schools? Can the burka be worn in a New Zealand court?

I suggest that it is useful to distinguish the legal and the political management of diversity. For legal purposes, biculturalism and multiculturalism are uncertain tools.

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2 International Covenant of Civil and Political Rights, Article 27 and New Zealand Bill of Rights Act 1990, s 20.

Biculturalism in New Zealand can be defined by its objectives. One is to acknowledge and respect those things that are distinctly Maori owned and operated, like Maori language, custom and lands, Maori schools (kohanga reo, kura kaupapa and wananga) and Maori governance institutions (runanga and urban authorities). Another is to make state-operated facilities more culturally amenable to Maori as with the recognition of Maori preferences and practices in schools, hospitals and prisons. A third is to foster Pakeha engagement with Maori culture as with the teaching of Maori language and culture amongst predominantly Pakeha students. A fourth is to provide especially for Maori in national institutions, like the Maori Parliamentary seats.

Yet another is to promote the settlement of land claims. And in addition, another goal is to combine elements of both cultures to forge a common national identity. The present Coat of Arms is a classic symbolic example, especially when compared with its predecessors. An example of a focused plan of action from the private sector is the programme to develop a bicultural jurisprudence undertaken at The University of Waikato.

These are laudable objectives but the law is more fundamentally concerned with the rights of Maori as an indigenous people. Accordingly, of the bicultural objectives I have mentioned, the law is probably concerned mainly with the recognition of Maori governance institutions, land rights, and custom law.

Multiculturalism has two aspects in New Zealand. One aspect concerns the toleration of cultural difference. The other concerns the celebration of cultural difference. The latter overlaps with bicultural policy development and can lead to competition for government support but more often I should think, the two policies are mutually supportive. However, the law is concerned only with the first aspect, the toleration of cultural difference. In New Zealand, this is normally in the context of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

However, for the more complete and effective management of diversity I suggest it is more helpful to fall back on the tried and trusty concept of the rule of law. I have suggested that the rule of law is fundamentally about the relationship that exists between the state and its subjects. The only problem is that the subjects of Dicey's state were one people. The state of the global age is more likely to have to deal with peoples. Accordingly, where Dicey spoke of individual liberties or civil rights, we have now to talk as well of group rights. I suggest that the predominant issue now, for world and national peace and good order, is the appropriate accommodation of different interest groups within the life of the state.

You will note then that the courts have been grasping the nettle for some long time. Just as Dicey thought should be the case the courts have not waited for constitutional direction or direction from the assembly of states in international instruments. The have been making constitutional provisions for years. It is important to observe that in each of the countries of the New World with which we are most familiar, United States, Canada, Australia, and New Zealand, the accommodation of indigenous peoples within the state has resulted directly from judicial prompting.

This is classic judge-made constitutional development. The concepts of domestic dependent nations, aboriginal autonomy, aboriginal rights and treaty partnership are all from the bench over a period of about 170 years. They turn give effect to principles tracing back to the fifteenth century. To my mind, these decisions on the status of indigenous people involved the quintessential application of the rule of law. The issues concerned the accommodation of peoples within the state in ways that most protected their liberty and the necessary constraint upon the state having regard to long established principles of colonial common law.

The Courts have also managed, in multi-cultural context, the remaining principle that Dicey raised, that all are equal before the law. As many have made clear, Justice Mary Gaudron especially, multiculturalism reminds us that equality is relative and depends upon the recognition of difference.[3]

The international community has struggled with the recognition of group rights. This may be due to the long focus on individual rights since that was all that was required in the homogeneous Old World. I suggest that today, it may be pretentious not to recognise that group rights exist. For example, the right in section 20 of the New Zealand Bill of Rights Act to enjoy one's culture, in community with other members of the group, is generally seen as an individual right. However, its effective exercise may depend on the recognition that is given to the group.

However, there are some concerns about group rights that do need to be confronted. One is that the group's own laws may conflict with certain fundamental standards accepted by the state. Does the group provide fairly for women or adequately protect the rights of the child or in other respects will members be unjustly treated or excluded? Another is whether the recognition of cultural difference will impair the development of national unity. A third is whether the rights of peoples are political matters that are not justiciable.

Each is a particularly large topic that cannot be addressed in a few sentences but I suggest for now that each concern is exaggerated. First, a significant reason for recognising a right is sometimes that it is immediately constrained as a result. I refer to formal constraints like that in the New Zealand Constitution Act 1852 and the New Zealand Bill of Rights Act 1990. The former provided for the recognition of Maori customs and usages 'so far as they are not repugnant to the general principles of humanity'.[4] The latter effectively provides that rights may be limited where the limitation can be demonstrably justified in a free and democratic society.[5] In addition I refer to the Hohfeldian constraint that leads us to consider the duty that corresponds with the right conferred. And finally, it is invariably the case that rights are not so fundamental in fact that they are incapable of falling foul of others. It is then not beyond the wit of the courts to seek an appropriate balance, or to consider how the two may be harmonised.

Secondly, does recognition cause division? I suggest that national tension is more likely to arise not from efforts to accommodate ethnic groups under the umbrella of the state but from the refusal to accommodate them.

Thirdly, are these matters entirely political? I think 'entirely' overstates the position. I suggest that the New Zealand Wars of the 1860s to 1880s could have been avoided if, instead of leaving matters to the discretion of the Governor, there had been a law to provide for the recognition of appropriate representatives for Maori tribal groups prior to the alienation of Maori land. In other words, some things are political because we choose to let them be so, and fail to see the rule of law issues that are involved. Of course other aspects of group rights are political, like the political structure by which national policy is decided. The concern here is with that which is necessary to secure liberty for individuals as members of a particular interest group.

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3 See the collection of articles honouring Justice Mary Gaudron in (2004) 15 Public Law Rev 261.

4 Section 71.

5 Section 5.

In conclusion, I suggest that a framework of individual rights is inadequate to deal with the legal issues behind the management of cultural difference. The Diceyan principles remain as important as they ever were, but the issues for today should be addressed within a group rights framework.