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# THE RIGHT TO DIFFERENCE

*The Honorable Justice Ron Merkel†*

## I. INTRODUCTION

One of the most fundamental and least analyzed of all human rights is the right of individuals to their cultural identity—the right to be different. In this context, culture embraces religious, ethnic, cultural and social identification. The right to cultural difference is the right of individuals to their identity without governmental interference. In the United States, Justice Brandeis captured the essence of the right when he stated: “The makers of our constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>1</sup>

In the context of international law, the right to cultural difference has been recognized in many documents, including the Universal Declaration of Human Rights<sup>2</sup> and the International Covenant on Civil and Political Rights.<sup>3</sup> Specifically, Article 27 of the ICCPR provides:

In those States in which ethnic, religious, or linguist minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>4</sup>

The right to difference contains both a negative and a positive aspect. Justice Brandeis’ “right to be let alone” captures the negative aspect of the right. But the right has also been recognized as having a positive aspect, particularly in relation to the rights of In-

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† Appointed to the Federal Court of Australia in 1996. Prior to that time, he was a barrister of the Australian Bar. He has worked in the areas of Aboriginal rights, immigration law, and human rights litigation. Judge Merkel has also worked with many human rights organizations. A shorter version of this paper was presented at *Bringing It Home: Building International Human Rights Law, Advocacy and Culture, A Conference to Mark the 50th Anniversary of the Universal Declaration of Human Rights*, held at the City University of New York School of Law, 1 May-3 May 1998.

<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>2</sup> Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>3</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, *entered into force for the U.S.* June 8, 1992, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

<sup>4</sup> *Id.* at 179.

indigenous peoples and other minority groups. With regard to the positive aspect of the right to difference, the Human Rights Committee overseeing the implementation of the ICCPR stated the following in its 1994 General Comment on Article 27:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. . . . The enjoyment of those rights may require positive legal [means] of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>5</sup>

In this regard, it is appropriate to focus on the right to difference of Indigenous people, as they best exemplify both the importance of the right and difficulty in securing it.

Obviously, there are many circumstances where differential treatment is necessary in order to achieve true equality of outcome. For example, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>6</sup> developed the broad principle of non-discrimination on the basis of race.<sup>7</sup> This document makes it clear that distinctions on the basis of race are not forbidden if they qualify as "special measures" to overcome disadvantage, and may even be required.<sup>8</sup>

## II. THE DEVELOPMENT OF THE RIGHT TO DIFFERENCE IN AUSTRALIA

Australia, like the United States, has a tragic history in relation to its treatment of the Indigenous population. One aspect of that history has been the lack of understanding of the customary association of Indigenous people with their land. This lack of under-

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<sup>5</sup> *General Comment Adopted by the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 50th Sess. 1314th mtg. ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).

<sup>6</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter *Race Convention*]. See W.J.F.M. Van der Wolf, *Human Rights: Selected Documents* 91 (1994).

<sup>7</sup> See Van der Wolf, *supra* note 6, at 91.

<sup>8</sup> See Van der Wolf, *supra* note 6, at 92. Article 1, § 4 states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

standing has been central to the disadvantage and alienation suffered by Aboriginal people in Australia. Recently, it has been remedied in part by the recognition of customary native title rights under Australian law.<sup>9</sup>

In a recent article discussing native title rights,<sup>10</sup> Professor Garth Nettheim, a Professor of Indigenous Law, at the Indigenous Law Centre School of Law at the University of New South Wales, stated:

[T]he relationship of Indigenous peoples to their land is of a qualitatively different nature from the relationship of non-Indigenous peoples to land so that it requires differential treatment in order to achieve substantive equality of outcome. . . . The issue is not solely to do with principles of non-discrimination. It relates to equality rights generally, and, to the specific rights of ethnic minorities and Indigenous peoples. True equality requires measures (a) to ensure that members of racial minorities are placed in every respect on a footing of perfect equality with other citizens and (b) to ensure for the minority means for the preservation of their particular characteristics and traditions. This was decided as long ago as 1935 by the Permanent Court of International Justice in its Advisory Opinion on *Minority Schools in Albania*. The need for differential treatment to protect the basic and distinguishing characteristics of minorities has been reiterated on a number of subsequent occasions, for example the judgment of Judge Tanaka in the 1966 *South West Africa Case* in the International Court of Justice.<sup>11</sup>

We can accept as fundamental Article 7 of the Universal Declaration, which mandates that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>12</sup> However, as Justice Gaudron of the High Court of Australia has observed, ensuring equality outside of the area of mathematics is an infuriatingly elusive concept.<sup>13</sup> Justice Gaudron made many important observations, which I will endeavour to summarize.

The content of the law in western democracies has traditionally been determined by the dominant social group. Consequently, equality has traditionally involved sameness and undifferentiating

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<sup>9</sup> See *Mabo v. Queensland* (1992) 175 C.L.R. 1; Native Title Act 1993, ch. 2 (Cth.) (the *NTA*) (Austl.).

<sup>10</sup> See Garth Nettheim, *The International Implications of the Native Title Act Amendments*, VOL. 4, 9 INDIGENOUS L. BULL. 12 (1998).

<sup>11</sup> *Id.* at 14 & n.3.

<sup>12</sup> Van der Wolf, *supra* note 6, at 32.

<sup>13</sup> See Honorable Justice Mary Gaudron, *Towards a Jurisprudence of Equality*, Address to the Bar Readers' Course, Brisbane (July 20, 1994) at 1.

treatment, no matter how different the circumstances of the persons concerned. This approach, which is based on the failure to acknowledge and tolerate difference, can result, and has resulted in cruel oppression and injustice.<sup>14</sup> By contrast, the Aristotelian approach deals with equality in the face of existing differences and allows consideration of those differences according to the particular difference involved.<sup>15</sup>

Justice Gaudron indicated that legal analysis in Australia has to some extent accepted the idea that, where difference exists, identical treatment may compound underlying inequality and produce further injustice.<sup>16</sup> Thus, as Justice Gaudron observed, “[T]here are two aspects to equality. The first requires that artificial and irrelevant distinctions be put aside; the second requires that distinctions which are genuine and relevant be brought to account.”<sup>17</sup> Accordingly, the law and equality involve the recognition of genuine difference and, where it exists, different treatment adapted to that difference.<sup>18</sup> In many respects, the demands for equal justice by Indigenous people and other minorities, including many women, are demands for legal recognition and consideration of their different social, cultural, and economic circumstances.<sup>19</sup> Moreover, the law must respond to these particular needs, whether as persons invoking its protection or as persons who must answer to it for its misdeeds.<sup>20</sup>

One of the great legal challenges facing the judiciary is recognizing, accepting, understanding and adapting to a diverse population.<sup>21</sup> If the Universal Declaration and other human rights instruments are to produce real, rather than illusory, equality and justice for minority groups, these legal challenges must be seriously addressed. As Justice Gaudron also pointed out, it is much easier for the law to proceed as though differences do not exist.<sup>22</sup> Obviously then, difficulties in this area become greater as societies become more diverse, with people from different ethnic and religious

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<sup>14</sup> See *id.* at 12-13.

<sup>15</sup> See *id.* at 14-15.

<sup>16</sup> See *id.* at 15.

<sup>17</sup> See *id.* at 16.

<sup>18</sup> See *Kartinyeri v. Commonwealth* (1998) 152 A.L.R. 540, 557-58 (articulating Justice Gaudron's additional observations in relation to the scope of the Commonwealth's power to legislate under the "races power" conferred by Section 51 (xxvi) of the Constitution).

<sup>19</sup> See Gaudron, *supra* note 13, at 17.

<sup>20</sup> See Gaudron, *supra* note 13, at 17.

<sup>21</sup> See Gaudron, *supra* note 13, at 17.

<sup>22</sup> See Gaudron, *supra* note 13, at 17.

backgrounds with divergent cultural values living together in one community.<sup>23</sup>

The right to cultural difference may transcend many cultures and indeed, many other rights. For example, in December 1997, the International Commission of Jurists released its most recent report on human rights abuses in Tibet.<sup>24</sup> The Commission concluded that self-determination for the Tibetan people was both urgent and critical for their future survival as a cultural and religious group.<sup>25</sup> The Dalai Lama, in an interview recorded in the Commission's report, expressed his very real fear that the destruction of Tibetan culture in his homeland would render valueless any ultimate achievement of self-determination and freedom for the Tibetan people. His fear underscores the reason why the right to cultural difference and identity for Indigenous people and many other minority groups might transcend many other rights.

In Australia, the courts defer to the wisdom of Parliament. Unless expressly stated in the legislation or by necessary implication, the courts will presume that Parliament did not intend to pass legislation that would remove fundamental rights and freedoms from its purview.<sup>26</sup> Yet, international standards have been drawn upon to influence the development of the common law,<sup>27</sup> and the interpretation and application of certain rights and freedoms.<sup>28</sup> Furthermore, at present, failure to regard a material treaty obligation can lead to the vitiation of certain decisions made by government authorities or bodies under Commonwealth legislation.<sup>29</sup> Thus, to some extent, the use of international standards and instruments has shaped the present status of Australian law.

### III. ABORIGINAL CUSTOMARY BELIEFS

Issues involving the right to difference often arise in unexpected ways. I will outline certain recent experiences in Australia

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<sup>23</sup> See Gaudron, *supra* note 13, at 18.

<sup>24</sup> See Barbara Crossett, *Legal Experts' Group Says China Is Clamping Down on Tibetans*, N.Y. TIMES, Dec. 27, 1997, at A4.

<sup>25</sup> See *id.*

<sup>26</sup> See *Coco v. The Queen* (1994) 179 C.L.R. 427, 436-37.

<sup>27</sup> See *Mabo* 175 C.L.R. at 42; see also *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 306, 321, 360; *Jago v. Dist. Ct. of N.S.W.* (1988) 12 N.S.W.L.R. 558, 569.

<sup>28</sup> See *Theophanous v. The Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104, 159-63.

<sup>29</sup> See *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 287-88; see also John W. Perry, *At the Intersection—Australian and International Law*, 71 AUSTRALIAN L.J. 841, 850-53 (1997) (discussing the Commonwealth government's response to *Teoh*).

which demonstrate how the legal system, especially in relation to Indigenous people, has been challenged to provide equal justice in the context of minority groups' right to difference. The questions raised by the examples have a poignant significance extending beyond Australian shores.

In some Australian Indigenous communities there is a customary belief that certain spirits endanger Aboriginal children.<sup>30</sup> An Aborigine was stranded with his child in the Australian bush when his car broke down on a very dark night. The father heard noises in the bushes which he believed were made by the Pulyarts: evil spirits with supernatural powers which sometimes take a child but are afraid of light and fire. He feared for his child and lit a fire to protect his child against the spirits but accidentally burnt out a large area of prime wheat land. The father was charged with unlawfully setting fire to land during a period in which a total ban applied under the Bushfires Act (WA) of 1954.<sup>31</sup> Should protecting his child in accordance with custom constitute a defence to the charge? The judge held that it was not a defence, and sentenced the father to community service and probation.<sup>32</sup>

An Aboriginal elder is obligated to protect the spiritual well being of the tribe's children. That well being was perceived to have been jeopardised by a photographer capturing the "spirit" of certain children without permission. The elder forcibly removed the camera from the photographer. Was the assault and property damage involved in the recovery and exposure of the film an offence? A magistrate ruled that it was not, as he was satisfied that the conduct was an exercise of a valid claim or right under customary law.<sup>33</sup>

The Aboriginal custom of "pay-back" can require a spearing of the leg of a violent offender by the victim's family.<sup>34</sup> If the offender is unavailable, the pay-back may be against an innocent member of the offender's family.<sup>35</sup> Bail was refused for an offender so that he could receive his pay-back while he was awaiting

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<sup>30</sup> See Maureen Tehan, *Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era*, VOL. 7, 3 PAC. RIM. L. & POL'Y J. 765, 771-73 (1998).

<sup>31</sup> See Len Moore, *The Queen v. Carlton James Winmar: Repelling the Pulyarts—Cultural Clash and Criminal Responsibility*, 46 ABOR. L. BULL. 17 (Oct. 1990).

<sup>32</sup> *Id.*

<sup>33</sup> See Nancy Williams & Marcia Langton, *The Law of the Land Holds Sway*, THE AGE, Feb. 23, 1998.

<sup>34</sup> See *Barnes v. The Queen*, <[http://www.austlii.edu.au/au/au/do/disp.pl/au/...eme\\_ct/unrep960.html?query=title\(Barnes\)>](http://www.austlii.edu.au/au/au/do/disp.pl/au/...eme_ct/unrep960.html?query=title(Barnes)>).

<sup>35</sup> See *id.* (citing *The Queen v. Jungarai* (1981) 9 N.T.R. 30).

trial for murder. Would the granting of bail have protected an innocent member of his family from grievous bodily harm or make the court an accessory for causing grievous bodily harm to the offender?<sup>36</sup>

Intellectual property laws confer property rights on individuals. In Aboriginal customary law many spiritual and other images related to land and information relating to natural tribal medicines are the "property" of the tribe rather than the individual.<sup>37</sup> Can rights conferred under copyright and patent laws vest in the tribal custodian of such rights under customary law or are they lost so the "rights" may be exploited by the community at large without recompense to the tribal owners of the rights? An Indigenous Reference Group on Cultural and Intellectual Property has recently prepared draft guidelines for protecting Aboriginal heritage in this area.<sup>38</sup> It remains to be seen whether such rights will be recognized by law.

Lake Mungo is listed as a World Heritage area in the State of New South Wales, which was the site of Aboriginal ceremonial burials twenty to thirty thousand years ago. The burials are amongst the earliest known rituals with which there is a spiritual association with death. As a result of soil erosion caused by Australian pastoralists, this unique record of Australia's Aboriginal past is threatened with permanent destruction. Invaluable and irreplaceable anthropological research is essential to ensure pride, respect and understanding of this extraordinary aspect of Aboriginal heritage for all Australians. However, according to Aboriginal tribal law and custom, the diggings necessary to the research can interfere with the spirits of the ancestors of the local Aboriginal people. Accordingly, the Aborigines refused to allow the digging to continue. Is the digging necessary to protect or enhance heritage or will it destroy it?

#### IV. IMPUTING STANDARDS OF NON-INDIGENOUS MINORITIES TO INDIGENOUS PEOPLES

In a recent decision in the High Court of Australia, Justice McHugh dissented, and commented on the adoption of the ordi-

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<sup>36</sup> See *Barnes v. The Queen*. But see *The Queen v. Williams* (1976) 14 S.A.S.R. 1, 7 (discussing that the police should recognize the cultural divergences of Aboriginal people and adjust their treatment of Aboriginals accordingly); *Jungarai v. The Queen* (1982) 5 A. Crim. R. 319 (discussing that court's willingness to take into account customary punishment in sentencing).

<sup>37</sup> See Debra Jopson, *Culture Clash*, SYDNEY MORNING HERALD, Apr. 20, 1998, at 13.

<sup>38</sup> See *id.*



nary person standard used in criminal cases.<sup>39</sup> He commented on the injustice of that standard by stating, "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."<sup>40</sup>

To use the ordinary man standard as an example, provocation is a defence to a charge of murder, reducing the murder charge to a manslaughter charge.<sup>41</sup> The generally accepted test is whether the provocation is such that it is capable of causing an ordinary person to lose self-control and react in the manner in which the accused reacted.<sup>42</sup> The ordinary person in a multicultural society is obviously a legal fiction. Provocation often arises from anger, insults or violent retaliation that in many instances have a significant cultural dimension. Should the test be based on the values of an ordinary person in the dominant group or by reference to those of the minority class to which the accused belongs, or should the test be entirely subjective; thereby, acknowledging not just the differences attaching to a group, but individual difference.<sup>43</sup>

The difference in the values of the dominant class and the minority class is also seen in the debate over body mutilation, which has formed a part of many cultural traditions. For Jewish people, male circumcision shortly after birth is carried out in accordance with religious practice.<sup>44</sup> Body piercing and inscription have become a popular Western practice involving piercing of tongues, lips, nostrils, eyebrows, nipples, and genitals. For Indigenous people it has included initiation rites involving perforation of parts of the body, scarring, tattoos, chipping and filing of teeth and stretching of ear lobes. It is reported that in excess of thirty-five countries around the world, including twenty-eight African countries, practice some form of female genital mutilation.<sup>45</sup> Should the practice be abolished because the dominant class views are different from the views of the minority class?

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<sup>39</sup> See *Masciantonio v. The Queen* (1995) 183 C.L.R. 58.

<sup>40</sup> *Id.* at 74.

<sup>41</sup> See C. E. WEIGALL & R.J. MCKAY, *CRIMINAL LAW AND PROCEDURE: N.S.W.* § 23, at 46 (6th ed., 1956).

<sup>42</sup> See *id.*

<sup>43</sup> See Simon Bronitt & Kumaralingam Amirthalingam, *Cultural Blindness: Criminal Law in Multicultural Australia*, Vol. 21, 2 *ALTERNATIVE L.J.* 58 (1996).

<sup>44</sup> See Doriane L. Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 *DUKE L.J.* 717, 759 (1998).

<sup>45</sup> See Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 *J. CONTEMP. HEALTH L. & POL'Y* 325, 327 (1995).

There has been a strong movement in many Western countries to outlaw the performance of all forms of female genital mutilation by making it an offence to perform any act of female genital mutilation.<sup>46</sup> However, it is important to understand the conceptual complexities involved in such measures. Does prohibition by the dominant society of the practice of an ancient cultural tradition of a people involve a moral judgment of cultural inferiority of the society that has long practiced it? Or is the appropriate analysis one that acknowledges that within certain ethnic groups there are also dominant groups which impose their culture on the group? If so, the practice of female genital mutilation may reinforce and perpetuate a dominant patriarchy which continues that tradition to the exclusion of the voice of women who are thereby excluded from any choice in relation to its continuance. Irrespective of views regarding whether a cultural tradition that offends fundamental values should be changed by prohibition, prohibition without education is not only offensive, but may fail to achieve its objective.

An important view on this role of education within the relevant community is to be found in the Joint Statement<sup>47</sup> of three United Nations agencies. The agencies stated:

Even though cultural practices may appear senseless or destructive from the [personal and cultural] standpoint of others, they have meaning and fulfill a function for those who practise them. However, culture is not static: it is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and when they realise that it is possible to give up harmful practices, without giving up meaningful aspects of their culture.<sup>48</sup>

It is unacceptable that the international community remain passive in the name of a distorted vision of multiculturalism. The importance of change has also been emphasized at the local level: "To be effective at local and community levels, the imposition of the universal must be by way of an opening in the culture itself, not by external imposition on the culture. Therefore, it is of great importance to nurture cultural rethinking, reinterpretation, and internal

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<sup>46</sup> See Abbie J. Chessler, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555, 591-93 (1997); Melissa A. Morgan, *Female Genital Mutilation: An Issue on the Doorstep of the American Medical Community*, 18 J. LEGAL MED. 93, 101-10 (1997).

<sup>47</sup> Joint Statement by the World Health Organization (WHO), United Nations Children's Fund (UNICEF), and United Nations Population Fund (UNFPA) on *Female Genital Mutilation*, WORLD HEALTH ORGANIZATION (1997).

<sup>48</sup> *Id.* at 1-2.

dialogue. . . ."<sup>49</sup>

## V. CONCLUSION

The questions raised by the above examples are not intended to proffer a view as to how they are to be answered; rather, the examples challenge the right to cultural difference at the extremes of that right, because it is only at extremes that the integrity of any right is tested. Although the examples present somewhat isolated circumstances, they represent challenges for the jurisprudential task ahead to ensure that the right to difference is given effect and substantive content to achieve true rather than nominal equal justice.

The importance of the present day challenge to the judiciary cannot be understated. A failure to recognize and protect the right to cultural difference may dilute the real value of other fundamental rights and freedoms with which the Universal Declaration is concerned. Of course, those rights and freedoms form only part of the municipal law of individual nations when treaty obligations are implemented in a manner that incorporates them into municipal law. However, even where incorporation has not yet occurred, treaty obligations in respect of fundamental rights and freedoms can nevertheless influence the development of municipal law.

Yet, even in the face of international and domestic progress, challenges still exist in many areas. The Universal Declaration and other international human rights instruments embody universal values. However, because they are treaties, incorporation of treaty obligations into municipal law is a matter of some complexity. In Australia, only when treaties are enacted do they become part of the nation's municipal law. The true international judicial challenge for the future is to ensure that at the national level, to the extent the law permits, the universal values adopted by the international community influence the evolutionary development of legal values and the law. At the heart of those values, however, will be the "always-shifting interplay between the valuing of difference and the quest for sameness."<sup>50</sup>

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<sup>49</sup> Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 44, 49 (Abdullahi Ahmed An-Na'im ed., 1991).

<sup>50</sup> *Id.* at 46.