

Cultural diversity and the law
Speech to the Australian Intercultural Society

Chief Judge Peter Kidd

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Introduction

Over 10 years ago, I spent three years prosecuting war crimes in Sarajevo, Bosnia and Herzegovina. The crimes arose out of the brutal ethnic conflict which followed the breakup of Yugoslavia in the early 1990s.

A war crimes court was established by the international community in Sarajevo. It comprised both international and Bosnian judges and prosecutors. The mix of Bosnians was carefully chosen, in roughly equal measure, between Serb or Orthodox, Croat or Catholic, and Muslim. Ethnic and religious identity lay at the very heart of its formation.

The court had to be structured, staffed and the cases selected for prosecution, in such a way that there was ethnic balance. The court needed the support of all three ethnic groups. We were told that the success and acceptance of the war crimes court was one of the keys to maintaining the fragile federation of Bosnia. The court was one of the few truly federal institutions which symbolised Bosnia as one nation, comprising three ethnic groups.

My experience with the Bosnian war crimes court is clearly an imperfect example upon which to draw analogies with our own stable domestic justice system. It is an extreme example, of a court born from a violent ethnic storm.

Yet my Bosnian experience raised fundamental questions which touch upon issues of the law and cultural diversity. Questions such as the central importance of the relationship between the authority of a court and the community's confidence and trust in it. It highlighted how important it was for a court to be seen as balanced and fair, and connected to the community it serves. Had this special court only comprised Bosnian Muslim judges, for example, it would have had no authority within the Croat and Serb communities. My experience taught me of the importance of symbolism and representation to a perception of access to justice.

It also re-enforced, in my own mind, that while ethnic diversity can never be used to the disadvantage of an ethnic group, the criminal process or the law cannot always be steadfastly blind to diversity – sometimes, the circumstances demand that such differences be recognised and illuminated in order for justice to be done, or seen to be done.

Relevance of culture in sentencing

This apparent tension, and the different ways in which the law treats cultural diversity to achieve a fair and just outcome, is exemplified by the law of sentencing.

Equal justice requires equality before the law. All members of the community, irrespective of their political, social or economic status or their race or ethnicity are subject to the same law.

In this respect, the law is blind to someone's cultural background or to cultural differences. It is membership in our *society* that matters, not membership of the *cultural* or *ethnic* group. No one can be disadvantaged under the law by reason of their membership in a particular cultural group.

That said, cultural background is not always irrelevant.

When sentencing an offender, the courts impose individualised justice – each sentence must be tailored to the individual case, taking account of all relevant circumstances in that particular case.¹

Individualised justice provides scope for the court to consider and may even require the court to take into account a person’s cultural background.

The fact of membership in a particular cultural group may inform the personal circumstances of the offender. Frequently, cultural or ethnic history will provide the contextual setting to a person’s life. Sometimes it may shed light on matters such as family support, and the offender’s prospects for rehabilitation. In cases where an offender has come from a particularly traumatised and deprived upbringing, perhaps even from a war zone, these factors may go to explain why the offending occurred and what needs to be addressed to prevent any re-offending.

The law’s treatment of Indigenous Australians provides an illustrative example of how these principles operate in practice.

A sentencing judge applies the same sentencing laws and principles to an Indigenous Australian offender as they would to a non-Indigenous Australian offender. However, the sentencing judge is bound to take into account those facts which exist only because of that Indigenous Australian’s cultural background. This may include the evidence of the effect of systemic

¹ *Elias v The Queen* (2013) 248 CLR 438.

and profound social deprivation and disadvantage experienced by that particular Indigenous Australian.²

But, it is not permissible to make sweeping *assumptions* about the individual circumstances of a particular offender just because they belong to a certain ethnic or cultural group.

Access to justice

Another critical element of the rule of law is the degree to which people subject to the law can access justice. Access to justice refers to the ability of people to access the courts and legal processes to ensure that the law can enforce their rights, or the responsibilities of others in our society towards them.

An individual's cultural or ethnic background may potentially have a significant impact on their ability to access the courts and legal processes.

Courts recognise the need to ensure that court users are provided with information in a way which is clear, comprehensible and readily obtained. The County Court website, for example, has been recently updated into a more user friendly format with many more resources for all court users.

While Victoria's legal system is an English language system, courts recognise that its users are linguistically diverse. For many Victorians English may not be their first language, or even one that they speak at all. This can represent a serious barrier for people coming to court or seeking legal assistance.

² *Bugmy v The Queen* (2013) 249 CLR 571.

One practical and important way to ensure people access the court is through the use of interpreters. Interpreters are used in courtrooms to assist witnesses to give evidence or to interpret on behalf of an accused person. Within the court itself, Registry staff are able to engage with members of the public who do not speak English by utilising a telephone interpreting service.

Language barriers can be especially disruptive to a person's ability to engage with legal or court processes if they are self-represented and do not have the benefit of legal assistance. The County Court has adapted to try to better support and accommodate the needs of Self-Represented Litigants by creating Self-Represented Litigants Case Managers, who sit within the Court Registry. These managers provide practical assistance to self-represented litigants to help them understand court procedures. While the Case Managers do not provide legal advice, they can link litigants to legal and other support services.

Leadership from heads of jurisdiction, judicial officers and court administrators is required to demonstrate the courts' commitment to providing equal justice and access to justice to persons from diverse cultural and linguistic backgrounds.

One example is the establishment of the Judicial Council on Cultural Diversity. It is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to diverse needs. It advocates the adoption of measures to modify structures and policies throughout the court system to tackle the distrust and a lack of familiarity with court processes that exist with some court users. The County Court participates in this Council.

Community engagement: confidence & trust

One way in which justice can be made accessible to culturally diverse communities is for the courts to reach out and directly engage with members of these communities. This can build confidence and trust in courts within those culturally diverse communities.

Courts already communicate their work to the public every day through the delivery of their judgments or reasons for sentence. These provide information and explanation about the judge's reasoning in a particular case.

However, courts now recognise that there is a real need to educate and inform the public about its work at a more conceptual or general level, and that other methods of communication may be needed to better engage with the public.

The role of a modern court is about more than simply delivering justice in individual cases.

In particular, there is important work to be done in building confidence in the courts among those new members of our community who may have come from countries where a lack of confidence in — or outright suspicion of — the courts was entirely justified.

Some of you, in fact I hope all of you, are now aware of the steps which the courts in this State are taking to more directly engage with the communities which we serve. Those steps include providing educational

materials and podcasts on our websites, writing articles to the newspapers, appearing on radio, and hosting secondary school group tours and talks.

Last year the County Court held its inaugural Community Engagement Day. The Court invited representatives from a cross-section of the community, including cultural and religious groups, such as the Interfaith Centre of Melbourne, inTouch Multicultural Centre against Family Violence, the Board of Imams and the Australian Intercultural Society, our host today, to engage directly with judges and be informed about the work of the courts. Another engagement day is in the planning stages for September this year.

It has been a great privilege to have been a part of this journey. It is an educational exchange, running both ways. I have learned much from it. Like my experience in Bosnia, this whole process has caused me to reflect upon the fundamental principles which underpin our criminal justice system. It is these principles which require explanation at first instance. It is these basic principles which make our criminal justice system such a robust, fair and rigorous one.

Ethnic diversity on the bench

I cannot talk about the law and cultural diversity without saying something about cultural diversity on the bench, that is, cultural diversity amongst judicial officers.

Diversity on the bench is something that should be welcomed, including cultural and ethnic diversity.

I say welcomed, because in my view diversity on the bench is not a precondition for the fair and impartial dispensation of justice. Every day,

judicial officers judge matters involving people of diverse backgrounds, including backgrounds different from their own. They do so conscientiously, fairly and impartially, no matter their own personal circumstances or those of any the parties.

Of course, at a practical level there are also limits to a judicial bench being fully culturally representative.

Having acknowledged this, the community may more readily perceive that its judges are fair and impartial, and that the courts uphold the rights and interests of all Victorians, if those judges were more diverse, reflecting the diverse society on whose behalf they judge.

Or as Justice McHugh put it when speaking extra-curially, 'when a court is socially and culturally homogeneous, it is less likely to command public confidence in the impartiality of the institution'.³

Diversity among judicial officers may also enrich decision making. It ensures that a single set of values or views do not dominate judicial decision making or thinking.

Fair and equal justice requires that courts are free from the potential of unconscious bias and discrimination. This requires judicial officers to possess a level of cultural awareness around the challenges and barriers which diverse cultural and ethnic groups may face. Cultural awareness can be developed through judicial education and indeed through the collective knowledge of the judicial officers within the institution. It is obvious enough

³ Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the High Court dinner hosted by the West Australian Law Society, 27 October 2004).

that such cultural awareness can equally be imported through the appointment of people from culturally diverse backgrounds.

Any judicial appointment must be based upon merit. But merit and diversity are not mutually exclusive. High Court Justice Gageler, observed when he was then Commonwealth Solicitor-General, that once capable people have been identified, 'wider considerations can, and ought legitimately to be brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance.'⁴

And, as a Parliamentary Committee of the UK House Lords observed in their 2012 Report on Judicial Appointments:

Judging is a complex activity: it is necessary for judges to understand the wide array of concerns and experiences of those appearing before them. A more diverse judiciary can bring different perspectives to bear on the development of the law and to the concept of justice itself.⁵

Essential to increasing diversity of the judiciary is increasing and promoting diversity in the membership of the legal profession. That includes growing the diversity of membership of both the Victorian Bar and the solicitors of this State, and also ensuring that lawyers from diverse backgrounds occupy senior positions within the profession. The judiciary must be drawn from the legal profession, so that is where the focus must be.

⁴ Stephen Gageler, *Judicial Appointment* (2008) 30(1) Sydney Law Review 157.

⁵ House of Lords, United Kingdom, *Select Committee on the Constitution, 25th Report of Session 2010–12, Judicial Appointments*, Report, 26.

The judiciary itself, alongside the professional membership bodies of the Victorian Bar and Law Institute of Victoria, must actively encourage lawyers from diverse backgrounds to consider pursuing a judicial career.

Ultimately, appointments are of course not made by the courts, but by governments.

Need to correct distorted media coverage

Before I finish, I need to say something about the law, cultural diversity and the manner in which the courts' work is covered in the media.

Inaccurate, misleading and distorted coverage of the work of courts generally needs to be tackled.

Sometimes the misleading reporting about the work of courts concerns a particular ethnic or cultural group. For example, we have seen in the recent past selective reporting which created a misperception that a large portion of the criminal work of the courts involves young African Australian offenders, when this group in fact represents a minority. Last year I was interviewed about this matter on 4 Corners and took the opportunity to correct the misperception.

It is appropriate that the Courts address such distorted reporting.

It is also vitally important that people who belong to marginalised or vulnerable ethnic or cultural groups see that the Courts dispense justice on their behalf like we do for everyone else, and that we do so without regard to any outside pressure. Whatever might be said from time to time in some

sections of the media, or by some politicians, about particular cultural or ethnic groups, the courts continue to dispense justice fairly and impartially.

The courts and judges are not concerned with fostering popularity: our only concern is to dispense justice, every day, in every case.

The courts are your courts.

They are the people's courts, and the people are made up of a diversity of cultures.