Chapter Four

Tully and de Soto on Uniformity and Diversity

In the first chapter we discussed the moral basis of legitimate entitlement and argued for a system in which entitlement to property is linked to a general right rather than a special right, based on factual contingencies. Following Kymlicka we argued that for indigenous people and others it is morally preferable to found land claims and other ownership rights on the general principle of personal autonomy rather than historical events. In the second chapter we discussed matters related to the issues of autonomy on individual and collective levels. We underlined the difficulties associated with maintaining the autonomy of indigenous groups facing the economic and political realities posed by the dominant groups. Towards the end of the chapter we suggested that Tully’s conviction that sees dominant groups having fiduciary duties that entail moral responsibilities for indigenous peoples may well offer a viable solution to the problem posed by the fact that financial weakness tends to undermine capacity for autonomy.

This solution again reinstates Tully’s advocacy of parallel jurisdictions in which the minority indigenous communities maintain their legal systems and traditions while receiving the necessary support from the dominant group according to certain fiduciary duties entailed from earlier historical events. In the first chapter we discussed Tully’s argument that “modern constitutionalism” is behind the Western world’s intolerance of indigenous customs and legal systems and policies of assimilation. The modern constitution, he says, refuses to accept varied local customs, and reifies relations as it pushes to have communities and institutions homogenized and subsumed under uniform laws and subject to one national system of institutionalized legal and political authority. He claims that the influence of the modern constitutionalism is evident in the treatment of the aboriginal peoples of North America, and the abrogation of the original commitments as stated in the Royal Proclamation of 1763 and the U.S. Supreme Court decisions of John Marshall. James Tully sees the ‘ancient constitution’ as an ‘assemblage’ that, as Bolingbroke put it, incorporated a motley of overlapping legal and political jurisdictions. The ancient constitution tolerated and even respected custom.¹ For example, customary forms of ownership, institutions and

laws differed from locale and jurisdiction, yet were preserved within the blanket protection of the ancient constitution.

Hernando de Soto, the Peruvian economist, gives us a very different perspective on the motley of overlapping jurisdictions and argues that diversity of systems, customs and rules with respect to property has conspired to maintain the entrenched poverty of the developing world. He argues that it is the unified, codified and integrated systems of the West that have allowed these societies to mobilize capital to escape the endemic widespread poverty of the pre-capitalist age. The West, he says, transformed property from ‘dead’ to ‘live capital’—(to use de Soto’s terminology). When this occurs in the developing world, people will be able to play a part in the increasing global economy and begin to acquire access to the world’s wealth that at the moment appears locked away in the developed world. Otherwise the peoples of the developing world remain trapped in “…the grubby basement of the pre-capitalist world.” The last statement brings to mind Plato’s simile of the “cave”. In the course of this chapter I seek to compare and evaluate the competing claims of Tully and de Soto.

In the 1980s and the 1990s, we saw a rise in the ‘communitarian’ or ‘culturist’ reaction to traditional liberal approaches to governance. Writers such as Will Kymlicka, Joseph Raz, Avishai Margalit, and Vernon Van Dyke, for example, argued for the devolution of state powers to members of cultural groups so they might maintain the integrity of their cultures, customs, norms and languages which compose their way of life. Communitarian and so called culturist critiques of liberal theory questioned the liberal tendency to articulate principles of justice premised on the ‘bi-polarity’ of the individual on the one hand and the state on the other. Moreover, many pointed to the inheritance of Hobbes and Bodin, which called for strong central governments to impose sovereignty on local political groups, communities and cultures. It was claimed that this failure to recognize the importance of community had generated a very much-devalued notion of liberal justice.

James Tully and Modern Constitutionalism

In the late 1990s James Tully gave the communitarian/multicultural debate an additional historical context locating this rejection of diversity in community and culture in the historical shift from ‘ancient’ to ‘modern constitutionalism’. Tully demonstrates this through reference to the plight of the Amerindians, who are seen as victims of the new constitutionalism. Tully strongly feels that mistreatment of these indigenous peoples is traceable to attitudes of governance which fail to respect difference, and the alternatives to homogeneity. These attitudes have led North American states to breach the original understandings and accords between the settlers and indigenous, that respected the autonomy of these two