Chapter 1  On Cultural Diversity: The Importance of Normative Foundations for Legal Responses

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In this chapter I consider the way in which lawyers in Britain respond to and try to resolve questions related to cultural diversity. In particular I focus upon how their approach differs from that adopted by political philosophers. Philosophers who concern themselves with cultural diversity deal mainly with the normative issues it raises. In contrast, lawyers tend to make rights the starting point of their enquiries. They think about cultural diversity in terms of anti-discrimination, civil rights, minority languages, religious rights, human rights, and so on.¹ This is not to say that lawyers never concern themselves with normative issues; legal philosophers certainly look at normative questions, but their field of enquiry is the question of what ‘law’ is, and while the answers to this question would certainly inform the ways in which law should deal with the issues of cultural diversity, few take this further step. In this chapter I aim to demonstrate that the dominant approach in law, the rights-based approach, skips a vital, normative, step which has a significant impact on the role of the pursuit of justice in legal responses to cultural diversity. The claim that I am endeavouring to justify is that the challenge of cultural diversity in Britain has a salience in legal realms that goes deeper than just raising questions of rights.

¹ See, for example, Robilliard (1984), Poulter (1986, 1990, 1998), Gregory (1987), Hepple & Szyszczak (1992), Bradney (1993), King (1995), Mason (1995), Townsend-Smith (1998), Hepple & Choudhury (2001) and Weller et al. (2001). I list these merely as examples of dominant legal responses to cultural diversity in Britain, it does not represent a list of responses whose conclusions I disagree with. I am concerned in this chapter with the method used and route taken to reach these conclusions, not with the substantive contents of the conclusions themselves.

By focusing on rights alone, legal responses to cultural diversity implicitly see the normative question of whether diversity should be encouraged as superfluous. This exclusion of normative and conceptual issues is based upon the factual situation of diversity, which acts to render the question of the desirability of diversity otiose; if cultural diversity is a factual reality that we must deal with, why should valuable time be wasted considering whether it is a situation that can be normatively justified? There is much to be said in favour of such an approach, especially since it represents a pragmatic and direct response to extremely sensitive and difficult issues. However, my argument here is that without clarifying the underlying normative issues, responses to diversity are shaped without any clear statement of the presuppositions that give them meaning and purpose and that this has a significant, and damaging, impact on their ability to put forth a just solution.

In order to illustrate how a particular normative base can influence the pursuit of justice in political and legal responses, I begin with a normative argument in support of cultural diversity. In order to construct this illustrative normative position I draw upon Will Kymlicka’s Theory of Multicultural Citizenship. There are two main norms which I consider to be vital to Kymlicka’s theory. First, that cultures are valuable because they provide us with meaningful options in our lives; and secondly, that we have a strong and deep bond to our own cultures which means that we cannot easily be expected to give them up. I then use these normative foundations as reference points to assess the justice of different responses to the challenge of cultural diversity. First, I consider Kymlicka’s own response which claims that voluntary immigrants should, to some extent at least, be expected to give up their own cultures, and I demonstrate that this response is unjust. Secondly, I consider two examples of dominant legal responses and, by using these normative foundations, illustrate not only that these responses are in themselves unjust, but that their failure to take the necessary normative steps displaces the very pursuit of justice from its location as a central motivation, making it a peripheral concern in their endeavours.

In order to illustrate the importance of normative foundations for legal responses, it is useful at this juncture to introduce two examples of dominant legal responses to cultural diversity. David Pearl has written extensively in this field over a number of years, later focusing on Islamic family law. Whilst this later material differs markedly in its approach to his earlier work, an excerpt from one of his earlier pieces provides us with a classical example of a dominant legal approach to cultural diversity in Britain (Pearl 1972: 20):

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