CHAPTER 4
THE RACIAL DISCRIMINATION ACT (RDA) AND AUSTRALIAN MULTICULTURALISM

'*Formal equality before the law is an engine of oppression, destructive f human dignity, if the law entrenches inequality in the political, economic, social, cultural or any other field of public life*'.

– J. Brenon (1985) in Geghardy vs. Brown

The Review of the RDA

The RDA, as previously noted in Chapter 3, is a landmark piece of social legislation which warrants scrutiny in the light of the resurgence of continuing racism and racial violence (Cuneen et al. 1997; Castles 1990). It is a matter of some significance that the RDA 1975 evolved concurrently at a time when there was considerable public concern and interest in the removal of discriminatory elements in the Commonwealth and State laws. The passing of the RDA was a sequel to Australia's signing the CERD in 1966, but ratified only in 1975. Furthermore, this was at a time of heightened public consciousness about racism, especially during the Springbok Rugby tour of 1971 (Antonios 1995). The demonstrations at this time against apartheid helped to bring into the public focus, questions relating to the rights of indigenous Australians—the Aboriginal people—who were granted full citizenship rights in 1967 (Stevens 1971).

The RDA was an extremely important legislative enactment because the common law does not cope well with human rights issues such as racial discrimination. Consequently, the RDA has come to be seen as operating 'in the manner of an equality clause in a Bill of Rights (Antonios 1995: 55), and this was clearly evident when the High Court relied on the RDA to invalidate

legislative and executive actions by two State governments (Western Australia and Queensland). The fact is that in the absence of a Bill of Rights, Australia had no constitutional guarantees of human rights and freedom.[1] Admittedly, in this regard, there has been a significant shift recently in judicial thinking as a result of historic decisions of the High Court which have been read into the Australian Constitution an implied right of free speech (Akmeemana and Jones 1995).

The Review of the RDA (Antonios 1995) affords an ideal opportunity to engage in a critical examination of, not just the effectiveness and adequacy of the legislative provisions contained in the Act, but also the wider contextual and institutional issues bearing on social-political, and philosophical considerations pertaining to the nature and future directions of Australian multiculturalism, i.e., as a democratic pluralistic society. The Review document itself is in two parts: The first part (Chapters 1-5) provides an overview and exposition of the RDA—its history, contextual background and how the Act operates. This section also contains a useful discussion of the constitutional implications for any amendments of the RDA.

The second part of the RDA Review (Chapters 6-18) contains the substantial sections of the Report, and consists of eight Research Papers compiled by researchers with special expertise on the workings of the RDA. These papers, written from a socio-legal perspective, provide an excellent resume of the critical public policy issues bearing on the RDA, such as those dealing with special measures, collective and group rights and conciliation. Admittedly, the review document is not comprehensive as it fails to examine the institutional framework within which the RDA operates; nor does it consider organisational matters such as issues of funding and resource allocations.

Furthermore, as Wilkie (1994) rightly observes, the RDA 'addressed not the problem of racism but that of racial discrimination'. This is despite the fact that Part V of the RDA (which refers to Article 7 CERD) requires consideration of measures to combat racism.[2] On this issue, the Review of RDA merely acknowledges that the RDA has invested the

Commissioner for Community Relations—later known as the Race Discrimination Commissioner—with authority to undertake research, education and other programmes relating to racial discrimination and also to promote understanding and tolerance between racial and ethnic groups. This, incidentally, serves to highlight the need for all Australian governments, to embark on a comprehensive, systematic, and multifaceted approach to combat racism.

But, despite the immense juristic and sociological significance of the RDA, as the Review of RDA rightly observes, there has been a lack of rigorous research and scholarship bearing on the RDA and cognate areas of race and racism comparable to the 'depth and sophistication of Australian feminist scholarship' (Antonios 1995: 2). The racial discrimination legislation along with other anti-discrimination measures (Ronalds 1998; 1998) in addition to proscribing discrimination on the grounds of race and/or ethnicity, have also helped to generate, however slowly, a fundamental change in the way we think about certain forms of social behaviour, especially in the public domain. Even if it may not have led to an eradication of racial violence and prejudice, these public policies have helped to generate more humane and acceptable standards of behaviour relating to conduct pertaining to matters of 'race'. There is no doubt that the law conditions, or even determines racist behaviour as being unacceptable, rather than simply reflecting 'a society's shared sense of right and wrong' (Smedley, 22 May 1997). In this sense, the RDA has been a positive force in the promotion of multiculturalism in Australia.

The RDA and the Politics of Universalism

Equality and 'Difference'

Although the RDA has not been an unequivocal success, it has nevertheless been 'an important site of contest that has facilitated the development of Aboriginal and multicultural consciousness' (Thornton 1995: 81). The significance of the RDA

in determining the future directions of Australian multiculturalism primarily arises from the centrality of the *concept of equality* for the RDA as well as for Australian multiculturalism. The 'enactment of anti-discrimination measures which has grown out of the quest for social equality' (Thornton 1995: 9) has certainly been one of the key features of Australian multiculturalism. In endeavouring to protect and guarantee the *equality of all* citizens irrespective of their ethnic origin. Hence, the slogan 'multiculturalism for ALL Australians'—the hallmark of cultural pluralism as it was promoted in the Fraser-Galbally era (see Table A in Chapter 1).

The citizenship status of the Aboriginal people, only fully cemented by the 1967 Referendum also ensured formal equality and equal rights with others in mainstream society (Chestermann and Galligan 1997; Jayasuriya 2004). The RDA was soon seen as the instrument of multicultural social policies through which the legal protection of ethnic minorities (indigenous and non-indigenous) was guaranteed at *all* levels of Government. Importantly, this was primarily on the grounds of equality understood as non-discrimination. Furthermore, there was wide acceptance of this viewpoint because the RDA was enforceable throughout the country, the Commonwealth and the States. This arose as a result of Australia's treaty obligations following the endorsement of CERD and its implementation through the RDA (Malcolm 1996; Ronalds 2008).

The principle of *equality* inherent in orthodox versions of equality political liberalism and enshrined in the RDA has proved to be problematic for Australian multiculturalism as well as anti-discrimination legislation (Jayasuriya 2004). This is mainly because this view of equality is premised on a strong insistence on the politics of *universalism*, that is, one which stresses *sameness* of treatment irrespective of differences. The emphasis placed on uniformity, equal rights, common sentiments and values has paradoxically led to a denial of difference and particularisms which are implicit in a multicultural society.

Consequently, differences in terms of ethnicity, race, nationality or origins, characteristic of a pluralistic society, tend to be ignored or denied by virtue of a rigid adherence to the

principles of equal treatment and universalism. In short, this Australian model of multiculturalism (see Table in Chapter 1) has sought to accommodate 'difference' and plurality within a policy paradigm of *universal* citizenship which enshrines the virtues of *equality* as non-discrimination. Accordingly equality was understood as 'procedural equality' in the *management* of diversity. The main weakness of this model of normative multiculturalism was that by its strong emphasis on questions of identity and difference failed to acknowledge the facts of 'difference'.

This highly de-politicised, state-regulated form of liberal multiculturalism, as a policy strategy has been partially successful as an effective way of dealing with the early stages of migrant settlement, especially the early waves of migrants from Europe. However, this model of multiculturalism as cultural pluralism, sought to deny or minimise recognition of difference and particularisms (such as those arising from the existence of ethnic structures) by refusing to give formal recognition or legal status to the differences, characteristic of a multicultural society (Lerner 1995). This to a large extent accounts for the reluctance of Australian public policymakers to pursue affirmative actions programmes which require addressing group based inequalities such as in the 'access and equity' policies pursued by the Labor Government in the Hawke and Keating era.

One of the main difficulties with the this model of multiculturalism and its associated inclusionary citizenship is that in its eagerness to avoid '*difference*', it implicitly denies the very pluralistic nature of Australian society—the fact that society consists of varying groups of people drawn from a range of social and cultural backgrounds (Castles 1993). By regarding culture and ethnicity in essentialist terms (e.g., by reifying culture as an immutable fixed entity), *identity politics*—among other consequences—serves to marginalise the 'culturally different' by relegating their needs, strivings, and aspirations to the cultural domain. This exaggeration of 'cultural' difference and the emphasis given to the intrinsic worth of the primordial cultural attributes' such as core values, mores, and value systems, has generated a 'new nationalism', and an ideology of racism (*new*

racism) based on the idea of a *nation* being contained within a homogeneous culture.

This 'new racism' maintains that these intrinsic 'differences' are normal and natural and are integral to national unit. But, as Davidson (1997) pointedly observes, the practice of 'liberal multiculturalism' of the recent past has 'allowed the slide from the maintenance of Anglo-Celtic legal and political traditions to the "new nationalism" and to its latest expression in Pauline Hanson's *One Nation*. In brief, the conflation of *race*, *nation*, and *culture* is central to the crisis of Australian multiculturalism. In reality, differences attributable to culture cannot be understood without locating such differences within a socio-political context. For this reason, the perceptive and insightful observation made by Appiah (1997) in the context of American multiculturalism that 'culture is not the problem, and it is *not* the solution', is equally applicable to Australian multiculturalism. The structural location of so-called 'cultural groups' permits an alternative conceptualisation of these 'cultural' groups as 'minority groups' singled out for differential and pejorative treatment on the grounds of their cultural attributes (Martin 1978).

However, the conventional versions of multiculturalism preoccupied with '*cultural diversity*', ignores the minority status of ethnic groups on the convenient grounds that to do so wold be to devalue these groups! The crux of the 'denial of difference', reflected in the marginal, powerless status of these groups, is an outcome of 'the much vaunted homogenising influence of 'multiculturalism for all' philosophy—the oft repeated slogan of Australian multiculturalism in its old and new renderings (NMAC Report 1999).

Equality and Differential Treatment: 'Special Measures'

Not surprisingly, the resort to 'special measures' in terms of Section 8(1) of the RDA permitting differential treatment catering to special needs or protective measures for minority groups is seen as being problematic for conventional multiculturalism. This is mainly because the recognition of

'difference' within the confines of 'liberal multiculturalism' amounts to a denial of formal equality before the law –meaning procedural equality or equal treatment (Lerner 1995)—this constitutes a serious departure from the principle of universalism embodied in discrimination legislation. By contrast, Canadian multiculturalism with its model of 'corporate pluralism' is better equipped to accommodate difference and differential treatment as an aspect of public policy because it readily acknowledges 'differences' in legal enactments such as the Canadian Charter (Nevitte and Kornberg 1985).

Unlike Australian multiculturalism, Canadian multiculturalism has a 'four-tier equality provision' (Morton 1985) which provides a more fulsome guarantee of the legal status of Canadian ethnic minorities (indigenous and non-indigenous) in matters of public policy. This enables the Canadians to entertain a minimalist view of 'group rights', that is, one which is understood essentially in individualistic terms. Accordingly, individuals are not discriminated by virtue of their group membership, i.e., as members belonging to racial, religious, or ethnic minority groups. In Canada, the most basic meaning of equality as 'non discrimination' is guaranteed constitutionally by the Canadian *Bill of Rights* S15. But more importantly, additional equality rights are conferred on ethnic minorities by virtue of Sec 14 of the Canadian Charter (Eberts 1985). These provisions came into force in 1985, and provide that:

> 1. Every individual is equal *before* and *under* the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origins, colour, religion, sex, age or mental or physical disability.
>
> 2. Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

This Canadian statute provides a much broader meaning of '*equality*' by adding two more tiers, viz., '*equality under the law*' and

'*equal protection of the law*'. Consequently, ethnic minorities are protected, for instance from being discriminated by their identification as a legislative category or classification. An additional benefit of considerable significance accrues from the fourth tier—'*equal benefit of the law*'. This provision prescribes laws that have an unequal impact upon minority groups such as those arising from institutional or systematic discrimination.

Public policies relating to ethnic minority groups may relate to one or more of these kinds of equality determinations. Invariably, there is likely to be strong tension, and even conflicts between different kinds of minority group policies, resting on a broad based understanding of this equality provisions. The resolution of these conflicts in the Canadian context no longer rests on the legislature, but resides in the Courts, which of course, pays due heed to the opinions and attitudes of the legislature as well as the wider community.

However, in Australia, given the absence of a constitutionally entrenched notion of equality in Australia the responsibility for reconciling the competing demands and values of equality falls primarily on the legislature—the elected representatives of government. Furthermore, in the absence of legislative provisions, 'special measures' for ethnic minorities are generally matters for political negotiation. An important exception, however, to this generalisation is the legislative provision for 'special measures' contained in RDA Sec. 8(1) which are intended to conform to the provisions of Article 1 (a) of the CERD. These 'special measures', as specified in the RDA, are the only permissible exceptions to the 'non discrimination' principle embodied in the RDA.

In a significant decision, *Gerhady v Brown* 1985 (Lerner 1995), it was argued that a 'special measure' in accord with RDA needs to have one or more of the following characteristics: that

1. it confers a benefit on some or all members of a class; and that membership of this class must be based on 'race, colour, descent, or national or ethnic origin';

2. it must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy

> and exercise equally with others, human rights and fundamental freedom; and
>
> 3. the protection given by special measures must be necessary in order that they may enjoy and exercise equality with others human rights and fundamental freedoms.

When one considers the need for 'special measures' or special entitlements because of the social history and placement in society of particular groups—be they indigenous or non-indigenous or ethnic—what is in question is the meaning attached to 'equality' and its cognate notion of equality of opportunity. Multicultural societies, such as Australia which do not accord formal acknowledgement of group differences as in Canada, have tended to move away from the *politics of universalism*, characteristic of conventional liberal thought, towards a concept of the *politics of difference*, which recognises the distinctive identity of individuals, and this includes mixed and multiple identities. But an acceptance of the latter involves renegotiating the concept of universal citizenship, and reframing the principle of equality, characteristic of liberal democratic theory.

Accommodating 'Difference': The Politics of Difference

Multicultural Citizenship

The controversies and vehemence of the conservative backlash against multiculturalism (e.g., as exemplified by Pauline Hanson's *One Nation*) clearly points to the problematic nature of liberal multiculturalism as a policy paradigm (Jayasuriya 2003). The meaning and significance of normative multiculturalism, i.e., multiculturalism as a principle of public policy—for the Australian society of the foreseeable future needs to acknowledge and respond to changed social and demographic structures occasioned by new waves of migrants and changes wrought by the transformation of the economy (see Table in Chapter 1). Above all, contemporary Australian society is heavily influenced by generational differences, gender and class relations.

In refashioning our understanding of the diversity and

pluralism of present day society, we need to acknowledge that the 'politics of difference' (Taylor 1992) is about social subjectivity which is seen as transcending particular subcultures, social locations and value stances (McLennan 1995). Crucially, this difference has to be represented through the new 'politics of difference' (Taylor 1992) where 'identity' is no longer primordial but situationally determined in a pluralistic society. In this regard the quest for identity looms large, and identity formation, and, amounts to 'negotiation and articulating hybridity' (Hall 1994). The emerging 'new ethnicities' of the second and third generations revealed by cultural productions and practices which engages rather than suppress difference, are central to understanding 'difference', 'towards and beyond 2000'. In this context 'hybridity' may, indeed, be 'one of the distinctly novel types of identity produced in the era of late modernity' (Hall 1994: 310).

We need to acknowledge, confront meaningfully, respect and represent difference, not to deny or minimise difference. At the same time, unlike mainstream notions of multiculturalism, we need to recognise that cultural and ethnic identities are not fixed and immutable in a 'private cultural sphere' but dynamic and evolving in the public/political sphere. Therefore, the central issues in constituting a new framework for multiculturalism is to move away from a cultural and managerial model to a political and enabling multiculturalism constructed within a '*multicultural citizenship*'. This, above all, requires that multiculturalism be seen as a means of recognising difference and including ethnic minority groups in the 'public conversation' of society. Indeed, as Taylor (1992) observes, there is provision within a democratic concept of universal rights to accommodate difference in a manner consistent with liberal political theorising (for a critique of Taylor, see Ram 1997).

In re-theorising the democratic concept of citizenship, it is important to remember that contemporary political theorising recognises that there are various models of citizenship in democratic societies depending on the character and complexity of each society. In this context, Australian theorists and policy makers would be well advised to consider the influential work of the Canadian political philosopher, Will Kymlicka's (1995)

exposition of what he calls 'multicultural citizenship'. Kymlicka presents a cogently argued case for accommodating differences within a framework of liberalism, that is, one which values individual freedom and tolerance, and is based on notions of autonomy and freedom of choice. In essence, he argues that free choice is possible only in a cultural context—and hence, the need to safeguard and guarantee the cultural rights of minorities. Therefore, the critical issue for Australian multiculturalism is to frame a policy rationale for Australian multiculturalism which is able to determine '*how we treat all members as equal, and also recognise their separate identities*' (Taylor 1992).

To this end, we need to move away from the *politics of universalism*, characteristic of conventional liberal thought, towards a concept of the *politics of difference*, which recognises the distinctive identity of individuals. The latter too is firmly entrenched in liberal thought, especially the principle of equality (Thornton 1990). This basically involves renegotiating the concept of universal citizenship characteristic of liberal democratic theory. Thus, within a democratic concept of universal rights, there is provision to accommodate difference within the framework of liberal political theorising (Kymlicka 1995).

Variants of Multicultural Citizenship

Importantly, Kymlicka, in his theorising on *multicultural citizenship*, makes an important distinction between two variants of this generic model of citizenship. One form of *multicultural citizenship* pertains to national minorities or 'societal cultures'. This usually refers to indigenous minorities or territorial minorities whose members, as citizens of the state, still have claims for self-government and also enjoy some degree of institutional autonomy. These groups have a right to maintain and preserve their cultural heritage as is characteristic of the self-determination claims of the Aboriginal people who rightfully claim to be 'a distinct people in terms of international law' (Article 1 of ICCPR).

The other form of *multicultural citizenship* pertains to ethnic minority communities, usually of immigrant origin, who have claims on the state as regards basic rights of non-discrimination

and some limited measure of accommodation of difference. This accommodation may take the form of adapting social institutions and practices of mainstream society to meet 'special needs'—such as those of language and religion—of these groups. Kymlicka also proceeds to make the interesting observation that, since these groups have made a voluntary choice to leave their homelands and their original cultures, they have implicitly renounced any claim to establish their cultures in their new homeland. In short, they have no right to claim self-governing status or for any form of structural accommodation.

Adopting this model of multicultural citizenship has a two-fold merit. First, it is able to resolve the tension that currently exists between the claim to Aboriginal autonomy and the paradigm of universal citizenship; at the same time, this viewpoint also recognises special needs and special entitlement of migrant groups on account of their history and social location. Secondly, this model of *multicultural citizenship* also enables a genuine alliance of indigenous and non-indigenous ethnic minorities, i.e., the Aboriginal people and migrant communities—within a more defensible ideology of Australian multiculturalism than is the case at present.

Currently the Aboriginal people are rightly lukewarm and indifferent to the current ideology of Australian multiculturalism which they regard as being irrelevant to their needs and aspirations (Vasta and Castles 1997). At the same time, ethnic groups and their spokespersons have failed to recognise and promote the concerns of Aboriginal people. Indeed, as Sivanandan expresses it, 'Australia has "two societies"—one multicultural and the other racist' (quoted in Bird 1995). This is presumably because the multiculturalism as currently practised masks the oppression and exclusion of Aboriginal Australians. It is therefore, a matter of high priority that the alliance of indigenous and non-indigenous ethnic groups be facilitated by re-negotiating the concept of citizenship as befitting a pluralistic society.

The HREOC Review of the RDA (Antonios 1995) as well as the ATSIC Report of 1995 on *Social Justice Matter* have argued strongly for a Bill of Rights or a Charter of Rights.

Concurrently, it is also critical that *multicultural citizenship* should be framed and inscribed in statute in the form of an Australian Charter of Rights as it is no longer defensible, morally or politically, that we should rely on the common law or the RD Act for the protection of minority rights.

Endnotes

[1] With the accession of the European Human Rights Convention into domestic law of the United Kingdom, Australia may be the only liberal democratic country in the world not to have any explicit recognition of rights in its Constitution or domestic law.

[2] It would seem that these provisions of the RDA are observed in the breach. Confirming this trend, Clause 113 of the Draft Human Rights Legislation Amendment Bill (No 2) 1998 has recommended that the provisions contained in Part V of the RDA to establish a *Community Relations Council* be repealed. In the context of the current national concern about the resurgence of racism and the Federal Government's commitment to an anti-racism campaign, the non-implementation of these provisions by successive governments constitutes a major shortcoming of public policy.