The origin of Indigenous customary law in Australia

***Abstract**: My article tries to answer the question whether in criminal cases existing courts should be able to apply indigenous customary law to indigenous people, and whether indigenous communities should have the power to apply their indigenous customary laws in the punishment and rehabilitation of indigenous people*

***Keywords**: indigenuous customary law, Australia, indigenous people.*

1. Basic question of applying indigenous customary law

On 9 February 1977, the then Federal Attorney-General, Mr RJ Ellicott QC, referred the question – whether it would be desirable to apply either in whole or in part Indigenous customary law to Indigenous people, either generally or in particular areas or to those living in tribal conditions only.

More specifically the Research asks on whether in criminal cases existing courts should be able to apply indigenous customary law to indigenous people, and whether indigenous communities should have the power to apply their indigenous customary laws in the punishment and rehabilitation of indigenous people.

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The fairness of applying the general law to Indigenous people, and the injustice of non-recognition of indigenous customary laws, have been debated in one form or another since settlement, the date from which British law was held to apply to Indigenous people. Committee on Indigenous people had stated that to require from Indigenous people the observation of British laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust'.[1] But the then recommendations of the House of Commons Select Committee did not mirrored these opinion. Rather the Colonial Office had assigned the Governor of New South Wales to safeguard that all Indigenous people within his jurisdiction were to be treated as British subjects. Indigenous people and non-Indigenous people were to be governed by the one, introduced, law.[2]

I would submit, therefore, that it is necessary from the moment the Indigenous people of this Country are declared British Subjects they should, as far as possible, be taught that the British Laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or,

to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws.[3]

Thus no specific recognition was to be given to Indigenous customary laws and practices. Australian law, civil and criminal, substantive and procedural, was to be applied to Indigenous people to the exclusion of their own laws except in the rare cases where legislation made specific provision to the contrary.[4] Together with other federal rules applied since 1788 at the national and local levels, have had an heroic impact on Indigenous customs and culture. The blight of traditional Indigenous life and cultural treasure in many areas has made the task of recognition nearly 200 years later both difficult and very different from what it would have been had Indigenous peoples been treated with, from the first, as distinct peoples with their own institutions of government and laws.

2. Development towards recognition

Developments towards recognition have already had to be considered by Australian governments and other bodies, in a variety of contexts. A specific question asks whether Indigenous communities should have power to apply their customary laws and practices in the punishment of Indigenous people.

Alterations in federal policy towards Indigenous people have led to the acceptance of the idea that Indigenous people have within certain limits the right to retain their racial identity and traditional lifestyle. To support in the claim of this right, steps have started to be taken by Australian Parliament to recognize Indigenous traditions and the Indigenous heritage in a variety of ways. These have included:

– the protection of Indigenous hunting, gathering and fishing rights;

– a degree of protection of Indigenous sacred sites and other aspects of the Indigenous heritage;

– some provision for traditional distribution of property on death;

– the conferral in some areas of land rights based in part on traditional affiliations with land, and recognizing traditional rights to use or control land;

– the recognition of traditional Indigenous marriages for certain purposes;

As well the courts, came across with the reality of Indigenous adherence to different or conflicting rules, have tried to take Indigenous customary rules and traditions into account in ways such as:

– treating loss of traditional status and privileges as a compensable injury in road accident cases;

– the application of defenses based on provocation, duress and claim of right;

– the exercise of sentencing discretions;

The need for change gained drive from the Referendum in 1967, which, by a breathtaking majority, authorized the Australian Parliament to make special laws for Indigenous people.[5] Subsequent developments have included:

– proposals for a Makarrata or treaty of commitment, developed by the Indigenous Treaty Committee.

– the establishment of the Indigenous Development Commission (as successor to the Indigenous Land Fund Commission) to assist in providing economic independence for Indigenous people;

– attempts to establish representative Indigenous bodies (successively the National Indigenous Consultative Committee, then the National Indigenous Conference) to act as an advisory body to the Federal Government;

– the enactment of legislation to recognize Indigenous land, or to allow claims to be made to land, in the Northern Territory, South Australia and elsewhere;

– demonstrated Indigenous self-management in particular fields, with the emergence of Indigenous Medical and Legal Services, Indigenous Child

– Care Agencies, Indigenous Hostels Ltd and Indigenous schools (eg Yipirrinya, NT);

3. Changing Policies Towards Indigenous People

3.1. The Initial Impact

Indigenous people have possessed Australia for no less than 40 000 years. However, nearly nothing is thought about the historical backdrop of human occupation amid this colossal time span. Recorded Indigenous history is a past filled with contact, with Macassan or Indonesian traders or fishermen, with European, particularly British. At the time of the landing of the First Fleet in 1788, there was, obviously, no single Indigenous community. Australia (including Tasmania) contained a substantial number of communities involving pretty much discrete zones and with significant differences as far as dialect and culture. Conflicts between colonists and Indigenous people, and the devastation created by introduced maladies and liquor, decreased the Indigenous population during the initial hundred years of settlement from an expected 300 000 to 60 000. Most of the individuals who survived had their traditional methods for life pulverized or at least suppressed. In the area of Tasmania the impacts of white settlement were crushing, conveying Tasmanian Indigenous people to the edge of extinction. It has been conservatively assessed that no less than 10 000 Indigenous people died in Queensland somewhere around 1824 and 1908.

3.2. Early Years of British Settlement

Governor Phillip's directions on first settlement in 1788 had been to keep up serene and amicable relations with the local tenants. Indigenous individuals were characterized to be British subjects and qualified to the protection of British law. The reality was exceptionally different. As the outskirts of settlement extended more Indigenous area was taken and violence regularly emitted. The Indigenous people, having no perceived title to the area yet being viewed as British subjects for the reasons of the law, were liable to be dealt with violence in the event that they opposed infringements upon their territory. Reece states that:

Racial conflicts arose primarily from the rapid expropriation of the Indigenous people' land – a process which had been going on steadily since first settlement. In this the white settlers had been assisted by soldiers and police and there was little reason for anyone to think that killing Indigenous people was a crime, especially when it was done to protect sheep and cattle, and settlers'lives.[6]

The economic and political realities were covered by a perspective of Indigenous people as primitive, if not sub-human, a perspective which uncovered central obliviousness of Indigenous societies. Europeans were, Stanner has said:

"… unable to see, let alone credit, the facts that have convinced modern anthropologists that the Indigenous people are a deeply religious people. That blindness … profoundly affected European conduct toward the Indigenous people. It reinforced two opposed views – that they were a survival into modern times of a protoid form of humanity incapable of civilization, and that they were decadents from a once-higher life and culture. It fed the psychological disposition to hate and despise those whom the powerful have injured … It allowed European moral standards to atrophy by tacitly exempting from canons of right, law, and justice acts of dispossession, neglect, and violence at Indigenous expense."[7]

3.3. Assimilation

Proceeding with troubles, and reactions of the treatment of Indigenous people particularly in central and northern Australia, drove in 1936 to requests by the States for expanded Commonwealth contribution in Indigenous affairs. At the 1936 Premiers' Conference in Adelaide, it was concurred that while Commonwealth control may not be viable there ought to be consistent gatherings between the State and Commonwealth officers in charge of Indigenous affairs. At the first such meeting, held in Canberra in 1937, the Commonwealth and the States concurred that the goal ought to be the assimilation at any rate of the natives of Indigenous origin yet not of the full blood. It could be said assimilation was that part of the strategy of protection concerned with the future of Indigenous people (basically of mixed blood) in settled regions. In the 1950s assimilation turned into a generally acknowledged objective for all Indigenous people and was received as strategy by the Commonwealth and by all State Governments. The policy was characterized at the 1961 Native Welfare Conference of Federal and State Ministers in these terms: The policy of assimilation means that all Indigenous people and part-Indigenous people are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians."[8]

Steps were taken to attain to this outcome. Expenditure on health, housing, education and training programs started to be expanded in the Northern Territory and in the States. The decrease in the Indigenous population in the north and venter was stopped and turned around in the 1950s, and in southern and eastern Australia the Indigenous population was expanding quickly. In the 1960s a coordinated exertion was made to audit and cancelation prohibitive and oppressive enactment, particularly by the Commonwealth Government, and the instruments of protection were eliminated. Access to government disability advantages for Indigenous people came in 1960, Indigenous people got to be qualified for vote at federal elections in 1962 and the ward ship system in the Northern Territory was disassembled in 1964. State enactment restricting access to liquor for Indigenous people was canceled and in many jurisdictions Indigenous people got to be qualified for full Award wages. In 1967 the Constitution was changed by referendum so that Indigenous people would in future be numbered in the Census, and to approve the Commonwealth Parliament to pass laws particularly for the advantage of Indigenous people. An Office of Indigenous Affairs was created by the Commonwealth Government to affect and regulate projects of support for Indigenous People.

3.4. Self-Management or Self-Determination

Lately the strategy of the Commonwealth has been taking into account what has been depicted as the basic right of Indigenous people to hold their racial identity and traditional way of life or, where wished, to receive completely or partially an European lifestyle and has supported Indigenous participation or control in local or community government, and in different areas of concern. This methodology differently depicted as a strategy of organization toward oneself or determination toward oneself has been joined by government bolster projects oversaw by Indigenous associations. Par instance the Indigenous Development Commission was created in 1980 to help further the financial and social advancement of Indigenous people, to advance their improvement and self-management and to give a base to Indigenous economic independence. The issues of the Indigenous Development Commission are to help Indigenous people to obtain land, to take part in business ventures and to acquire account for lodging and other individual needs. Other Indigenous associations, both administrative and non-governmental, are demonstrating progressively critical: these incorporate land councils, child care offices, liquor recovery services, medicinal administrations, inns, legal services and social associations. Endeavors have kept on creating a body which can represent Indigenous and Torres Strait Islander ideas on all matters of approach, through offering exhortation to the Commonwealth and in other ways.

The Commonwealth's approach has been figured by the Federal Minister for Indigenous Affairs in the accompanying way:

This Government looks to achieve further progress for the Indigenous and Torres Strait Islander people through the two principles of consultation and self-determination, that is, with the involvement of the Indigenous people in the whole process … All our policies, each of our programs and projects, have been and will continue to be fashioned in discussions with Indigenous people and their organizations at national and community levels.[9]

There are, unmistakably enough, contrasts between the expressions self-management, consultation, and self-determination. Full self-determination in a specific field infers more than either administration by or consultation with the self involved.

3.5. Impact on Traditional Authority

Traditional authority and Indigenous customary laws have been especially influenced by the methods of settlement and dispossession. Undoubtedly, as Dr von Sturmer has called attention to: "Traditional authority was undermined even where there was no dispossession, certainly none of the sort that Indigenous people were aware of. This may even be true of pastoral properties where people may have been aware that they are moving into new sorts of relationships but may have continued to believe that they owned/controlled the land. I recall that the people at Aurukun with whom I worked were quite shocked when I told them in 1970 that the government, not they, owned the land. And in many of the pastoral properties it seems that Indigenous people believed they were working the land in conjunction with the European pastoralists."[10]

The purposes behind the undermining of traditional authority go much more profound than researches to liquor, to material merchandise or to the impact of the broad communications would recommend. The general non-acknowledgment of Indigenous customary laws was another factor. While the outstation development and the allowing of area rights are parts of what has been seen as a revival of Indigenous custom and society, it stays genuine that from the

soonest days, European contact had a tendency to undermine Indigenous laws, society, culture and religion – a procedure which is a continuing one. Indigenous people keep on confronting troublesome decisions about their lives and their spot in their own groups. A sample is the support now given to the foundation of Indigenous associations. Indigenous people elected to hold office in group committees are frequently more youthful, school-taught Indigenous people who are more talented in the ways and ideas of the more extensive Australian culture than the elders. This can create pressures or divisions inside a group, cutting crosswise over and undermining customary lines of authority. Then again this example is not widespread in a few groups the holders of customary power keep on practicing their impact through the chose office holders, while somewhere else an unmistakable refinement may be drawn between the forces practiced by the chose gathering and the power of older men and women. Whatever the focal points to be picked up by Indigenous people from mining operations on Indigenous area, or from the joining or enrollment of gatherings, such procedures essentially include the individuals from the specific gathering in change and in redefinition of their connection to one another and to the more extensive society. These methodologies are often excruciating, troublesome and antagonis.

3.6. Measuring Present Disadvantage

The degree of past disengagement and dispossession is all around reported, yet it is harder to survey its effect on current neediness and hindrance among far reaching an assorted Indigenous populations. Insights on poverty and inconvenience are lacking and there has been a hesitance to gather or keep measurements recognizing Indigenous people as a different group. Additionally statistics have a tendency to show side effects, not causes, and there is now and again a suspicion that the social substances they reflect are a result of outer components working on uninvolved (Indigenous) populaces. Measurements used to exhibit drawback might likewise be reflecting social contrasts, and a presearch by Indigenous people to hold their own particular manner of life in spite of those inconveniences. In any case the indications, and the measurements, are critical: "[Indigenous people] probably have the highest growth rate, the highest birth rate, the highest death rate, the worst health and housing and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population."[11].

There are other well-known figures: "

A review by the Indigenous Development Commission in June 1983 demonstrated that 6003 Indigenous people were on the holding up lists of lodging associations and that further 2000 houses were expected to house periphery dwellers."[12]

The 1981 National Population and Housing Census demonstrated that the yearly Indigenous wage per head was pretty nearly 50% of that of the Australian populace as a whole.[13]1981 enumeration figures demonstrate that nearly 12.5% of all Indigenous people 15 and over have never gone to class. This contrasts with 1% for the non-Indigenous population.[14]

Indigenous unemployment is just about three times the rate of unemployment for non-Indigenous individuals. In the range of 23474 Indigenous people (1 in 8) were unemployed as at September 1985.114 Twenty-five % off all unemployed Indigenous people were under 20.[15]

The normal life expectancy for Indigenous people is much lower than for non-Indigenous individuals. In 1981 the normal life expectancy for Indigenous individuals living in territories in New South Wales was roughly 49 years for males and 56 years for females.[16]

The pervasiveness of the eye malady, trachoma, has been evaluated to be 15 times higher for Indigenous people than for non-Indigenous individuals. In a few territories of the Northern Territory and Western Australia up to 77% of Indigenous people are affected.[17]

The number of Indigenous children in substitute consideration plans is alarmingly high. In New South Wales, for instance, as at 30 June 1981, 15% of kids in substitute consideration (barring adoption) were Indigenous people (587 of 3836 kids), albeit Indigenous People make up under 1% of the aggregate populace of New South Wales.[18]

This speaks to 5% of all Indigenous children in substitute consideration contrasted with 0.4% of all non-Indigenous youngsters. In Western Australia, more than 54% of the youngsters (937 of 1710) in child care situations are named Indigenous or Torres Strait Islander; and more than 58% of the kids (821 of 1411) in residental child care foundations are comparably classified.[19]

Indigenous people are horribly over-represented in Australian criminal statistics, both regarding conviction rate and the rate of detainment. Indigenous capture rates are altogether higher than those for non- Indigenous individuals. For sample, in the Northern Territory in 1977-78, 78% of those Indigenous people, yet Indigenous people made up just 25% of the population.[20]

Indigenous people are factually less inclined to be discharged on safeguard, and more prone to be indicted than non-Indigenous individuals. They are factually more prone to get a jail sentence than non-Indigenous people.

The crime rate on Queensland Indigenous reserves was, between 1979-81, 39.6 per 100. 000 or practically ten times both the national and Queensland average.[21]

The attack rate on Indigenous reserves in Queensland was 226.05 per 100 000, while the Queensland rate was 43.85 per 100 000. Indigenous people in Queensland have a detainment rate of 410 per 100 000, seven times higher than the overall population in that State.[22]

It is against this foundation of hardship and disengagement that any examination of Indigenous customary laws must occur.

Notes

[1] British House of Commons, Select Committee on Indigenous people (British Settlements), *Report*, House of Commons Parl Paper 425, 1837, 84.

[2] Glenelg to Bourke, 26 June 1837, *Historical Records of Australia* (hereafter HRA) set 1, vol 19, 47

[3] Report by Grey on the Method for Promoting the Civilization of Indigenous people, Enclosure in correspondence, Lord John Russell to Sir George Gipps, 8 October 1840, *HRA* ser 1, vol 21, 35.

[4] cf MC Kriewaldt, `The Application of the Criminal Law to the Indigenous people of the Northern Territory of Australia‘ (1960) 5 *UWALRev* 1, 20.

[5] In the Referendum, 5183113 (89.34%) voted in favour of the proposal; 527007 (9.08%) against; 91464 (1.58%) votes were informal.

[6] RHW Reece, *Indigenous people and Colonists: Indigenous people and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney UP, Sydney, 1974, 3.

[7] Weh Stanner, “Religion, Totemism and Symbolism” (1962), in Stanner (1979) 106, 108. cf CD Rowley, *The Destruction of Indigenous Society*, repr, Penguin, Ringwood 1978, 7.

[8] Cited in H Reynolds, *Indigenous people and Settlers: The Australian Experience 1788-1939*, Cassell Australia, Sydney, 1972, 175.

[9] Hon C Holding MHR, Commonwealth of Australia =134 *Parl Debs (H of R)* (8 December 1983) 3487.

[10] J von Sturmer, *Submission 403* (March 1984) 19.

[11] National Population Inquiry, *Population & Australia. A Demographic Analysis and Projection*, AGPS, Canberra, 1975, vol 2, 455.

[12] *Indigenous Social Indicators 1984*, Department of Indigenous Affairs, Canberra, 1984, 22-9.

[13] id, 48 ($6000 pa compared with a national average of $12 000). For earlier studies see eg Commission of Inquiry into Poverty, Second Main Report, *Law and Poverty in Australia* (Commissioner: R Sackville) AGPS, Canberra, 1975, 262.

[14] *Indigenous Social Indicators 1984*, 36.

[15] Commonwealth Employment Service Statistics: Department of Employment and Industrial Relations, September 1985.

[16] NSW Department of Health, =Indigenous Mortality in NSW Country Regions 1980/81‘ (unpublished) Sydney, October 1983, 4.

[17] National Trachoma and Eye Health Program, *Report*, Royal Australian College of Opthalmologists, Sydney, 1980, Table 1.7.

[18] Cited in Indigenous Children‘s Research Project (NSW), *Draft Principal Report*, Sydney, 1982, 75. cf the Project‘s Discussion Paper No 3, *Assimilation and Indigenous Child Welfare – the NSW Community Welfare Bill*, Sydney, 1981, 8, which points to the high rates of breakdown of foster care and adoption placements when Indigenous children are placed with non-Indigenous families.

[19] Information provided through WELSTAT, Department of Social Security, Canberra. Figures as at 30 June 1981. See further para 346.

[20] House of Representatives Standing Committee on Indigenous Affairs, *Indigenous Legal Aid*, AGPS, Canberra, 1980.

[21] Evidence of Dr Paul Wilson, *R v Alwyn Peter*, unreported Queensland Supreme Court (Dunn J) 8-11, 18 September 1981, transcript 34-6; P Wilson, *Black Death, White Hands*, George Allen and Unwin, Sydney, 1982, 4.

[22] ibid. And cf W Clifford, An Approach to Indigenous Criminology (1982) 15 *ANZJ Crim* 3, 8-9.

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