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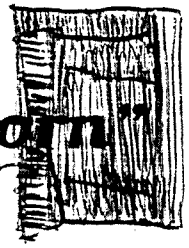

"The Theology of Popcorn"

by

Chief Justice Brian Martin

(of the Supreme Court of the Northern Territory)

RECONCILIATION, ABORIGINAL CUSTOMARY LAW AND THE NEW STATE CONSTITUTION

The Aboriginal and Torres Strait Islander Commission's 1995 report to government "Recognition, Rights and Reform" contains a social justice package submission asserting that there is no right more fundamental for indigenous people than that of self determination:

> "As an aspirational concept the right of self determination underpins a variety of broader goals and objectives, including: ... recognition of customary law"[1]

The Australian Council for Reconciliation in recent publications says that recognition of indigenous law is an important way in which reconciliation between Aboriginal and Torres Strait Islander peoples and the wider Australian community may be progressed.

WHERE ARE WE?

In *Walker v The State of New South Wales,*[2] Mason CJ. was dealing with an application that the action be dismissed or stayed upon the ground that the

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[1] ATSIC, *Recognition, Rights and Reform : Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia, in Pritchard, S., *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, prepared for the Aboriginal and Torres Strait Islander Commission, Faculty of Law, University NSW, June 1996, p27.

[2] (1992-93) 182 CLR 45

statement of claim did not plead a reasonable cause of action. The plaintiff, who had been charged with offences under the law of New South Wales, was said to be a member of the Noonuccal "nation" of Aboriginal people. He alleged, inter alia, that the common law was only valid in its application to Aboriginal people to the extent to which it had been accepted by them, and that the Parliaments of the Commonwealth of Australia and of the States lacked power to legislate in a manner affecting Aboriginal people without the request and consent of Aboriginal people. As might be expected, his Honour held that in so far as the plaintiff's claim was based on the proposition that the legislatures lacked power to legislate over Aboriginal people, it disclosed no reasonable cause of action. However, counsel for the plaintiff in his oral submissions had put the matter somewhat differently, submitting that the question which arose was whether customary Aboriginal criminal law was something which had been recognised by the common law and continued in the same way that Mabo (No. 2)[3] decided that the customary law of the Meriam people relating to land tenure continued to exist. Counsel relied on a passage in Blackstone on the introduction of English law into a country that had been outside the King's dominions:

> "Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony".[4]

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[3] *Mabo v State of Queensland [No 2]* (1991-92) 175 CLR 1

[4] *Walker,* op cit, p49, n15.

His Honour rejected the submission that the statutes of New South Wales did not apply to people of Aboriginal descent, saying that it was a basic principle that all people should stand equal before the law.

> "A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle."[5]

In conclusion his Honour said that even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. It was held in Mabo that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown, but, his Honour said with some emphasis:

> "There is no analogy with the criminal law. English criminal law did not and Australian criminal law does not accommodate an alternative body of law operating alongside it. There is nothing in Mabo (No. 2) to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people."[6]

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[5] Ibid p49.

[6] Ibid p50.

That case only concerned the question of the legislative competence of the Parliament of New South Wales to enact the provisions pursuant to which the plaintiff had been charged. The plaintiff did not attempt to show that what he had done was in any way based upon customary Aboriginal law. He did not claim, in accordance with that law, any right to do what he had done or that what he had done in accordance with that law provided any authorisation, justification or excuse for his conduct. In that context, it might be thought, with respect, that some of the former Chief Justice's terminology, taken at face value, goes too far, but perhaps that depends upon the view that is taken of the words "alternative body of law operating alongside it". For example, how do those remarks fit with what was said in *Walden v Hensler*.[7] There, the defendant appellant, an Aboriginal, was found in possession of a partly plucked plain turkey and a live turkey chick. He had shot the turkey in the bush for food and the chick was being kept as a pet until it had grown sufficiently to be released in the bush. The birds were fauna for the purposes of the *Fauna Conservation Act* and he had no licence to take them, as required. At the relevant time he believed, in accordance with Aboriginal custom and his own practice of a lifetime, that he was entitled to take the turkeys as "bush tucker" and that he was committing no offence in so doing. It was held, by majority, that the offence not being an offence relating to property (the birds being wild animals), the appellant could

[7] (1987) 163 CLR 561

not claim that what he had done was in the exercise of an honest claim of right to property so as to avoid criminal responsibility under of the Queensland Criminal Code. Brennan CJ. affirmed that in doing what he did the appellant had abided by Aboriginal law, and in the course of his reasons declaimed the heavy financial burden of $919.50 imposed upon him by way of fine, royalties and costs, notwithstanding the moral innocence of his conduct.[8] His Honour asserted that the result, "makes a mockery of justice".[9] A little later his Honour intriguingly said:

> "It would not have been surprising if a question had been raised by the appellant as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away, but that question was not raised."[10]

His Honour noted that counsel for the prosecutor had submitted that: "If tribal or customary law is to be applied in European courts, it is a matter for Parliament",[11] but that submission did not have to be considered because the appellant had not argued that tribal customary law was applicable, he being content to accept that the law governing the appellant's liability to conviction was

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[8] Ibid p563.

[9] Ibid p564.

[10] Ibid p565.

[11] Id.

to be found in the Fauna Conservation Act and the Code. The appellant's keeping of the carcass and the chick was c early consistent with his honest belief that he was entitled to do so, and:

> "as the right claimed does not have to be a right recognised by the law of Queensland, the appellant's belief in his entitlement according to Aboriginal law and tradition to keep the carcass and the chick would have sufficed to raise an honest claim of r ght in the absence of any knowledge that the entitlement claimed had been overridden by the law of Queensland".[12]

What was important in the resolution of the question in that case was not whether some aspect of Aboriginal law prevailed over the statute law of the state, but whether the appellant's belief tha: he was entitled to take the birds amounted to a claim of right within the law of the state. The appellant's assertions both as to the content of Aboriginal customary law and his belief that he had abided by it was not put to one side as being irrelevant to the court's considerations. They were accepted as the factual basis for consideration of the application of the statute law. There does not seem to have been any evidence or argument going to the notion of "property" in the birds in Aboriginal customary law. The definition of "property" in s1 Criminal Code is "everything, animate or

[12] Ibid p569.

inanimate, capable of being the subject of ownership". The question might have been "ownership" in accordance with whose law?

Similarly, *in Ngatayi v The Queen*,[13] Murphy J. acknowledged the existence and operation of Aboriginal customary law:

> "The existence of two systems of law side by side, the prevailing one and Aboriginal customary law, with their very different attitudes to guilt and responsibility, create serious problems and the question of how far our laws should apply to Aboriginals and how far their laws should be allowed to apply to them is controversial".[14]

That issue, amongst many others, was taken up by the Australian Law Reform Commission in its reference in regard to the recognition of Aboriginal customary laws upon which it reported in 1986.[15] The particularly relevant term of reference, as drafted, required the Commission to investigate whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines. The reference to "existing courts" was in the

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[13] (1979) 30 ALR 27.

[14] Ibid p36.

[15] The Law Reform Commission - Australia, *The Recognition of Aboriginal Customary Laws*, Report No 31, Australian Government Publishing Service, Canberra 1986.

context of the next following term of reference involving the extent to which Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines. I will not dilate upon that question, not because it is not of interest, but to endeavour to do so would be to absorb far more time than is presently available.

I found it interesting in scanning the Commission's final report on this subject that it rephrased the question:

> "The question is, therefore, whether and in what ways Aboriginal customary laws should be recognised within the framework of the general criminal law".[16]

The express term of reference raised the issue of empowering the courts to apply Aboriginal customary law, assuming that there was no such power, but the Commission raised as the real question not the question of power, but the question of method of recognition and implicitly how such a law once recognised might be applied.

[16] Ibid, Vol 1, Chap17, par402.

RECOGNITION IN THE TERRITORY

There have been many examples, both in the courts and by way of statute of the recognition of some aspects of Aboriginal customary law, which recognises that there is such a thing. They also point to the gradual emergence of an understanding of its content in particular areas. As to the courts, there is a very detailed history provided in the discussion paper entitled "Recognition of Aboriginal Customary Law" published by the Sessional Committee on Constitutional Development in August 1992.[17] It is appropriate at this juncture to gratefully acknowledge the resource material made available by that Committee as part of its consultative process and its sundry reports to the Parliament. I have drawn heavily upon them as a convenient source of information and discourse.

The fact that recognition of Aboriginal customs and Aboriginal customary law has apparently been piecemeal, is justified upon the basis that many aspects of that law are inaccessible for a variety of reasons. It varies from one Aboriginal group to another; it was originally not recorded in writing and the attempts to do so thus far by anthropologists and others have not been comprehensive; some of the information is secret and confidential so that it can usually only be learnt orally in the relevant Aboriginal language. It is based upon ideas and concepts which may be radically different to those of other people. There has been a

[17] Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, Discussion Paper No4, *Recognition of Aboriginal Customary Law*, August 1992.

gradual emergence of information in relation to some areas brought about, in the main, with a view to preserving Aboriginal ways, customs and laws, and so as to bring about for Aboriginal people benefits and advancement which might not otherwise be available. The rules relating to kinship and marriage, the role of different people within Aboriginal society, the laws and rules about hunting. fishing and gathering, rights and duties in respect of land, sacred sites and objects, spiritual beliefs and practices, concepts of authority and responsibility and methods of conflict resolution and punishment are being better understood, we hope. In that latter area, of course, the courts have been drawn into significant controversy, some of the criticisms being ill founded. Research undertaken in the preparation for land claims in the Territory has resulted in a significant increase of the breadth and depth of understanding of matters relevant to that process. I do not propose to attempt in any way to define any of the laws which have come to be recognised. It would, I think, be a foolhardy thing to attempt. Codification of Aboriginal customary law does not appeal to me. Nor do I propose to be comprehensive in my review of Territory cases, time does not permit, but I simply wish to direct attention to examples of cases where the courts have recognised and taken account of, or applied customary law, either by way of direction or in the sentencing process (by directions I include directions given by a trial Judge to himself in the days when there were no juries in the Territory and directions to juries of later times).

It is not necessary to go into details of all the cases in which the Supreme Court of the Northern Territory and other courts in Australia have, on occasion, taken into account punishment which may be suffered by a convicted Aboriginal arising from the application of customary law in fixing a sentence. In some cases the traditional punishment so called has already been inflicted, and in others it is said to be intended to be carried out either before or after the convicted person has been dealt with by the court. The type of corporal punishment involved has ranged from assaults upon the person of the offender with sticks through to spearing in the thigh, but corporal punishment of that kind has not been the only type of consequence borne in mind. In a fairly recent case, I heard evidence about a woman, who had pleaded guilty to stabbing her husband for the second time, having been dealt with in Aboriginal way. She had been under the Aboriginal equivalent to a good behaviour bond, imposed as a consequence of settlement of differences between her family and the victim's family. She had been subject to it for a period of about two years between the commission of the offence until she was brought before the Court. There was also substantial evidence of rehabilitation from alcohol abuse, part of the conditions of the "bond", and of the re-establishment of a good relationship between herself and her husband. That was not only to their benefit, but also the benefit of the community in which they lived. There was no need for the court to impose anything further by way of penalty, other than to record the conviction. It was interesting, not only because of the relative novelty of the type of sanction

imposed by the community in which the offender lived (so far as the Court was aware), but also because of the impassioned plea by the husband on oath before the court to the effect that the matter having been settled in the Aboriginal way, and he being party to that settlement, his standing in the community would be significantly reduced if the Court determined that there should be something further by way of punishment imposed. It would, also, in his view, have been a significant disdainful affront to the Aboriginal people involved had the Court ignored or not given sufficient weight to the traditional means by which peace was restored in that community. It went beyond the question of rehabilitation of the offender, it also went to the authority of those to whose direction she had submitted. In that case it was necessary to point out that the criminal justice system is not a matter of redress of private wrongs, it is there to effect the purposes of the state, a public matter. Nevertheless, as that and many other cases have demonstrated there is room for both objectives to work together.

As to punishment, either past or prospective, see *R v Minor*,[18] and for a further example of a reconciliation process within the Aboriginal community, *R v Munungurr*.[19]

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[18] (1992) 2 NTLR 183.

[19] (1994) 4 NTLR 63.

As to taking into account Aboriginal custom or customary law for the purposes of determining whether or not an offence has been committed, there are, again, a number of cases particularly going to provocation. Evidence has been given of matters which may well cause an Aboriginal offender to be deprived of the power of self control which might not be so regarded in other sections of the Australian community. For these purposes the objective test of the ordinary person's power of self control is placed in the context of the offender. The test remains objective, unaffected by the personal characteristics of the accused apart from his or her Aboriginality which might be shown to be relevant to both the seriousness of the provocation and the level of self control expected of such a person. It is unfortunate, I think, that the courts' efforts in that regard have been seen in some quarters as adopting an assumption that Aborigines as a race possess lower powers of self control than other Australians and such an assumption is objectionable as it has the effect of promoting a negative stereotype of an Aborigine being at a lower order of the evolutionary scale. Those words appear in an article "The Recognition of Aboriginality by Australian Criminal Law" (Professor Stanley Yeo, Faculty of Law and Criminal Justice at the Southern Cross University.[20]) Such assumptions are not made by the court and I can find no clear indication that such was ever the case. What is accepted, however, is that upon the basis of evidence demonstrating the fact, Aboriginal persons may lose the power of self control for reasons which are different to

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[20] Yeo, S. Prof., *The Recognition of Aboriginality by Australian Criminal Law*, in Bird, G., et al (ed) *MAJAH: Indigenous Peoples and the Law*, Federation Press, Annandale, 1996, p229.

those which may cause other Australians to lose their power of self control. That says nothing about the position of Aborigines on the evolutionary scale.

Before moving on from these general observations, I am reminded that in 1933 a panel of sixty jurors presented a petition to acting Judge Sharwood of the Supreme Court in Darwin calling for Aborigines to be tried in accordance with customary law in circumstances where the offence was known to be of a tribal nature.[21] They pointed out that very often tribal elders were charged with an offence for inflicting punishment on another Aborigine in accordance with customary law. The jurors sought "the establishment of a tribal court, especially created to deal with cases of the nature above mentioned, functioning under milder laws of punishment than our present criminal system provides. It is known that if one Aboriginal unlawfully and violently injures another, his tribe will see to his proper punishment, irrespective of what the white man does to him. It is strongly urged that the whole question should be investigated and reported to the government by men who have lived amongst the natives and have knowledge of their codes, and by men who have studied their laws and customs from a scientific point of view, and by men who are genuinely and sympathetically interested in the Aborigines. Such men are the likeliest to point out the best manner in which to achieve the desired result. Leaving the matter in the hands of those who have no knowledge of the Aboriginal would only result in

[21] The Law Reform Commission - Australia, op cit, Vol 1, Chap4, par50, n76.

a remedy worse than the disease."[22] These comments incorporate not only questions relating to punishment, but also criminality. It may be that the body of men to which the petition referred has not been specially constituted to advise government, but that the sentiments expressed in the petition have been gradually taken up by lawyers and the courts. The men with the appropriate expertise are now to be found, not amongst the academics who have studied these things, but amongst Aboriginal people themselves, who it appears are becoming more willing to come forward and give evidence in appropriate cases.

But it has not been in the area of development of the criminal law alone in which customary law has, at least in the Northern Territory, received attention. It has been taken into account, for example, in the protection of secret Aboriginal ceremonies from disclosure by publication (*Foster v Mountford and Rigby*[23]), in the immunity of confidential information about Aboriginal sacred sites from use in evidence (*Aboriginal Sacred Sites Protection Authority v Maurice*[24]), and in taking into account Aboriginal traditional status and the ability to participate in ceremonies in determining damages for injuries (*Roberts v Devereux*[25]), and in another case in having regard to tribal marriages for the purposes of adoption.

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[22] Ibid.

[23] (1976) 14 ALR 71.

[24] (1986) 65 ALR 247.

[25] Forster CJ., Unreported, 22 April 1982.

That reference, taken from the Sessional Committee Discussion paper,[26] may refer to an Alice Springs matter, many years ago, in which an American couple had been approved as adopting parents to an Aboriginal child whose unmarried mother had given consent to an adoption. She then sought to withdraw the consent, and as you might imagine a significant number of issues arose, but they were all ultimately resolved in favour of the mother.

Beyond the Courts, Parliament has also recognised features of Aboriginal customary law. Leaving aside the Commonwealth Aboriginal Land Rights (Northern Territory) Act, there is operating within the Territory a range of legislation dealing with sacred sites and heritage, specifically, recognising Aboriginal sites and objects; traditional use of land and water by Aboriginals is protected under legislation such as the Territory Parks and Wildlife Conservation Act, the Crown Lands Act and Fisheries Act. Tribal marriages are recognised in a number of Acts including those dealing with administration of deceased estates, adoptions, family provisions, motor vehicle accident compensation and work health. The Criminal Code, in its definitions of husband and wife, includes in the case of Aborigines, persons living in a husband and wife relationship according to tribal custom. As to children, the Community Welfare Act, has special provision in relation to Aboriginal child welfare

[26] Legislative Assembly of the Northern Territory, op cit.

including the need to have regard to Aboriginal customary law in considering that question.

The categories or range of customary law to which recognition can be given are not closed. There was an interesting prospect not so long ago of the courts hearing a charge against an Aboriginal who had destroyed a dilly bag. It was thought the evidence would show that the bag was a sacred object identifying the clan to which it belonged, their land and their responsibilities to the land. It had been used before to demonstrate the Aboriginals links with land. It was proposed that the defendant be tried for unlawfully damaging property, with the aggravating circumstance that the dilly bag was regarded as evidence of title to land. There were, I understand, significant consultations between the Aboriginals involved and other law enforcement authorities with the result that the matter did not come to trial after the community affected advised that it had dealt with the matter and sought to have the charges dropped.

THE NEW STATE CONSTITUTION

The purpose of my venturing upon this subject, which hardly needs expounding in this company, lies in a proposal that Aboriginal customary law be recognised as one of the sources of law in the Northern Territory, as the laws of the Territory for the purposes of its Constitution, upon becoming a State in the Australian

Federation. The Courts and the Parliament have now gone so far down the road of recognition of Aboriginal customary law and tradition as to make the recognition of that law in the Constitution in the manner proposed, I would have thought, an almost foregone conclusion or, at least, noncontentious. At a time when reconciliation is a byword in developing relationships between Aboriginals and other Australians, recognition of Aboriginal customary law could not be seen as anything but a positive measure. There is no attempt to codify that law and I suggest that that would be extremely difficult since it is unlikely that we know enough about it to even attempt such a course. Where sufficient definition of the operation of the law has been determined, it has been applied on a needs basis both in the Courts and in the Parliament.

I am not privy to the political mood in regard to the possibility of Statehood, suffice to say that it would seem to have substantial support within the Northern Territory, and if one can accept what has been recently published in the media, there would appear to be no objections on the part of any of the major political parties at either the Commonwealth or State levels. In the view of some Statehood and admission to the federation will come about coincidentally with the 100th anniversary of the founding of the Commonwealth in 2001.

But I digress. The draft Constitution[27] proposes that there be included a division to deal with "Laws of the Northern Territory" (Clause 2.1). Those laws include, of course, the usual array to which we are all well accustomed, but exceptionally refer to Organic laws and "other laws recognised by this Constitution". It is in that context that the draft provides:

> "Aboriginal customary law, to the extent of its existence in the Northern Territory immediately before the commencement of the Constitution: (a) shall be recognised as a source of law in the Northern Territory; and"

The draft then provides for alternatives:

The first is as follows:

> "(b) Except where it is implemented and enforced as part of the common law or the practice of the courts, shall not be implemented or enforced by the Northern Territory, its institutions (including judicial institutions), instrumentalities, officers (including law enforcement officers), employees or agents except as expressly provided or by or under an Organic law or other Act".

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[27] Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, *The Report on Paragraph 1(a) of the Committee's Terms of Reference on a Final Draft Constitution for the Northern Territory*, Vol 1, Appendix 8, pp8.59-8.132, November 1996.

The second provides that Aboriginal customary law:

> "(b) may be implemented or enforced in respect of any person, but only under and in accordance with that Aboriginal customary law where that person considers that he or she is bound by that law; and
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> (c) may also be implemented or enforced in so far as it part of the common law of the Northern Territory or in accordance with the practice of the courts;
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> but subject to (b) and (c) above, shall not be implemented or enforced by the Northern Territory, its institutions (including judicial institutions), instrumentalities, officers (including law enforcement officers), employees or agents except to the extent that is expressly provided by or under an Organic law or other Act".

The explanatory note to the draft reads that the clause:

> "Provides for the first time for the recognition of current Aboriginal customary law as a source of law in the Northern Territory, for its continued implementation and enforcement among Aboriginal persons

themselves by traditional Aboriginal methods and also pursuant to court decisions to the extent that it is already part of the common law or pursuant to existing court practice, but otherwise only as provided by this Constitution, an Organic Law, or an Act of the Parliament. Two alternatives are offered for consideration.

Alternative 1 - The first alternative omits any reference to the enforceability of Aboriginal customary law as between Aboriginal people themselves. It will be left to the courts to decide to what extent it will be given effect to as a source of law.

Alternative 2 - The second alternative includes reference to enforceability of Aboriginal customary law as between Aboriginal people themselves in accordance with that law, thus making it clear that it is an enforceable system of law in respect of those persons who consider themselves bound by it.

In addition, under either alternative, the existing law and practise will also continue. Subject thereto, Northern Territory institutions and officers will only be able to enforce Aboriginal customary law in so far as the Constitution, an Organic Law or an Act of Parliament so permits."[28]

[28] Ibid p8.73.

It is interesting to note that this is not the first time that it has been proposed that Aboriginal customary law as such be specifically recognised and applied. As early as 1939 the Criminal Law Amendment Ordinance of the Commonwealth, applying in the Territory required a court upon a conviction of murder to hear evidence "as to any relevant native law or custom".

(I should shortly dispose of the question of what is proposed to be an Organic law if only for the purpose of setting it to one side for further consideration. It is a law that is declared by the Constitution to be an Organic law or is an Act of the Parliament which itself expressly states that it is an Organic law. It requires a particular majority of members of the Parliament to be enacted and compliance with certain specific procedures during the legislative process. Amendment of an Organic law requires the same majority and procedure.)

The draft also makes provision (Clause 2.2) for the "priority of laws of the Northern Territory, giving the new Constitution (as well as the main federal constitutional documents) first priority as the fundamental law of the Northern Territory, with Organic Laws second, Acts of the Parliament and previous Acts still in force third, subordinate legislation fourth, with common law and other sources of Northern Territory law, (including Aboriginal customary law), equal next. This," according to the notes to the draft, "basically accords with the

current priority of laws in the Northern Territory, but gives the new Constitution a fundamental status, introduces a new category of Organic Laws of special importance, and equates Aboriginal customary law with the common law."[29]

The proposal that there be recognition of Aboriginal customary law and its place within the hierarchy of the laws of the Northern Territory are not the only provisions in the draft Constitution which may have an effect upon the laws and the application of the laws, including the criminal laws of the Territory. For instance, it is provided in the Preamble that the "people of the Northern Territory are concerned to preserve a harmonious, tolerant and united multicultural society, and to that end, it is desirable that no person should be unreasonably denied the right:

(a) to use his or her own language in communicating with others, speaking or understanding the same language;

(b) to observe and practice his or her own social and cultural customs and traditions in common with others of the same tradition; and

(c) to manifest his or her own religion or belief and worship, ceremony, observance, practice or teaching,

[29] Ibid p8.74.

and that within the framework of such a society, the people of the Territory recognise that the Aboriginal people of the Territory are entitled, under and in accordance with the Constitution and the laws of the Territory, to self determination in the control of their daily affairs."[30]

At par7.3 it is provided that, subject to the Constitution, an Act may provide for Aboriginal self determination and for all matters incidental thereto.[31] "Aboriginal self determination" is defined (par11.1) as meaning the activity of Aboriginal people in the Northern Territory exercising control over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities.[32]

THE INTERNATIONAL SCENE

The concept behind these proposals may have been influenced by Articles of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights affirming the right of all peoples to self determination:

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[30] Ibid p8.70.

[31] Ibid p8.172.

[32] Ibid p8.124.

"Indigenous peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[33]

Going back to 1971, the United Nations commenced study on the problem of discrimination amongst indigenous populations and to suggest measures for eliminating that discrimination. This has developed over time into a Working Group on Indigenous Populations which held its first session in Geneva in August 1982. It has met annually (except in 1986). Commencing in 1988, a draft Declaration on the rights of indigenous peoples was produced leading to a decision in March 1995 by the Commission on Human Rights to advance the progress thus made to prepare a draft: "United Nations Declaration on the Rights of Indigenous Peoples"[34] for consideration and adoption by the General Assembly within the international decade of the world's indigenous people. As I understand it, the draft Declaration, if and when adopted, by the UN General Assembly will constitute a non binding declaration in that unlike legally binding agreements to which Australia is a party, it will not create any obligations upon Australia under international law. It will not render Australia legally accountable

[33] International Covenant on Civil and Political Rights, United Nations, 1966, Article 1; International Covenant on Economic Social and Cultural Rights, United Nations, 1966, Article 1.

[34] United Nations High Commissioner for Human Rights, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations declaration on the rights of indigenous peoples*, Sub-Commission resolution 1994/95.

for its actions towards Aboriginal and Torres Strait Islander peoples.[35] For that it would be necessary for there to be an international convention or treaty and Australia would have to agree expressly to be bound by the standards elaborated in it.[36] The Australian government has always stressed that the draft Declaration will be an aspirational document which imposes no obligations of implementation, but it is suggested that it will contribute to a growing body of customary international law in the area of indigenous people's rights, and thus may acquire the status of customary law and become binding on Australia.[37] This should not come as any surprise or cause any significant change of attitude, since at the first session of the Commission of the Human Rights Working Group in November 1995, the leader of the Australian delegation said:

> "Self determination for Australia's indigenous people has been government policy since 1972. Since 1991, we have made statements in WGIP in favour of the use of the term "self determination" in the draft Declaration. We have done so on the basis that the principle of the territorial integrity of states is sufficiently enshrined internationally that a reference for self determination in the draft Declaration would not imply a right to secession. In the Australian context, self determination will be

[35] Pritchard, S. *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, op cit p15.

[36] Id.

[37] Id.

worked out within national boundaries and through the establishment of representative bodies such as the Aboriginal and Torres Strait Islander Commission".[38]

On the question of customary law and practice, the draft Declaration contains, at Article 4:

> "Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics as well as their legal systems, while retaining their rights to participate fully, if they so chose, in the political, economic, social and cultural life of the State".[39]

According to a Department of Foreign Affairs and Trades Discussion Paper,[40] the parts of Article 4 dealing with economic, social and cultural characteristics are likely to be accepted, whilst the political and legal aspects are likely to be the subject of extensive discussion and negotiation.

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[38] Statement by Mr Bill Barker on behalf of the Australian Delegation, First Session, CHR Working Group, 21 November 1995, in Pritchard S. ibid p25.

[39] Op cit Article 4.

[40] Department of Foreign Affairs and Trade, Discussion Paper, Sept 1995, in Pritchard, S. *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, op cit p64.

NEW HORIZONS

The following are just a few examples of the areas where the recognition or improved recognition of Aboriginal customary laws may give rise to significant matters for consideration not only by Parliaments, but in the existing Court structures as well. Kinship and the rights, obligations and discipline flowing from it; inheritance, in contrast with modern societies where inheritance is purely individualistic, in some traditional societies the group outweighs the individual, the property involved may not be tangible, but deeply personal, where it may be important to establish who will take the place of a deceased person in important relations he or she had with others; marriage, whether within or without the ordered pattern; the care and custody of children; contract and quasi contract where obligations and rights do not arise pursuant to things like offer, acceptance and consideration, but from the status of the relevant individuals within the society and the legal responsibilities arising from that circumstance; the full range of sanction for failure to abide by customary law and the settlement of disputes, whether by violence or otherwise through , for example, ritual. For this rather brief list I am grateful for the English translation of Professor Rouland's book "Legal Anthropology".[41]

[41] Rouland, N. Prof., *Legal Anthropology*, The Athlone Press, London, 1994.

CONCLUSION

There is no conclusion, perhaps only a tentative beginning. My remarks are directed to nothing more than increasing awareness of the growing importance of the addition of Aboriginal traditional law to the framework of law by which relations between people and people and the State are governed. From small beginnings in the criminal justice system, on a case by case basis, and general direction from the Parliament in select areas, there is now emerging a much broader idea. Aboriginal traditional law may be recognised as a reality without defined boundaries of application. Our attention is likely to be focused not on just our legal tenets in cases involving Aboriginals. We may be invited to learn and apply new concepts. Broad acknowledgment of that law in a Constitution may well encourage representations based upon that law requiring recognition, understanding and support. The international debate is likely to produce a significant spurt to that process. In the course of all this one of the bricks in the foundation for the reconciliation movement could be put in place.