BALAYI: Culture, Law and Colonialism – Volume 5

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Articles:

The Power We Bring: Indigenous Sovereignty and Self-Determination in the Treaty Process

Larissa BEHRENDT – is the Professor of Law and Indigenous Studies, the Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney, and the Director of Ngiya, the National Institute of Indigenous Law, Policy and Practice.

Hugh MacKay's social research has identified a trend that sees Australians hardening in their attitudes towards minorities, including Indigenous peoples. I have seen this hardening and seen how tangible it is, in the community consultations that I have been involved in as part of the work I have undertaken as a member of the ACT Bill of Rights Consultative Committee inquiring into whether there should be a Bill of Rights in the ACT. In Australia's most educated demographic, there appears to be a fear of the protection of Indigenous rights. The feedback from the community consultations has included comments such as "if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans" and "if a Bill of Rights mentions Indigenous rights and the rights of other minorities it will have no legitimacy."

…

This paper looks at the challenge to progressive change, that is, change that seeks institutional and substantive form, in light of a conservative government and an increasingly conservative electorate. In addressing that issue, it will look at the 1967 referendum and the lessons that can be learnt from that period. It will then give a broad sketch of some of the issues that are at stake in relation to a final settlement and/or a treaty and then consider some of the ways that the agenda can be advanced in this increasingly conservative age.

The Treaty Debate, Bills of Rights and the Republic: Strategies and Lessons for Reform

***George WILLIAMS* –** is Anthony Mason Professor and Director, Gilbert & Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar.

The idea of a Treaty, or Treaties, between Indigenous peoples and the wider Australian community is again on the political agenda. It has been put there by bodies including ATSIC with its elected chair, Mr. Geoff Clark, restating the call for a Treaty at the Corroboree 2000 convention. The Council for Aboriginal Reconciliation has also identified a Treaty as one aspect of the unfinished business of the reconciliation process. It recommended in its final report "That the Commonwealth Parliament enact legislation … to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved."

A Treaty could be the lynchpin of the next stage in the reconciliation process. It might open up the Australian political and legal system, which, since Federation, has largely

excluded Indigenous peoples. While a Treaty has connotations that suggest an agreement between sovereign nation states, this need not be the case. It may merely amount to an agreement between two or more parties. In many other countries, a Treaty has been signed between the settler and Indigenous inhabitants as a way of striking an agreement on governance and other issues. New Zealand provides a good example with its Treaty of Waitangi signed in 1840. A Treaty is the accepted way in many other nations of achieving an appropriate settlement. In fact, Australia is the only Commonwealth nation that does not have a Treaty with its Indigenous peoples.

The New Zealand Experience: Outcomes, Research and Institutional Arrangements

Giselle M. BYRNES – is at Victoria University of Wellington.

The means by which Europeans came to occupy New Zealand, together with what the conditions of continued occupancy might be, are among the most pressing national issues for many New Zealanders. In both official and private discourse, 'the past' is continually evoked to locate a politics of identity and a politics of place. The increase in publications devoted to New Zealand history over the past two decades suggests that to identify with the present, we must first look to reconcile – or to at least recognise – the events of our shared colonial history.

For the past 25 years or so, the Treaty of Waitangi claims process has provided Maori (the indigenous people of New Zealand), with the mechanism to recognise, address, and provide restitution for numerous historical injustices. The process has been successful for some; yet painstakingly slow for others. However, for all its problems, and the challenges that still lie ahead, that Maori claimants and the Crown are at least talking negotiation, without resorting to bloodshed and public violence, needs to be acknowledged.

Sharing Jurisdiction: Indigenous Peoples' Place in Race Discrimination Law

Hannah McGLADE – is a Nyungar yorga (woman), she is a human rights lawyer and writer with firsthand experience of the 'equal opportunity' legal jurisdictions. At present she is a PhD student and is also busy working within the education system and her son's primary school who, despite the objections of a certain prejudiced politician, are introducing the teaching of Aboriginal history and culture.

The international prohibition of race discrimination in Australia is effected by the Commonwealth *Racial Discrimination Act (1975)*, (RDA). This Act has been complemented by various state legislative responses. The question of whether these responses adequately address the serious forms of discrimination experienced by Indigenous peoples, however, has been subject to little consideration. Although self-determination for Aboriginal peoples, our right to have effective participation in matters that concern us, and respect for our culture, are now acknowledged under international human rights law, these human rights have not been reflected in the domestic legal response to race discrimination. Recent legislative changes to the RDA further alienate Indigenous peoples from these fundamental rights and consequently weaken the effectiveness of the legal response to race discrimination.

In What Ways Do Practices Within the Criminal Justice System Operate to Disadvantage Indigenous Australian Women?

Maj-Lis O'ROURKE – is Co-ordinator and Lecturer, Gummurrii Centre, Griffith University.

The Australian Law Reform Commission (1994) reports that Indigenous women are 'multiply disadvantaged' and some of the treatment they receive is particular to them as Indigenous Australian women. Arguably, while some issues are common to women, they take on a different tint when clouded with racism and sexism that indisputably separates Indigenous women from other women.

In the interest and pursuit of justice, the understanding of historical and cultural factors are indeed important to the education and practice of those officers who work in the systemic structures of the police, the legal/courts, and the correctional areas of the criminal justice system. The practice of operating on assumptions and misled notions without implementing cultural understanding invariably engages the potential for injustice (and secondary victimisation). Particular lessons to be learnt from operating on assumptions and the lack of communication skills and cultural awareness may be taken from the Robyn Kina case in Queensland.

Dealing With Friendly Governments: Legal Issues, Negotiating Strategies and Tactics for NTRBs Dealing with Labor Governments

James FITZGERALD – is a partner of Chalk and Fitzgerald Lawyers, Sydney.

… There is of course no such thing as a 'friendly government'. If there were, it is unlikely that the High Court would have been moved to make its decision in Eddie Mabo's case because a friendly government would have ensured land rights justice in Australia well before 1992.

Government might best be described as a necessary evil. American writer P.J. O'Rourke put the matter this way:

> Feeling good about government is like looking on the bright side of a catastrophe. When you quit looking at the bright side, the catastrophe is still there.

Certainly there are individuals, working within governments, who are committed to decent outcomes. But let's dispel the myth of friendly government. Ten years after the enactment of the *Native Title Act 1993* (Cth), the Preamble to the Act, with its visions of governments orchestrating negotiated outcomes of native title claims and future acts, seems almost touchingly naïve. Save for a few notable exceptions governments have not risen to the occasion and have so far largely failed to embrace the opportunity to remedy the injustices of terra nullius on the ground, where it counts. But it's not enough simply to lament the state of things. These are the circumstances. The question is still, how to maximise the positive outcomes for Indigenous people in the circumstance.

Environmental Impact Assessment – A Tool for Promoting Indigenous Interests?

Lee McINTOSH – is a solicitor with the Environmental Defender's Office (WA) Inc.

In Western Australia Aboriginal heritage is principally recognised and protected by the operation of the provisions of the *Aboriginal Heritage Act 1972* (WA). However, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has noted, this Act is based on a limited conception of Aboriginal heritage and therefore does not provide comprehensive recognition of protection to Aboriginal heritage. Specifically, the Act, focuses on the preservation of particular objects and places and does not deal with social, economic or cultural issues. Further, the Act permits a proponent to commence development without taking any prior measures in relation to Indigenous heritage, and has relatively weak enforcement mechanisms.

There is, however, another legislative tool that may be used to recognise and protect Aboriginal heritage in WA – environmental impact assessment under the *Environmental Protection Act 1986* (WA). Environmental impact assessment is the primary mechanism for the assessment of the likely environmental impacts of major development proposals and can include an assessment of the likely impacts of proposals upon Aboriginal heritage.

… This paper explores the opportunities for recognition and protection of Aboriginal heritage in the environmental impact assessment process, outline the environmental impact assessment process (including the avenues for participation in the process), and describes the limitations of the process.

'A Comfortable Existence': Commercial Fishing and the Concept of Tradition in Native Title

Lisa STRELEIN – is Research Fellow and Manager of the native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Fishing was recognised in the *Native Title Act 1993* (Cth) (NTA) as one practice that was likely to be protected by the recognition of native title. However, the right of native title holders to commercially exploit their native title rights for individuals or community economic development has not necessarily been accepted as a natural extension of the recognition of native title. In fact, commercial aspects of resource use have often been presumed to be excluded from the recognition of native title here and overseas, preferring to limit native title rights to subsistence and ceremonial use. This is so despite the inherently commercial environment in which much native title business occurs.

I was intrigued when I read decisions of Canadians courts in relation to treaty rights which often balance subsistence and commercial use by saying that where Indigenous peoples could establish a right to trade it would be a right to enjoy a moderate livelihood from the commercial exploitation of their native title resource rights but would not extend to the open accumulation of wealth. Perhaps this is a reflection of a law that is uncomfortable with a concept of Indigenous rights that respects Indigenous peoples not just as a cultural and land holding group, but as an economic and political community.

From Rights to Relics: A Critical and Comparative Analysis of the Role of 'Traditional Laws and Customs' in Native Title Doctrine

Simon YOUNG – is Lecturer in Law, Queensland University of Technology/Visiting Lecturer and PhD student, University of Western Australia.

And Richard BARTLETT – is Professor of Law, Western Australia.

The inestimable importance of understanding Indigenous histories and preserving Indigenous cultures is beyond argument, both in respect of the needs of contemporary Indigenous peoples themselves and the needs of the broader national community – which in its 'press' for conformity relies increasingly upon the 'varying currents' of subcultures for depth and beauty. Yet in the course of the global re-examination of Indigenous affairs in the last 30-40 years, there has been growing legal recognition of an important anthropological certainty: the inevitability of evolution in Indigenous societies and their relationships with land. This has perhaps come as something of a conundrum to courts, legislatures and policy-makers, now working as they do within the broad parameters of a general intellectual commitment to the preservation of Indigenous culture.

Given this context, in recent years many of the post-colonial jurisdictions have, one-by-one, uncovered a serious and very difficult question: to what extent are inherent Indigenous rights to be conditioned upon, or measured by, the maintenance of 'tradition'? It is a question that squarely engages fundamental conceptions of the relationship and mutual rights and responsibilities of colonising populations and Indigenous peoples. It is a question that invites reflection upon the conspicuous dichotomies found in the history of relevant legal and social theory: assimilation v separatism; 'civilisation' v protection of the 'primitive'; equality v pragmatism; racism v romanticism; and idealism v self-interest. It is a question that, ultimately, illustrates the need for the law to consciously self-examine.

Prescribed Bodies Corporate in the Post-Determination Landscape

Alison MURPHY – is former Principal Legal Officer, Torres Strait Regional Authority.

The Torres Strait Regional Authority (TSRA) is the Native Title Representative Body for the Torres Strait region that stretches 150 km from the tip of Cape York Peninsular in Far North Queensland to the south-west coast of Papua New Guinea. The northern-most islands within the TSRA's jurisdiction lie less than 5 km from the Papua New Guinea coastline.
The Torres Strait is home to the island of Mer, over which the historic Mabo decision was made in 1992. Since that date there have been 14 determinations of native title over land in the Torres Strait starting with the communities of Saibi and Moa in 1999, followed by the communities of Masig, Poruma, Warraber, Mabuiag and Dauan in 2000, five determination in favour of the Kaurareg people in May 2001 and the islands of Waier and Dauar, originally part of the Meriam people's application in the Mabo case, in June 2001. In two weeks' time, the communities of Erub, Ugar, Badu, Boigu, Gebar, Kulkalgal and Iama will receive the Federal Court of Australia and the parties of their native title determination applications on to their islands for consent determinations over their traditional lands.

Each of these communities has been the centre of intense native title related activity over much of the last six years. During that time these communities were inundated with visits by their lawyers and those lawyers acting for other parties, anthropologists, visiting parties, negotiators from the State of Queensland, representatives from Commonwealth agencies and members and case managers from the National Native Title Tribunal. They have been required to mediate, to negotiate and in some instances to litigate and to do so within timeframes determined almost entirely by external factors. They have been asked to understand the limitations of the process and the artificial boundaries that it draws and to adjust and re-adjust to a constantly evolving legal framework.

Book Review: *Indigenous Human Rights*

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Reviewed by Megan DAVIS, International Lawyer and Principal Researcher, International Trade and Indigenous Peoples, Jumbunna Indigenous House of Learning, Visiting Fellow UNSW, LLB/BA (UQ) GDLP LLM (ANU).