

BOOK REVIEW

TOWARDS LEGAL PLURALISM IN AUSTRALIA

Australian Law Reform Commission: Research Papers 1-15 on the
References on Aboriginal Customary Law, Sydney 1982-1984
(limited circulation).

- RP 1 Promised Marriage in Aboriginal Society.
- RP 2 The Recognition of Aboriginal Customary or Tribal Marriage: General Principles.
- RP 3 The Recognition of Aboriginal Tribal Marriage: Areas for Functional Recognition.
- RP 4 Aboriginal Customary Law: Child Custody, Fostering and Adoption.
- RP 5 Aboriginal Customary Law: Traditional and Modern Distributions of Property.
- RP 6 Aboriginal Customary Law and the Substantive Criminal Law.
- RP 6a Appendix: Cases on Traditional Punishments and Sentencing.
- RP 7 Aboriginal Customary Law: the Sentencing and Disposition of Offenders.
- RP 8 Aboriginal Customary Law: a General Regime of Recognition.
- RP 9 Separate Institutions and Rules for the Aboriginal People: Pluralism and Reverse Discrimination.
- RP 10 Separate Institutions and Rules for Indigenous Peoples: International Prescriptions and Proscriptions.
- RP 11/12 Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals.
- RP 13 Aboriginal Customary Law: Problems of Evidence and Procedure.
- RP 14 The Proof of Aboriginal Customary Law.
- RP 15 Taking the Advice of Aboriginal Communities: Forms and Procedures.

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European settlement was no less destructive for Aboriginal societies in Australia than in the Americas. On the arrival of the first fleet in 1788 there were approximately 300,000 Aboriginal inhabitants, in around 500 tribes, whose ancestors had resided on the continent for perhaps 40,000 years. Today there are about 167,000, constituting 1.1% of the population, and they feature disproportionately in all the indicia of deprivation, poverty

and alienation from the dominant society. Only recently has the majority begun to show much concern at this state of affairs. One result of that concern was a Constitutional amendment of 1967 empowering the Commonwealth Parliament to legislate for the people of Aboriginal race for whom it might be deemed necessary to make special laws. Another was the 1977 Reference of the Commonwealth Attorney-General to the Australian Law Reform Commission of the question of the recognition of Aboriginal customary law.

To some extent Australia has been a legally pluralist territory for an extremely long time, since the various Aboriginal peoples interacted but did not follow one single law. With the creation of the modern state the character of its legal pluralism changed. Today there is on the one hand a unitary, although federal, state law, which gives the appearance of being effective in ordering the social relations of the majority of the population. Experience elsewhere suggests it is unlikely that it coincides precisely or extensively with the folk laws of the majority, but nevertheless the state law asserts as usual a claim to monopoly of legal regulation. On the other hand are the Aboriginal laws, greatly changed by the partial absorption of Aborigines into the economy of the state, but existing in fact as folk laws. The state law ignores Aboriginal law except in a few instances, and therefore has the tendency to suppress it.

Within this context the Australian Law Reform Commission, an agency of the Commonwealth for the reform of federal state law, was given the Aboriginal Customary Law Reference. Research paper 11/12 (p. vii) reproduces the full Reference. This first mentioned a number of factors, such as Aborigines' welfare, their basic human rights, their right to retain their racial identity and traditional life-style or to adopt a European life-style if they wished, the difficulties which had emerged in the application of the existing criminal justice system to Aborigines, and the general rights of all Australians to equitable, humane and fair treatment under the criminal justice system. It then asked the Commission to inquire into and report upon "whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only" and, in particular, the possible application of Aboriginal criminal law by the existing courts or by Aboriginal communities, and "any other related matter". The Commission recognizes that some of these questions may make unjustified assumptions, for example that "Aboriginal people ... have already formulated a uniform approach for reform of the legal system to accommodate Aboriginal customary law and that it is simply a matter of implementation". This assumption it finds to be "unrealistic", and the question

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based on it unanswerable (RP 11/12, p.211). Discussion of the Reference has frequently spoken of the possible "recognition" of Aboriginal customary law, a term which the Commission acknowledges to be "highly ambiguous" (RP 8, p.33).

The not very well ordered instructions, together with the legal and political framework within which the Commission operates, set the limits of the possible directions of its work. Its products illustrate sharply the manner in which the aspiration for practical achievement in specific political circumstances circumscribes the possible modes of development, foreclosing many possibilities which theory might advocate. In the first stage towards the construction of a pluralist legal system in a nation such as Australia, indigenous minorities and their supporters organize political protest against the state's antagonism to their folk laws. The conditions for effective political strategies generally entail acceptance of the existing constitutional order, and this limits and channels the types of policies advocated. Success in the first stage leads to the emergence of the second, in which one or more state agencies (law reform bodies, courts, executive agencies) investigate the adjustment of state law to take account of indigenous folk law. The variety of policies open for serious discussion is likely to be further limited here, since some which could be constitutionally permissible will be unacceptable politically to the dominant class.

It is not possible for a state agency such as the Australian Law Reform Commission, staffed by members of the majority group, to promote a "deep" legal pluralism in which state law would be but one element and Aboriginal law a separate, independent element. Neither is it politically feasible in Australia to propose that the state surrender, or deny that it has ever been entitled to, a degree of the sovereignty it has hitherto asserted over Aborigines. The Commission has been able to consider only the possible amendment of state law so that it will recognize or incorporate Aboriginal law. Moreover, the Commission interprets the Reference as limiting it to the consideration of possible state laws which will affect Aborigines alone. Repeatedly the juxtaposition of existing state law with Aboriginal social circumstances raises issues as to the appropriateness of particular state laws to all Australian circumstances, but these opportunities for creative criticism of the general law are set aside. Further, the Commission has had to take account of ethnocentric attitudes within the European Australia of which it is an instrument. The attitudes are vividly, if unconsciously manifested in many passages in RP 6a, a collection of cases, where the paternalism of the judges shines steadily through one judgment after another, often well-meant, but nearly always deeply condescending. Consequently the Commission has to argue care-

fully the case that legal pluralism of the limited type which it tentatively recommends is not necessarily and in principle wrong (cf. the submissions referred to in RP 9, p.52, n.186).

The wider possibilities will not disappear from all political consciousness. In the long term the conscious development of Aboriginal law can be achieved only by the Aboriginal communities. They, and the National Aboriginal Conference, have of necessity held aloof to some extent from the Commission. They cannot accept that state law may confer legal effect on their law for it is important to them to assert its existing, independent validity. They must be wary of reforms in state law which, while purporting to recognize Aboriginal law, assist further penetration by the state into their communities and reduce further their own control of their laws. The Commission is aware of these considerations. It has attempted to consult intensively with Aborigines, but it does not claim to represent their aspirations, and it states that "whether the Commission's final proposals are acceptable to Aboriginal people likely to be affected by them is a separate question which will have to be determined by the Government" (RP 8, p.13, n.34a).

Within its boundaries the Commission has considered ways of developing Australian law towards legal pluralism. It does not entirely reject the improbable notion of an age-old, static "traditional" law existing immediately prior to European settlement, but it recognizes that profound and irreversible changes have occurred since. It rejects the non sequitur that because of these changes no recognition should be accorded to existing Aboriginal folk law. It recognizes that any attempt to enforce directly the imperatives of Aboriginal law (such as observance of promises of marriage or "criminal" prohibitions) would transform it by changing its basis of effectiveness. It accepts that even state "recognition" of institutions of Aboriginal law may produce change by giving them novel consequences, so that for example the recognition of customary marriage as valid legal marriage could result in the imposition of non-customary duties of maintenance on Aboriginal spouses. However, these conclusions do not justify inaction. Aboriginal society and its folk laws are today being rapidly changed by external factors. It should be possible to influence this change in desirable directions, while having no illusions about the capacity of government, especially an alien government, to conduct beneficial social engineering.

The Research Papers are interim and tentative documents intended to report progress and stimulate discussion. The Commission has taken extensive oral and written evidence, wrestling with problems of methodology and communication, especially when seeking, as outsiders, information on matters which are sensitive

and sometimes confidential. It has surveyed thoroughly and carefully the literature of law and anthropology. It has surveyed the experiences of other nations in so far as they seemed relevant and were reasonably accessible: most references are to the USA, Canada and Papua New Guinea, although there is discussion of the experiences of anglophone Africa and India. It has considered the relevance of legal and ethical standards embedded in Australian constitutional law and international law. The final report will be a substantial and valuable text on legal pluralism, and so a contribution to scholarship independently of its effect on Australian legal development.

The work has become concentrated in two areas of law, family law and the criminal justice system. On these the tentative conclusions of the Commission reject the proposal of statutory injunctions for the application of Aboriginal law in very general categories of cases. This device, adopted in many British colonies and in Papua New Guinea, places responsibility on the courts for the development of a state-administered customary law. It may be doubted whether Australian judges would have the understanding of and respect for Aboriginal law which, for example, Ghanaian judges have shown for the folk laws of Ghanaian communities. The Commission has also rejected the proposal of the enactment of detailed rules intended to express Aboriginal law fully on particular issues. This would have required more knowledge than currently exists in the Australian legal community, and a willingness to make a large number of specific decisions on the forms which state-applied Aboriginal law should take. Moreover, the Commission argues, that

to attempt to codify customary law or try and make it work in what is, in this context, an artificial way is likely to lead to its complete destruction. Attempting to enforce Aboriginal customary law in a way in which it never operated in traditional society risks undermining completely whatever traditional law and authority still exists in such communities. For Aboriginal law to continue to be a reality it must remain in Aboriginal hands.

The approach tentatively adopted is that of "functional recognition". This entails the enumeration of fairly specific questions (e.g., whether a couple are married for the purpose of determining the legitimacy of their children, or what is the standard of reasonable self-control when an Aborigine accused raises the defence of provocation), with the provision that Aboriginal law is to be ascertained and applied to these issues when the party is an Aborigine. The selection of the issues, and the many other detailed questions which arise from this approach (for example, who should be considered an Aborigine, how exactly is

Aboriginal law to be ascertained) are discussed, and tentative conclusions advanced.

From these papers we can thus discern the route towards legal pluralism which Australia is likely to choose, and find a full account of the arguments relative to each step along the route for some way into the future. The discussion should be of interest particularly to those concerned with raising the status of folk laws of indigenous minorities in technologically complex nations, but will be of value to all students of legal pluralism. It is to be hoped that many will respond to the Commission's requests for comment and discussion.