OPINION

From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems

Indigenous peoples did not have a say when the British invaded our country. Nor did we have a voice when the Constitution was drafted. Our views were not sought at the time of federation. Even though the 1967 referendum recognised us as citizens for voting and taxation purposes, it is still questionable whether we have the same opportunities to participate as other, non-Indigenous citizens.

Inevitably we are compelled to conform to the dominant Western legal and political systems that were not of our making, that were imposed upon us, and that are fundamentally at odds with our Indigenous cultural and politico-legal systems. At heart is the undeniable fact of our dispossession, and the role of law as a central colonising discourse in this dispossession. As one writer has said in relation to American Indigenous peoples:

> law, regarded by the West as its most respected and cherished instrument of civilisation, was also the West's most vital and effective instrument of empire during its genocidal conquest and colonisation of the non-Western peoples of the New World . . .[1]

There is an urgent and compelling need to consider seriously the role for Indigenous law and custom within the Australian legal framework. At present, the burden of past preconceptions is limiting the degree to which Indigenous cultural and politico-legal systems can function in a meaningful manner. The colonisers' world views did not accept that Indigenous peoples had systems of law. We were not considered to possess an ordered and sophisticated means of decision making, of social control, or moral and ethical codes of behaviour. Our systems were considered so low on the scale of human activity that they could not be considered as legitimate. Some still prefer to view Indigenous society as being in a state of anarchy, or in a so-called Hobbesian condition of brutality.[2]

Supposedly, more enlightened views sought to depict our societies as possessing a set of principles, or traditions known as 'lore'. This 'lore' was described as a body of codes and prescriptions — usually unwritten — which was a defining criterion for peoples who had not, in the scale of humankind yet attained the status of proper, civilised societies which had law. This notion of Indigenous peoples' 'lore' was another of the colonisers legitimising charters for their denial of our fundamental rights — a denial based on the perceived superiority of Western legal, social, economic and political systems.

The machinery of the Australian legal system has acted as the legitimising arm of colonialism. It has operated through its body of codes, rules, regulations, and enactments to limit and define what is legitimate and what is unacceptable. Governments and the judiciary, the guardians of social behaviour, have predominantly been confined by their own institutions in their understanding of the world-views of others and have generally reacted by delegitimising what they do not understand. The result has been that the recognition of Aboriginal customary law had been premised on its conformity with the Australian legal system. The *Mabo* decision represents a possible turning point in the recognition, by the imposed Western legal system, of Aboriginal law. It overturned, at least in part, a particularly vile aspect of the colonising discourse which had denied the existence of Indigenous property rights. The *Native Title Act 1993 (Cth)* and the *Racial Disciminiation Act 1975 (Cth)* provide a degree of protection to those rights being enjoyed. However, the recognition of native title has its limitations. Among these is that, ultimately, native title is only recognised to the extent that the existence of that title does not interfere with the common law. This requirement for a degree of conformity limits the extent to which Aboriginal law is seen as legitimate. This is apparent in the comments of Mason CJ in the *Walker* case:

> In *Mabo [No.2]*, the Court held 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. There is no analogy with the criminal law.[3]

There appears an addiction in the Australian legal system of isolating components of Aboriginal law in order to place them into the artificial compartments which western legal systems are familiar with. This process of artificially selecting what is legitimate provides compromised justice for Indigenous people. If native title is a title based on our laws and customs, it is an absurd position if our title to land is recognised but the laws and customs which give meaning to that title are treated as if they do not exist. The Australian legal system must take the further step of accepting that native title is inseparable from the culture which gives it its meaning. As Kulchyski eloquently states:

> Aboriginal cultures are the waters through which Aboriginal rights swim.[4]

The Commonwealth Government's response to the *Mabo* decision, particularly through the *Native Title Act* and the social justice package, creates a climate in which more comprehensive recognition of our traditional systems can occur. There is still opposition to the *Native Title Act*, mainly by governments and others who continue to believe in the superiority of their own laws and actions — founded upon the original fact of their dispossession of Indigenous peoples. There are also some Aboriginal and Torres Strait Islander people who oppose the *Native Title Act*, viewing it as a further attempt by government to define and regulate us with their legal statutes. My view is that the recognition of native title and the enactment of the *Native Title Act* represents an opportunity for governments and decision makers, and indeed places an obligation on them to recognise our customary laws and society in a more meaningful manner. It is now up to governments, decision makers, business and industry, and all those who would have denied our rights, to acknowledge this, to give legitimacy to our traditional systems and to incorporate an understanding of our Indigenous laws and customs into their world views.

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References

1. Williams, Robert, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest*, OUP, 1990, p.6.
2. See for example Morgan, H., 'Mabo and Australia's Future', *Quadrant*, December 1993, p.66.
3. *Denis Walker v The State of New South Wales*, High Court of Australia, 16 December 1994, unreported, per Mason CJ at 4. [See Brief on this case at p.39 of this issue — Ed.]
4. Kulchyski, P., *Unjust Relations: Aboriginal Rights in Canadian Courts*, OUP, 1994, p.13.