Chapter Three

Two Rules of Law?

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

The interests of the Aboriginal peoples of Australia had for decades been of scant concern to most Australians, but the whirligig of time has now placed those interests in the centre of the political stage. The questions of what rights and privileges should be accorded to them have provoked bitter and divisive controversy. Claims which not long ago would have been ridiculed as wildly extravagant are now given serious consideration. Some of the claims that will be discussed in this paper, if fully accepted, would tend to destroy the integrity of Australia as a nation.

The claims which will be discussed are of a political, rather than a material kind, although in the ordinary course of affairs it often happens that an argument of political principle carries with its acceptance the prospect of pecuniary advantage. Stated in descending order of significance, those claims are for the recognition of Aboriginal sovereignty, the right of the Aboriginal peoples to self-determination and the recognition of Aboriginal law.

The claim that sovereignty resides in the Aboriginal peoples has been rejected by the High Court.[1] However, in some quarters it is still argued that it should be recognised that the Aboriginal peoples are sovereign, or ought to be granted sovereignty, at least in some parts of Australia. One argument is that the acquisition of sovereignty over Australian territory by the British Crown was illegal, because it resulted from the wrongful dispossession of the Aboriginal peoples. Colonisation, it has been said, was "a process of domination, subjection and genocide".[2] Statements of this kind do little justice to the courage, endurance and enterprise of those men and women who carried out the process of colonisation, and as a result created some of the world's great democracies; but whatever views may be held nowadays, it cannot too often be repeated that "nothing is more unfair than to judge men of the past by the ideas of the present".[3] The destruction of Aboriginal society in Australia occurred not because it was planned or intended, but because it proved to be an inevitable consequence of the collision which occurred between the culture of the colonists, who came from what was the most technologically advanced country in the world, and that of the Aboriginal peoples, whose society, well adapted though it may have been to local conditions, was that of the Stone Age.

It is understandable that the Aboriginal peoples should be embittered by what occurred, although it is difficult to see how reconciliation is advanced by constant reiteration of the evils of the society with which one seeks to be reconciled. On the other hand, the assertion that the British occupation of Australia was illegitimate, or at least morally wrong, seems to be remarkably effective as propaganda in persuading the general public to support claims for Aboriginal rights. I doubt however that such support extends to claims to the recognition of Aboriginal sovereignty.

The decisions of the High Court are also inconsistent with the further argument that there remain some areas of Australia -- tribal areas perhaps -- where Aboriginal sovereignty has not been extinguished, but survived and coexists with the sovereignty of the Commonwealth; or alternatively, that the Aboriginal peoples should be regarded as a domestic dependent nation enjoying limited sovereignty. The concept of a domestic dependent nation was developed in the United States, to take account of the fact that treaties had been made between the white settlers

and certain Indian tribes, but for at least one hundred years it has been settled law in the United States that the so-called nations are not independent, but are subject to the laws made by Congress. There was no similar reason to regard the Aboriginal peoples of Australia as a domestic dependent nation.

A further difficulty with all the Aboriginal claims to sovereignty is that it is doubtful whether sovereignty as understood by European jurisprudence existed in Australia before white settlement. That question need not be discussed, for if Aboriginal sovereignty did exist it has been extinguished.

Overlapping these claims -- and giving more reason for concern -- is the assertion that the Aboriginal peoples are entitled to the right of self-determination. The right of all peoples to self-determination has been recognised by international conventions. The concept of self-determination is difficult to define, but up to the present the right has been understood as limited to the peoples of former colonies which have regained their independence, although the situation of the peoples of East Timor and Irian Jaya suggests that the principle has not been uniformly applied even in that situation.

An argument now advanced is that the right of self-determination should also be exerciseable by peoples living within the framework of an existing nation or state, and thus by the Aboriginal peoples of Australia. It is argued that this will be the next development of the doctrine by the United Nations.

Although it seems unlikely that the great powers would agree to the application of the principle of self-determination in a way that would infringe the territorial integrity of a sovereign state, one must be hesitant to predict the attitude of the various committees of the United Nations, to which claims for self-determination might be brought pursuant to international obligations ill-advisedly incurred by previous Australian governments.[4] However, there is no doubt that any claim by the Aboriginal peoples to determine their own political status, and to assert a right to sovereignty or independence, must be rejected as contrary to the interests of Australia as a whole.

On the other hand, a claim by the Aboriginal peoples to pursue their economic, social and cultural development within the law, and to take part in the decision-making processes which affect themselves, in the same way as other Australians may do, and within the legal structure of the nation, must of course be supported. It is only reasonable that the Aboriginal peoples should be involved in the processes of making the decisions that affect their health, education and financial position, and should indeed make those decisions whenever that is practicable.

An attempt to involve them in this way was made by the creation of the Aboriginal and Torres Strait Islander Commission, although it appears that that attempt has not been successful. It may well be appropriate to establish separate local government bodies in areas in which Aboriginal or Torres Strait Islander peoples reside, so that those peoples could join in controlling the local government bodies in the same way as other inhabitants of local government areas can do. All this must however be done within the ordinary law.

Just as any attempt to put the Aboriginal peoples outside the Australian nation must be firmly opposed, so should any attempt to grant Statehood, or any degree of autonomy, to any particular group of the Aboriginal peoples. Those peoples do not occupy a uniform situation in Australian society. The criteria for determining who is an Aboriginal person for statutory and administrative purposes are broad and flexible. Only a small degree of Aboriginal descent will suffice if the person genuinely identifies himself or herself as an Aboriginal and is accepted as such in the community in which he or she lives.[5] Thus many people will be regarded as Aboriginals

although they had some ancestors who were not Aboriginal, and indeed although they are predominantly of European descent.

The Aboriginal peoples and Torres Strait Islanders now comprise about two per cent of the total population; the number has increased in recent years since more people of mixed descent now claim to be Aboriginal. Many of these Aboriginal peoples live in urban areas; only a minority live under tribal conditions. It seems safe to infer that a large proportion of the persons classed as Aboriginal are of mixed descent, and that only a small proportion maintain their traditional lifestyle. Even those who maintain that lifestyle will be likely to have had some contact with Europeans, which will have affected their culture and traditions to a greater or lesser extent. Others have abandoned the traditional lifestyle and follow the same customs as other Australians; some of this class have become very successful. Others dwell in country towns or in Aboriginal communities where traditional laws and customs have little or no place.

It would obviously be impracticable, as well as unjust, to grant sovereign or dominant power to the Aboriginal peoples in areas, such as country towns, in which persons entirely of European descent were as numerous as the descendants of the Aboriginal peoples, many of whom would themselves have had European ancestors. In other words, the only areas in which it would be possible to consider the grant of autonomy, whether in the form of Statehood or otherwise, would be those sparsely settled areas such as Arnhem Land and parts of central and north-western Australia, and perhaps the islands of the Torres Strait and some other islands off the coast of northern Australia. The grant of autonomy, either total or limited, in those areas would create a serious risk for the future of Australia.

One of our great natural advantages, and one that has played a part in enabling Australia to enjoy peace and stability of a kind not commonly seen elsewhere, is the fact that our ancestors achieved their goal of a nation for a continent and a continent for a nation. Experience elsewhere has shown that associations of states, federal or otherwise, do not endure when one state is composed of persons distinctly different in race, religion or culture from those of another. Yugoslavia and the former USSR provide recent examples. The future existence of Australia would be put at risk if statehood or any other form of autonomy were granted to small communities, chosen on the grounds of race, in areas of great strategic importance to this country. The risk that in the future a hostile power might obtain a foothold in such areas must surely be obvious.

The argument that Aboriginals were not subject to the ordinary criminal law was raised early in the 19th Century and accepted by one or two quixotic judges, but the contrary position was established by a decision in 1836.[6] However, not unnaturally *Mabo*[7] raised new hopes that the existence of Aboriginal law should be recognised. In that case it was said that the native title which the Court there held to exist had its origin in the laws and customs of the Aboriginal peoples, and that its nature and incidents must be ascertained by reference to those laws and customs. Thus, it has been argued that the Court had recognised that the traditional laws and customs of the Aboriginal peoples continued to be preserved and recognised by the law.

However, it was held in *Mabo* that native title could be extinguished by the valid exercise of power by the Parliament or Governor in Council of Queensland, and there is nothing in the decision that casts any doubt on the fundamental doctrine that the statutes of the Commonwealth apply to all Australians, including Aboriginals, and that the statutes of the States apply to all Australians within their respective jurisdictions. Some statutes passed after the *Racial Discrimination Act* 1975 of course will be invalid if they are inconsistent with that Act.

The High Court has more recently, in the case of *Walker v. New South Wales*,[8] rejected the notion that the Parliaments of the Commonwealth and the States lack the power to legislate over the Aboriginal peoples, and has held that enactments of those legislatures apply to all inhabitants of the Commonwealth or State unless some are expressly excluded. It was accordingly held that if the customary criminal law of the Aboriginal peoples survived British settlement, it has been extinguished by criminal statutes of general application. The same must be true of statutes on such subjects as succession and matrimonial causes, to take only two examples. It is most unlikely that it would be held that, except in relation to native title, any of the tribal laws of the Aboriginal peoples has survived the overriding effect of the general statute law.

Nevertheless it is still argued that Aboriginals should be subject to their own traditional laws, and not to "white fella law" as it is derogatively called. It was pointed out in *Walker v New South Wales*[9] that it is a basic principle that all people should stand equal before the law. However, supporters of the view that the traditional law of the Aboriginal peoples should still be applied argue that the application of European law brings about only formal equality, and that true equality embraces difference. This argument appears remarkably similar to the separate but equal doctrine which was formerly applied in the United States but has since been discredited as racially biased.

The essential principle that all people are equal before the law does not mean that the law must treat all people alike. It may, for example, give special benefits to widows or war veterans, or impose special disabilities on bankrupts or convicted felons, or require a higher standard of care from persons engaged in dangerous activities than from others. Differentiation of this kind is consistent with principle when it is made on rational grounds, to meet a particular need, reward merit or discourage anti-social behaviour.

It would however be contrary to basic principle to grant special rights to, or impose special obligations on, people simply because they belonged to a particular race, and irrespective of individual need or desert. It would be wrong to place all the members of the disparate class constituted by the Aboriginal peoples in a separate situation under the law. It is involved in the rule of law that rights and obligations are derived from the law that covers the whole community, and the notion that special classes of society should have laws of their own belongs to an early and outmoded stage of legal development.

Recent history has shown, and current events continue to illustrate, how dangerous it is to discriminate on the ground of race. Discriminatory laws which are benevolent in intention can easily become paternalistic -- something that is now deeply resented -- and once discrimination is accepted on the ground of race it is easy for the discrimination to cease to be benevolent. The *Racial Discrimination Act*, which gives effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*, admits an exception to its ban on discrimination on the grounds of race. The Convention provides that:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring special protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of special rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

The members of the Aboriginal race, like all other people in Australia, are entitled to the protection which our law gives to human rights and fundamental freedoms, and it is not

necessary in order to secure to those peoples the equal enjoyment of human rights and fundamental freedoms that they should be governed by their own traditional customary law. Further, it is clear that the Convention would not justify the maintenance for an indefinite period of a special body of law for a particular racial group.

Serious difficulties of a practical kind would arise if it were sought to apply Aboriginal customary laws to persons of the Aboriginal race. One question would be whether such laws should be applied only to members of the Aboriginal race living in tribal conditions, or whether they should be extended to all members of the Aboriginal race in the wide understanding of that expression which, as I have said, has been accepted, including those living in cities, country towns and communities artificially created from groups of Aboriginal persons of different tribal origins.

There are further practical difficulties. The customary laws were not uniform amongst all the groups or clans into which the Aboriginal peoples were divided, although no doubt the different customs had common characteristics. Some of the Aboriginal customary laws would be quite unacceptable in a modern society. For example, they were enforced by punishments which included beating, spearing and even death. They required "pay back" which might involve a violent assault on an innocent relative of a wrongdoer. Traditional marriage laws enabled a man to have several wives. Marriages were arranged by the betrothal of infants, and young girls were required to marry old men, whether the girls wished it or not. It is quite obvious that, if it were decided to recognise Aboriginal customary laws, it would be necessary to modify them so that those which were regarded as contrary to current conceptions of human rights and acceptable behaviour were not applied.

As everyone is aware, the Aboriginal peoples are by no means the only considerable section of Australian society which consists of persons who might claim to be entitled to special treatment on the grounds of race, origin or religion. There are many more Australian residents who were born in Asia than there are persons of Aboriginal descent. There are about as many persons born in Yugoslavia. There are many other significant racial groups, including South Sea Islanders. There are persons practising a religion whose members elsewhere are governed by religious laws. Although it can no doubt be argued that the Aboriginal peoples stand in a special situation, it would be foolish to fail to recognise that, if they were given the right to be governed by their own traditional laws, similar claims might well be made by other sections of society.

Moreover, some Aboriginal customary laws are secret. In some cases, the secrets may be disclosed only to women and in other cases only to men. It is a fundamental principle of our law that a court may not hear evidence or receive submissions from one side which are not disclosed to the other. Already attempts have been made to persuade the courts to give effect to the customary Aboriginal laws of secrecy, and to hold that a man could not receive evidence of women's business or a woman hear evidence of men's business.[10]

These attempts have met with some success, but with great respect, the wisdom of embarking on this course must be doubted. If these customary laws were applied, the results would be absurd as well as unjust: it would mean that in some cases only a male judge or a female judge (with male and female counsel respectively) could hear the case. In other cases two judges, one of either sex, might have to decide the matter, neither being free to disclose some secrets to the other, and trial by jury would be impossible. The truth is of course that Aboriginal traditions of this kind are inconsistent with the proper conduct of contemporary legal proceedings.

Further, much of Aboriginal customary law would be so inappropriate to the situation of those Aboriginal people who now live in cities and towns that it would be demeaning and unjust to

subject them to it against their will. One suggestion that has been made is that Aboriginal customary law should be applied when all parties, being Aboriginal persons, consent. The proposition that citizens should have the right to choose that they should not be governed by the ordinary law is quite unacceptable. The truth is that if Aboriginal customary law were to be given recognition, the whole body of that law could not be recognised, but selection and modification would be necessary, and those laws which were to be applied could not be made applicable to all of the Aboriginal peoples but only to some.

It would not be inconsistent with the principle of equality before the law that, where members of the Aboriginal race have special needs, those should be recognised by special rules laid down by the law. An example is provided by the judge-made rules which are designed to ensure that Aboriginal persons are sufficiently protected during interrogation by the police.[11] Such rules may be justified, not because the persons protected are of a particular race, but because they have special disabilities of language, education, or understanding.

Further, the law is flexible enough to allow the courts to consider the special situation of an Aboriginal party where that is relevant. For example, if provocation is in issue in a criminal trial, and the accused is an Aboriginal person, the question is whether an ordinary Aboriginal person, living in the conditions of the accused, would have been led to act on the provocation, and not whether a white person would have so acted.[12] The courts have shown sensitivity to the Aboriginal belief that a dead body should not be mutilated, by ordering that no autopsy should be performed in cases where the death was not suspicious.[13]

In sentencing, also, all the circumstances, including the situation of the offenders, must be considered. As the courts have recognised, the sentencing of Aboriginal offenders presents particular difficulties. One difficulty arises from the fact that a tribal or semi-tribal Aboriginal person may have received, or may be likely to receive, a traditional punishment for the offence. If the accused has in fact been physically punished before he comes to court, that would be a matter that could properly be considered by the judge in imposing a sentence, just as a judge could properly consider the fact that a white accused had been assaulted and seriously injured by a relative of the victim.

Judges, in an attempt to do justice in discharging the difficult role of sentencing tribal and semi-tribal Aboriginal persons, have gone further. In one case, at least, a judge suspended sentence to allow for the infliction of tribal punishment, but the error of that course was demonstrated when the members of the tribe declined to inflict a penalty.[14] In other cases, judges have held that the punishment imposed should recognise the probability that tribal punishment will be enacted.[15]

There are dangers in speculating in that way. Although the courts have emphasised that they are not to be taken as sanctioning tribal retribution, their actions do obviously recognise, rather than attempt to discourage, the practice. It is clear enough that a court should not direct that a traditional punishment be imposed, or make an order conditional on the traditional punishment taking place; and with great respect to the experienced judges who have followed the practice of taking into account the possibility of tribal punishment, it may be doubted whether that course is consistent with the rule of law. On the other hand, if the Aboriginal community can contribute to the rehabilitation of the offender in other ways, that should obviously be taken into account.

Another difficulty that arises in sentencing is caused by the dilemma that on the one hand, the courts wish whenever possible to avoid putting an Aboriginal person in prison, and on the other hand, recognise that there might be a public backlash if such a person commits a serious offence and is not properly punished. Clearly the ordinary criminal law is capable of facing these difficulties. It has rightly been held[16] that the same sentencing principles are to be applied to

Aboriginal persons as to all others, but that in applying them consideration must be given to any special factors that exist only by reason of the fact that the offenders are Aboriginal persons.

It is neither necessary, nor desirable, to apply to the Aboriginal peoples the rules of their customary law rather than the general law. National unity and the principle of equality before the law should not be sacrificed to sectional interests, and in any case the economic and social position of the Aboriginal peoples is not likely to be improved by doing so.

No doubt the Aboriginal peoples should be encouraged to take pride in their culture, and to develop and adapt it to modern conditions, but it must be hopeless, in this space age, at this time of accelerating social change, to endeavour to preserve, as if fossilised, a system of laws that developed to meet the needs of a primitive nomadic society. The attempt to uphold Aboriginal customary law is one aspect of the notion that the Aboriginal peoples will benefit if they continue to be treated as a class separate from the rest of the community, which must necessarily be a dependent and disadvantaged class. Surely it is better, in their interests and the interests of Australia, that they should be encouraged and assisted to take their place as equal members of Australian society, subject to, and protected by, the laws that apply to all of us.

Endnotes:

1. *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, at 31-2, 78-9, 121; *Coe v. The Commonwealth (No. 2)* (1993) 68 ALJR 110, 114-5.

2. *Majah: Indigenous Peoples and the Law* (1996) ed. Bird et al, p. 1.

3. Cited Tuchman, *The March of Folly* (1984) at p. 4.

4. For example, the *First Optional Protocol to the International Covenant on Civil and Political Rights.*

5.

See *The Commonwealth v. Tasmania* (1983) 158 CLR 1 at 274; *Gibbs v. Capewell* (1995) 128 ALR 577.

6.

R v. Murrell (1836) Legge 72.

7.

Supra, n. 1.

8.

(1994) 182 CLR 45.

9.

Ibid.

10.

WA v. Minister for Aboriginal Affairs (1994) 54 FCR 144; *Norvill v. Chapman* (1995) 133 ALR 226; and see *The Australian*, 21 October, 1997.

11.

R v. Anunga (1976) 11 ALR 412, 414-5.

12.

Jabarula v. Poore (1989) 42 A Crim R 479.

13.

Green v. Johnstone (1995) 2 VR 176; Re *Unchango*, unreported 19 August, 1997.

14.

R v. Wilson Jagamara Walker, unreported: see *The Australian*, 2 October, 1997.

15.

E.g., *Neil Inkamala Minor* (1992) 59 A Crim R 227.

16. *Fernando* (1992) 76 A Crim R 58.