AUSTRALIAN BROADCASTING COMMISSION

GUEST OF HONOUR BROADCAST

SHOULD WE RECOGNISE ABORIGINAL TRIBAL LAWS?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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TRADITIONAL LAWS REJECTED

The Australian legal system faces a stark question which it has so far avoided but which now requires an answer. It is whether we should recognise the traditional laws of the Aboriginal people of our country.

In the United States the Indian tribes were, virtually from the start, considered as distinct, independent political communities. For that reason, the American Constitution guaranteed certain respect for their laws and customs. It was not so in Australia. With the First Fleet came English settlers who brought with them the common law of England. Our highest court, the High Court of Australia, has recently declared that Australia was acquired by settlement not by conquest. Had there been conquest, it would have been necessary from the start to provide for the recognition and separate enforcement of the laws of the indigenous Aboriginal people. As it was, the Aboriginal people of Australia were not regarded as belonging to a civilised order with a settled legal system deserving of respect in European eyes. Accordingly, the view was taken that there was one settled legal system for black and white inhabitants of Austrtalia : the common law of England single and undiscriminating between all the races under its order.

Of course, before the white man came to this Continent the Aboriginal communities did have rules and procedures which governed in intricate detail their daily lives. For a number of reasons the qeustion is now posed as to whether the initial, somewhat arrogant, view of the early settlers should be reversed. Nearly two centuries later, we are asking the question whether it is not too late to recognise and give effect to Aboriginal customary laws. Whether in the Austraian legal system we should now give some measure of respect and enforcement to the traditional customary laws of the Aboriginal people.

Why should this be so? Why is the question now being asked? There are several reasons. Since at least 1967 efforts have been made to redress the disparaging and condescending attitudes of previous times. At the heart of most of these moves is the attempt of our institutions to facilitate and encourage pride in Aboriginality in place of the earlier notion that all members of the Australian community must aspire to conform to a single Anglo Saxon norm. Inherent in the new philosophy is the question whether the initial disparaging view of so-called "uncivilised" Aboriginal customary laws should now be reversed.

But there are other, more practical reasons why the question is now posed. The law is a force for cohesiveness, order and peace in society. Some observers, many of them Aboriginal, look with distress on the decline in self-discipline and traditional authority in Aboriginal communities. They see the ineffective way in which our Western laws and punishments have sought to deal with social breakdown. In these circumstances they ask the question whether the recreation of respect for Aboriginal customary laws would give fresh stability to Aboriginal society and protection against the erosion of Aboriginal identity. There is no doubt that our legal system is in many respects unsatisfactory : particularly in dealing with the social problems of Aborigal communities still living after a substantially traditional pattern : our laws are silent on many of the matters which are considered vitally important in Aboriginal traditional

ommunities. For example, the calling out of secret things by a man whilst he is intoxicated is regarded as a serious breach of the law by many Aboriginal communities. If it is an offence at all, under our legal system, it is one which secures little recognition and trivial punishments. Furthermore, there are other problems, related to Aboriginal culture itself, which our system, reflecting our culture, may fail entirely to recognise. The calling out of the names of the dead, breaches against religious rules or offences against the family and marriage rules, may just not be dealt with at all under our legal system. If our machinery for the administration of justice provides Aboriginal communities and individuals with no means for the resolution of disputes which are deeply felt, can we be surprised when they resort to their own rules and their own methods of resolving perceived wrongs?

MOVES TO RECOGNISE ABORIGINAL LAWS

The catalyst for change came in May 1976 in a celebrated case in the Supreme Court of South Australia. Sitting in the criminal jurisdiction, Mr. Justice Wells had to deal with the case of one Sydney Williams, an Aboriginal convicted of manslaughter. The evidence at the trial had disclosed that Williams had killed his wife after they had been drinking together. He claimed that his wife, under the influence of drink, mentioned secrets which under tribal law women were not supposed to know, let alone speak of. It was argued that by customary law of the Aboriginal people, this outburst warranted death. Mr. Justice Wells, in passing sentence, directed that Williams should be sent straight back to his tribe and handed over to the Old Men. He was required there to submit himself to the Tribal Elders and for a period of at leat a year to be ruled and governed by them and to obey their lawful orders and directions. There was no reference in the judge's order to any punishment. But when Williams came under the control of the Old Men he was punished in accordance with tribal custom, by being speared in the leg.

What was done by the trial judge here was scarcely novel. In the remote areas of Australia, magistrates and judges had for many years dealt with offences by traditional Aboriginals, by handing them over to tribal authorities, often

... the knowledge that by doing this, a more meaningful and effective penalty would be inflicted and double punishment (under our law and Aboriginal custom) would be avoided.

The Williams case caused something of a stir. Following the debate, inquiries were initiated in a number of States. At a Commonwealth level, the Federal Attorney-General asked the Australian Law Reform Commission to inquire into and report on whether existing courts or Aboriginal communities should have power to apply customary laws and punishments. The Law Reform Commission will shortly publish a discussion paper which outlines the options available to us and the arguments for and against the recognition of tribal laws. We will endeavour to engage the interested Australian community in a debate about this subject. Already experiments have sprung up in different, remote parts of this country in which magistrates have sought to involve local Aboriginal leaders in the court hearing and in deciding the aptness of this or that punishment. But no comprehensive approach to the involvement of Aboriginals in the administration of criminal justice can be attempted until we confront and overcome certain problems which scholars have asserted stand in the way of recognising and enforcing Aboriginal traditional laws.

THE PROBLEMS IDENTIFIED

An Australian anthropologist of world renown, the late Professor Ted Strehlow, had a unique advantage in considering this question. He was born on the Mission station at Hermannsburg in Central Australia. Virtually at his mother's knee he learned the Aranda language amidst the 150 Aboriginals of full blood who gathered there around his missionary family. He saw customary laws in operation. In government service and later in academic life he wrote of them. No-one can dispute that attention must be paid to the views of such a renowned linguist and anthropologist. Strehlow warned that Aboriginal laws were often secret, the possession only of fully initiated clansmen. Many of them involved religious rules, breach of which was sufficient to attract punishment, even mortal punishment, notwithstanding the fact that there was no intent to do wrong. Other rules strictly enforced inter-personal relationships within an extended familay. To modern

..ustralians, highly developed "incest taboos" might appear irrational and even discriminatory against women. Strict rules of kin relationships forbade any measure of disloyalty, let alone law enforcement against persons who are related to the subject. In such a case the notion of simply appointing traditional Aboriginals as police or justices ran, in Strehlow's view, into impossible difficulties. Aboriginal traditional law also used punishments which we in Australian society might regard as unacceptable. Death was an acceptable (and in some cases compulsory) punishment for offences against traditional law. Are we to countenance spearing, clubbing and other physical violence (which would constitute a serious offence against our legal system) simply because in Aboriginal society there is no prison nor any effective means of extracting a fine or other lesser form of punishment?

According to this view, it is now too late, if ever it was possible, to recognise and enforce the traditional laws of our Aboriginal people. Unacceptable secrecy, unacceptable legal rules, unacceptable procedures, unacceptable punishments all argue for the status quo. Furthermore, we must be wary of a synthetic, modern, customary law which is a kind of legal no-man's land : neither Aboriginal nor white, in which persons can openly flaunt the dictates of established authority and avoid proper punishment in the name of a well-meaning attempt to secure respect for Aboriginal institutions. A return to customary laws may be a solution to some antisocial conduct. But in the past those laws rested on religious beliefs and the unquestioned authority of traditional Elders. Is it possible, without a return to the old religion, the old power structures, unquestioned authority and rigid ceremonial, to resuscitate customary laws in today's society?

Against this despairing viewpoint stands an alternative view. No legal system in the world stands still as the community it governs changes. Just as our legal rules change, so we should expect Aboriginal laws to change and adapt. Whilst rejecting oppressive elements, out of keeping with today's society, we may still find in Aboriginal traditional law answers that will restore acceptable social control to at least some Aboriginal communities. Indeed, in

Scrutinising the firm basis for the healthy functioning of Aboriginal soceity, we may find answers to some of our own legal and social problems.

There is no doubt that, before the settlers arrived, Aboriginal law was not just a cruel, destructive, oppressive, irrational force. It provided a well-organised system and a firm basis for the healthy functioning of Aboriginal society in tune with its environment. The return to the so-called "good old days" is no more possible for Aboriginals, even traditional Aboriginals, than it is for the rest of us. In confronting the question : "Should we recognise Aboriginal tribal laws at last?" we in the Law Reform Commission will have no easy answers. But perhaps we can take satisfaction from the fact that, now nearly 200 years on, we are at least beginning to ask the right questions.