"COMMON ROOTS BUT DIFFERENT EVOLUTIONS: THE DEVELOPMENT OF ABORIGINAL RIGHTS AT COMMON LAW IN AUSTRALIA, ASIA AND NORTH AMERICA"**

by

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I. INTRODUCTION

Aboriginal rights is a matter of significant legal importance in the South Pacific and North America, as well as being worthy of legal analysis, for a number of reasons. One of these is that it provides an excellent opportunity for a comparative law analysis. It also generates a series of fundamental issues regarding constitutional law in federations; the impact of international law and comparative law on the common law; the operation of concepts of sovereignty and property within common law countries; the foundation and legal history of Australasia; federal-state (or provincial) conflicts and responsibilities; and the nature of justice and morality - or whether 'might is right' and 'power decides law'. This subject also posesses the potential for dramatically affecting both Australasian society and its legal system. It also impacts, albeit to a lesser degree, upon other nations in the South Pacific.

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Recognition of aboriginal rights by Australian courts could create a major transfer of resources (or wealth) from white to black society while raising questions regarding the jurisdiction of the courts to apply Aboriginal customary law, if they continue to have the exclusive authority to hear all cases involving Aborigines. The work of the Australian Law Reform Commission, through its reference on customary law, visibly demonstrates the possible ramifications of these latter points while the land claims settlements and propsals in the Northern Territory, South Australia, Victoria, Western Australia, and New South Wales along with recent regressive legislation in Queensland, indicate that this issue involves hundreds and hundreds of millions of dollars in transfer payments.

The movement by the Maori people of New Zealand to re-negotiate the Treaty of Waitangi and/or re-order the pakeha (settler) Maori relationship concerning land, resources and legal rights reflects a global movement by minority indigenous populations to regain respect for their traditions, recognition of their traditional laws, and control over their own lives.

The issues involved in aboriginal rights, including aboriginal title to land occupied since time immemorial, may also generate growing interest in some of the Pacific Island states in the future. The indigenous Fijian population have had legal recognition for communal title of some of their historic lands for many years. Pressures inherent in tourism, economic development, and an alteration in the ethnic make-up of Fijian society could spur further review of aboriginal rights questions there. Customary land tenure is a central component of governmental policies in PNG; and this can be cast in terms of aboriginal rights. Other countries may also face the possible increasing import of this theme.

Abroriginal rights, then, is a label which can be used to encompass many issues flowing from colonialism, such as, the existence of customary law, land tenure, special resource rights, local self-government, the traditional economy, and others in a context where there is either a dominant non-indigenous majority or an indigenous majority which itself consists of many different tribal peoples.

I believe that the legal history of aboriginal rights, in which Australia is the only ex-British colony in the world to deny its existence, raises basic questions concerning how the Australian judiciary has viewed the common law and how it has shaped its evolution. The experience of aboriginal rights elsewhere may be useful in assessing Australia's perceptions of the Aboriginal Torres Strait Islander population and their rights, as well as how this colony was established and developed.

This issue can raise similar questions in other South Pacific countries concerning their colonial legal history, the reception of the common law, the structure of their court systems, the attitudes of the judiciary, and post-independence initiatives to create a different vision of the future.

Finally, these issues are about, once again, to make legal "news" in that test case litigation is in the late stages of preparation before argument on an agreed statement of facts before the Australian High Court (Mabo v. Government of Queensland). A hearing is likely later this year.

Recognition of land rights would obviously have a major impact throughout Austrlaia, including those jurisdictions where land settlements have been made. Even rejection by the High Court is unlikely to resolve the matter as the history of land rights struggles demonstrates how legal 'defeats' in the courts spark political and legislative 'victories'. For example, the Gove Land Rights Case (1) led to the Aboriginal Land Fund Act , 1974 (Cth) (now subsumed by the Aboriginal Devlopment Commission), the Calder Case (2) caused a change in the government of Canada's policy on land claims, the Kanatewat Case (3) forced the federal and Quebec governments to negotiate the James Bay Agreement, and Re Paulette (4) led to the establishment of the Mackenzie Valley Pipeline Inquiry in northern Canada.

I would suggest that this subject matter encourages the asking of fundamental questions, such as: how and why has the common law evolved as it has? on what basis was Australia and other South Pacific islands colonised? why is Australia alone in not recognizing aboriginal rights in common law countries? will Australian courts and/or governments ever recognize the doctrine of aboriginal title? if they do, what will the impact be on Austrlian society and the legal system?

It is not possible within the parameters of this paper to provide a proper consideration of these questions and related issues. I will merely attempt to briefly highlight this subject while suggesting some factors to consider in approaching the questions I have raised.

Before embarking upon this subject, let me briefly sketch for you the position of the indigenous peoples in Canada and the U.S.A. so that the basis for comparison is clearer.

II. THE PRESENT SITUATION OF INDIGENOUS PEOPLES IN NORTH AMERICA

The Aboriginal population numbers over one million people, or roughtly 4% of Canadian society, who consist of members of dozens of Indian Nations, the Metis and the Inuit (formerly called Eskimos by the colonizers). The Indian people have been separated by federal legislation dating back to 1868(5) into those who are

registered or status Indians, divided into 575 bands (some 300,000 people today), and those people of Indian ancestry who are not recognized by law or governmental policy as being "Indians" at all (approximately 600,000 people today). In addition, the Inuit are comprised of 25,000 people, virtually all of whom continue to live upon thier traditional lands in the Arctic. The final group within the Aboriginal population is the Metis (approximately 150,000 people) who developed a unique culture based upon a blending of Indian and early French colonial values and lifestyles primarily in the three Prairie provinces of Canada (Manitoba, Saskatchewan and Alberta). All three groups are included within the term "Aboriginal People".

The history of governmental responsibility has been very different in Canada from Australia for the federal government was given express and exlusive jurisdiction regarding "Indians and lands reserved for Indians" in the Constitution which created an independent Canada in 1867. The Canadian Parliament has exercised this authority by defining who Indians are in such a way as to divide them into those who legally have the status of being Indians and those who are legally regarded as non-Indians despite their Indian heritage. Only the former have residency rights on Indian reserves and receive the benefits, as well as suffer the disadvantages, that accompany Indian status. The Inuit also fall within the federal government's constitutional mandate as a result of judicial decree.(6)

The social, economic, educational and health conditions of the indigenous peoples of Canada is somewhat akin to the position of the Maoris and the Aborigines - it is a disaster. Suicides and violent deaths occur far more frequently; infant mortality rates are higher; life spans are lower; available housing is inadequate to meet real needs; unemployment is fantastically high; school competition rates are very low; and the litany of tragic indices goes on and on.(7)

The legal system has played its role in the disintegration of Aboriginal communities in Canada too. The Indian and Metis peoples are grossly overrepresented in the jails and in the care of child welfare agencies as a result of judicial orders and the insufficient development of indigenous-controlled alternatives. The judiciary has also frequently failed to protect aboriginal and treaty rights to the fullest extent possible through narrow interpretations of the law.

Nevertheless, all is not totally bleak. There have been some major legal battles won over the years regarding land, rights to hunt and fish, federal trustee responsibility and the recognition of customary law. Aboriginal People are gaining control over their own lives through the acceptance of the necessity of their control over their education, lands, police, and child care agencies, as well as by the development of special legal service

programmes, halfway houses, alternatives to incarceration and other initiatives. The inclusion in the new Canadian Constitution Act, 1982 of s.35(1) should further assist the Aboriginal People in their struggle for self-determination and sovereignty within the Canadian state.

It says:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

There are many unanswered questions regarding the interpretation and impact of this section, which like the rest of the Constitution prevails over any inconsistent provincial or federal statute (s.52). This may keep the courts busy for years; however, s.37 requires constitutional conferences to be held to attempt to define its meaning. Two such conferences have been held leading to the passage of minor amendments to the Constitution. It is expected that future meetings of premiers, the Prime Minister, and Aboriginal leaders will result in an on-going process of technical and political dialogue to achieve, ultimately, a further definition of these rights.

The indigenous population of the U.S.A. also consists of approximately one million people of Indian, Inuit and Aleut background. They largely suffer similar social and economic disadvantages to the original inhabitants of Australia, New Zealand and Canada. As in Canada, Indians have been viewed as an area of exclusive federal responsibility under the Constitution, although this has resulted more from judicial interpretation of the U.S. Constitution than due to its express language. The consistent policy of Congress and the Presidency has been to recognize the uniqueness of these peoples, to be cognizant of their aboriginal rights and negotiate treaties to obtain their land for this reason, to provide special financial aid (albeit minimal) for their survival, to permit self-government due to continuing sovereignty to remain, and to refrain largely from interference with traditional law.

Parallel experiences exist regarding governmental policies over the years of segregation through reserves, assimilation through schools and missionaries, genocide through warfare or removal of children by the child welfare system, termination by forced relinquishment of reserved lands (although at least this was generally done by way of sales rather than unlawful revocations as in Australia), and modern notions of self-determination. Although much of the American experience has been as brutal and savage as has occurred in Australia and in Canada, the federal courts have consistently supported Indian land rights,

residual sovereignty, and traditional law. In that sense, the American Indians have received the best treatment by the laws and legal systems of the colonizers.

III. DEVELOPING A THEORY OF ABORIGINAL RIGHTS

A. HISTORICAL ROOTS

The common law, as with any legal regime, is a function of the society within which it operates. It developed in England during feudalism as an attempt by the Crown to impose its royal authority on a divided, localized, rebellious people ruled by numerous local autocratic barons and lords. The royal courts were established in part to extend the power of the Crown, to forge a unified country under the King's law and order. The judges, in fact, decided most matters in accordance with local customary law for many decades. Due to the continual contact among judges and the commencement of the practice of recording cases, a general system of legal principles slowly evolved.(8) The common law, then, consisted of customary law as modified and codified by the judiciary. It was assumed that the judges could solve all legal disputes. From this we later obtained the fiction that the common law contained "all laws" and judges merely needed to uncover the appropriate answer to new problems rather than actively create new answers.

I mention this because the customary law foundation to the common law, whcih is still relevant to a limited extent in the U.K., was almost completely ignored by judges in former British colonies when it came to assessing the validity of customary indigenous law. It is also important to remember that the common law had no real experience in analyzing how to relate to different societies with different legal systems and different land tenure beyond its contact with relatively similar practices and theories in Europe, including exposure to civil law in Scotland.

Nevertheless, the common law approach to problem-solving had two critical effects on indigenous peoples and their law. Firstly, the fiction that all answers already exist within the common law simply awaiting pronouncement led judges to believe they had both the right and the duty to make fundamental decisions regarding the rights and laws of other well-established societies. In addition, this fantasy generated the image that the judges were not themselves determining these fundamental decisions according to their personal perceptions but that the law - their law - demanded the outcome they gave.

B. THE INITIAL DEVELOPMENT OF THE DOCTRINE OF ABORIGINAL RIGHTS

What then was the original position of the common law concerning the exploration and "discovery" of "new" lands? If one turns to the writings of the early jurisprudes on this subject,

such as the Victoria, writing in the mid-16th century, Grotius and Pufendorf in the early 17th ccentury, and later Vattel and Blackstone, all of whom have been endorsed in many of the judgements in this area in Canada and the U.S.A., one finds the logical distinction being made between vacant and inhabited land. The former was assumed to be free for the taking by whomever found it and took possession of it.(9) Early examples of this were the Falkland Islands and Mauritius, while it was relied upon once again within the last half countury concerning the Antarctic.

Inhabited land was regarded on a very different basis, somewhat analagous to the position in Europe. That is, discovery was viewed as giving the discovering nation an initial monopoly on trade with those who occupied and owned the land which had previously been unknown to Europeans. The inhabitants had full ownership of their land and were an independent nation with their own land and government. As Chief Justice Marshall of the U.S. Supreme Court later said:

> America ....was inhabited by a distinct people, divided into separate nations independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws...(10)

This was as true of North America as it was of Australia, China, Africa or Asia. there was, thus, initially as much right for Columbus or Cabot or de Champlain to claim the parts of North America they found for their sponsoring Kings as there was for Marco Polo to claim all of China for Italy (Genoa).

The early English, Dutch and Swedish policy in North America was, therefore, similar to the policy later followed in China by European powers, namely, the desire to develop friendly relations, to engage in profitable trade, and to purchase small amounts of land for trading posts and minor settlements. The French adopted the first two aspects of this attitude, but ignored buying land and relied on gifts from Indian nations instead, while adding in the desire to catholicize the local inhabitants. Even the barbaric policy pursued by Spain was tempered by the negotiation of some treaties with Indian nations in the Americas.(11)

The English position was made perfectly clear through communications to Spain by Queen Elizabeth I and James I at the turn of the 17th century when it was stated that mere discovery without more gave no sovereignty over the land whatsoever to the discovering country. Proof of "obedience, dominion and tribute"(12) were required or, in other words, one had to develop colonial settlements on the "new" land and obtain the allegiance of the inhabitants as a subservient nation. As Sir Ernest Scott phrased it, "effective occupation gave a valid title, but that discovery did not".(13)

All of this competition amongst European powers, when combined with a slowly developing belief in their superiority (materially, militarily and culturally), created a change in this legal theory. Discovery became seen as giving another right to the discoverer, that is, the exclusive right to acquire the land from its owners. Marshall, C.J., described this principle in Johnson v. McIntosh:

> ...that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.(14)

This modification in no way affected the rights of property or of continued sovereignty in and of itself. In speaking of the American Indians, for example, the U.S. Supreme Court has consistently recognized the indigenous land right as being "as sacred as the fee simple" was to the English.(15) This view was also taken by the Privy Council in the early 1700s and again in 1770 regarding the same claim in Mohegan Indians v. Connecticut.(16)

The question then became, how would the European discovering nation obtain the land and/or assume sovereignty over the independent nation(s) of the inhabitants? This could occur through (a) conquest; (b) cession of purchase; (c) peaceful annexation; or (d) settlement. Different principles of international law were developed by the legal scholars in reference to each option, most of which was adopted by the English, American, Canadian and New Zealand courts. Not only would the choice selected by the colonizer affect the ownership of land, but it also would determine whether full sovereignty of the indigenous nation would survive. It had a further impact upon the determination of what law would apply (the lex loci or the discoverer's law) and to whom (that is, just to the colonists or also the original inhabitants).

The conquest theory was well understood in Europe. Defeat in battle neither led to the dispossession of the vanquished from their possessions and lands nor to a termination of domestic law or an extension of the sovereignty of the conqueror over the conquered. Nothing changed until the victorious country took express actions to alter the status quo, which could transpire either by an exercise of royal prerogative (through a proclamation) or as part of the terms of any surrender or peace treaty. Both of these devices were used in North America when England defeated France as the Articles of Capitulation in Quebec in 1761 and the Treaty of Paris in 1763 involved France's relinquishment

of its claims to land ownership and sovereignty while the Royal Proclamation of 1763 established new British colonial governments for the former French colonies. It is interesting to note that the Royal Proclamation did not alter the French or Indian laws then in force, but it authorized the election of local assemblies to pass laws similar to England (English law was subsequently withdrawn, except for criminal law, in 1774). The Royal Proclamation of 1763 also expressly recognized the Indian nations as allies, rather than subjects, with title to their lands.

English, and Dutch policy before it, tended to rely upon the second option as the preferred means of obtaining land. Treaties were entered into with the Indian nations in North America commencing in the early 1600s in which official representatives negotiated the purchase of Indian lands for the purpose of erecting colonial settlements. These treaties were careful either to guarantee continued Indian sovereignty and Indian law or avoid mentioning these matters.

Throughout the 1700s, the policy varied somewhat as in certain regions treaties of peace and friendship were negotiated which did not involve land transfers, imposition of English law, or renunciation of Indian sovereignty. Other treaties contained provisions whereby Indian nations expressly relinquished their independence in favour of British protection, which did not, however, affect their domestic sovereignty. These treaties fall into the third category of providing the discoverer with sovereign authority but with no title to land. Still other treaties involved land sales and the extension of British sovereignty to the Indian signatories. This last group represents a blending of the second option, regarding the obtaining of title to land, with the third in terms of gaining sovereignty over the land and its original owners.

The fourth method of simply settling the land was regarded as not being morally right or legally sufficient to extinguish original title without the presence of express or implicit consent to settlement by the indigenous peoples. The generosity of the latter, along with their ignorance of the expansive intentions of the colonists, frequently caused such consent to be readily given in the early stages of contact all across North America.

These principles did, however, cause some strain on the common law theory of real property in non-conquest situtations as it had no basis for accounting for land that did not flow from the Crown. The common law land rules were founded upon the following: (1) complete sovereignty in the Crown alone; (2) the ultimate or radical or underlying fee for all land residing in the Crown; (3) all private property interests stemming from the Crown which could be traced back to Crown grants as no original title other than the Crown's existed; and (4) the Crown's right to revoke its grants.

These principles were understandable in light of English history but they did not fit territories inhabited by independent peoples outisde the English Crown's realm.

The common law, therefore, either had to adapt or the international law principles had to be rejected. The courts had little choice since the Crown had already acceded to those international principles in its official policy out of self-interest as a result of competition from other European powers as well as due to the military strength and economic importance of the Indian nations in North America. The judiciary attempted to modify the common law and impose restrictions on indigenous peoples' rights which would, in their view, rationalize this conflict.

Thus, the law of what is now called aboriginal rights began slowly to unfold in a series of cases in the 18th and 19th centuries.

C. ABORIGINAL TITLE AND THE LAW

The first portions of the doctrine of aboriginal title to be articulated included the recognition of indigenous rights to land as part of the law. This legal interest in land was, however, made subject to two burdens. Firstly, once discovery was coupled with active steps indicating the intention to assert the Crown's authority (such as through settlement, purchase or acceptance of British protection) then the Crown obtained the underlying title to all indigenous land. The original title of the inhabitants was transformed into a lesser interest superimposed upon the Crown's radical fee.

Secondly, this lesser interest was made subject to a restraint on alienation, namely, that the indigenous title could only be ceded to the Crown and not to any other nation or individual. It is for this reason that the well-known treaty of John Batman with the Aborigines in the Port Phillip area was officially renounced in a Proclamation of 26 August 1835 by Governor Bourke(17) and the U.S. Supreme Court rejected a private treaty in Johnson v. McIntosh.(18)

To these two restrictions was later added a third - the loss of independence. Chief Justice Marshall attributed this loss as a result of:

> ...power, war and conquest give rights, which after possession, are conceded by the world; and which can never be contraverted by those on whom they descent.(19)

This is understandable where conquest occurred or where sovereignty was released and allegiance pledged to the Crown (or, after independence, to the American government). I must suggest,

however, that there was no basis in law for the transference of the vast majority of independent Indian states into "domestic dependent nations(20) as they were neither conquered nor did they renounce their independence. Rather, this is an example of the judiciary responding to external pressures, its own beliefs, and its perceptions of the political realities of the day.

Aboriginal rights were also restricted by granting the government the ability to interfere with or override indigenous law. Further, the Crown or Congress was given the right to eliminate aboriginal title to land without judicial control. It has the "exclusive power to extinguish the right of occupancy at will".(21) The decision to do so is "political, not justiciable" and the royal prerogative extends to determining "the manner, method and time of such extinguishment."(22)

These conditions have been further refined over the years regarding how the title can be extinguished, how clear and unambiguous the act of extinguishment must be, whether a right to compensation exists, who possesses aboriginal title, what type of proof is necessary, whether the title is communal in nature, and so forth.(23) One might now define aboriginal title in terms of these restrictions; or it could be simply said to be an exclusive possessory right to land and its resources which consists of a communal right of occupancy and right to use or enjoy the benefits of the land and its resources that is inalienable by its very nature, as well as under indigenous law, except to another nation.

D. AUSTRALIAN VERSUS NORTH AMERICAN AND NEW ZEALAND PERCEPTIONS

It is my view that the perceptions of aboriginal title and the broader category of aboriginal rights is very different indeed between Canada and Australia. I would also suggest that the Australian postition as it now stands also does not reflect the law in New Zealand, Africa, the West Indies or the USA. Further, I submit that Mr. Justice Blackburn's interpretation of the prevailing law in these other jurisdictions in the Gove Land Rights Case can and should be challenged.

I think the American position can be aptly stated by quoting from Chief Justice Marchall in Worcester v. State of Georgia as follows:

> This principle [discovery], acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it.

> It regulated the right given by discovery among the European discoverers, but could not affect the rights of those as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase but did not found that right on a denial of the right of the possessor to sell.(24) [emphasis added].

An early Canadian view of the American law is that of Mr. Justice Strong of the Supreme Court of Canada in St. Catherines Milling and Lumber Co. v. The Queen where he described the U.S. jurisprudence as follows:

> It may be summarily staed as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, be found to be an accurate description of the principles upon which the Crown invariably acted with reference to Indian lands, at least from the year 1756...(25)

He then described the impact of this on Canadian law:

> The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding that title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognize it as a continuance of the policies established by the British Government, and therefore identical with those which have also continued to be recognized and applied in British North America.(26)

Some 85 years later the Supreme Court of Canada addressed the issue once again in the aforementioned Calder case. Three of the judges rejected the continued existence of aboriginal title regarding the Nishga Indians in north-eastern British columbia. Nevertheless, these judges still viewed aboriginal title as having been recognized by the common law and made the following comments:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".(27)

The dissenting judges believed that the Nishga's still possessed their aboriginal title. Their judgement was delivered by Hall J., who said:

> This is not a claim to tile in fee but is in the nature of an equitable title or interest,...a usufructuray right and a right to occupy the land and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.(28)

He later cited American, Canadian and Privy Council decisions (including those on appeal from Africa) before stating that there is "a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession of enjoyment of lands of aborigines precisely analogous to the Nishga situation",(29) and that it does not depend "on treaty, executive order or legislative enactment."(30)

Within the year, aboriginal title was upheld by two superior court judges across the country.(31)

Two years later the chief Justice of Nova Scotia summarized both sides of the Calder case in these words:

> Both Mr. Justice Judson and Mr. Justice Hall agreed that "Indian title" or rights flowed from basic principles authoritatively expressed by Chief Justice Marshall of the United States Supreme Court in Johnson and Graham's Lessee v. McIntosh ... and Worcester v. Georgia ..., and adopted by many other American, Canadian and English courts.(32)

The last Canadian decision of importance was in the Baker Lake Case, in which Mr. Justice Mahoney expressly rejected the application of Mr. Justice Blackburn's view to Canada. He then went on to say:

> The Calder decision renders untenable, insofar as Canada is concerned, the defendant's arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect.(33)

It is important to realize that this decision was in reference to the Inuit, who are improperly described as a so-called "simple" or "primitive" people similar in many ways to the Aboriginal people of Australia. Mahoney J. gave due regard for the Privy Council decision which had such a large impact upon Mr. Justice Blackburn regarding the common law's required degree of 'sophistication' or an organized society before recognizing aboriginal title. He described the law this way:

The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:

1. That they and their ancestors were members of an organized society.

2. That the organized society occupied the specific territory over which they assert the aboriginal title.

3. That the occupation was to the exclusion of other organized societies.

4. That the occupation was an established fact at the time sovereignty was asserted by England.

Proof that the plaintiffs and their ancestors were members of an organized society is required by the authorities. In quoting Mr. Justice Judson's Calder judgement, I emphasized the phrase "organized in societies" and I repeated the emphasis Mr. Justice Hall had included in quoting the passage from Worcester v. Georgia: "having institutions of their own, and governing themselves by their own laws". The rationale of the requirement is to be found in the following dicta of the Privy Council in Re Southern Rhodesia, [1919] A.C. 211 (pp. 233-4):

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or

> the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Their Lordships did not find it necessary to pursue the question further since they found that the aboriginal rights, if any, that might once have existed had been expressly extinguished by the Crown.

It is apparent that the relative sophistication of the organization of any society will be a function of the needs of its members, the demands they make of it. While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory.

The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.(34)

The New Zealand position, which was also rejected by Mr. Justice Blackburn, dates back to 1847 in R. v. Symonds(35) and was approved by the Pricy Council in 1901.(36) In the former case, Mr. Justice Chapman said:

> The practice of extinguishing Native titles by fair purchases is centainly more than two centuries old. It has long been adopted by our government in our American colonies, and by that of the United

> States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would not hesitate to do so in a suit by one of the Native Indians. ... Whatever may be the opinion of jurists as to the strength or weakness of the Native title ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the courts to assert, the Queen's exclusive right to extinguish.(37)

Lord Davey later repeated this passage with approval and concluded that the Crown could only extinguish aboriginal title with the consent of the original occupiers or in accordance with proper legislation.(38) This interpretation was made by Mr. Justice North in Re Bed of the Wanganui River, where he stated:

> I apprehend then that, in the view of the Lordship,... the Native title cannot be extingusihed except by the free consents of the Native owners, or by virtue of a statute, and in strict compliance with its terms, or by a proclamation which has been gazetted in accordance with the provisions to that effect contained in the various statues.(39)

These views flow in part from the specific legal history of New Zealand, particularly regarding the recognition of aboriginal title in the Treaty of Waitangi of 1840, the Land Claims Ordinance 1841 (which Lord Davey described as "a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty"(40)), the Native Lands Purchase Ordinance 1946, sections 72-73 of the New Zealand Constitution Act of 1852, and the subsequent development of the Maori Land Court.(41)

Although the New Zealand experience leaves much to be desired from a Maori perspective, and the judiciary has not uniformly followed the North American jurisprudence, the legal position is similar to Canadian and American law whereas the Australian judiciary has marched to a different drummer.

The Australian courts have continually adopted a harsh and unfavourable attitude toward the Aboriginal and Torres Strait Islander population since almost the moment that colonization began. Other than a few early decisions which rejected the application of the common law to Aborigines(42) mostly due to a prejudicialy belief as to the 'inferiority' and 'primitiveness' of

the latter - the Australian judiciary have failed to respect Aboriginal land rights and Aboriginal laws. Regard for customary law has increased over the last decade while major land settlements have occurred. Nevertheless, the only two court decisions have been negative.

The Gove Land Rights Case was launched as a test case to challenge the assumption that aboriginal title did not exist in Australia (concerning Arnhem Land in particular). Mr. Justice Blackburn, after a lengthy discussion of the law elsewhere and concluding that Aboriginal customary law was indeed "a system of law:(43), determined that aboriginal title did not exist there on the basis that it had never been expressly recognized earlier by Australian law. A further reason for his rejection was his view that Aboriginal concepts of property could not fit within the common law theory of realty. Both of these propositions can be challenged on legal grounds with the support of historical and anthropological evidence. It must also be remembered that the significance of this decision has been blown out of proportion because it is the only one on point in Australia. It is, afterall, only a trial decision from the Northern Territory Supreme Court with only mildly persuasive precedential value.

An assertion of continuing Aboriginal sovereignty was rejected in Coe v. Commonwealth of Australia.(44) This is a much more fundamental decision as it emanates from the Australian High Corut. One can only suggest that it suffers from being argued in the abstract, without a specific factual situation, and with insufficient distorical and anthropological evidence as well as a lack of attention to the American jurisprudence. Mr. Justice Murphy did indicate his openness to a challenge of the theory that Australia was largely uninhabited at the time of settlement,(45) although Gibbs and Aickin JJ were not so inclined.(46)

The forthcoming Mabo case may provide the perfect opportunity to have these issues fully addressed by the Australian High Court in a definitive fashion.

CONCLUSION

Aboriginal land rights has been a major legal and social issue for over a decade in North America and parts of the South Pacific. It is likely to continue to be so for decades to come. Although it can be seen solely as a legal matter, it is inextricably linked with moral, social, political and economic considerations. It is also rooted in the history of colonialism and colonization.

One of the dangers inherent in examining the quesiton of aboriginal title today is the tendency to engage in what historians call "presentism", that is, looking at past events, too heavily through the eyes of the present so as to allow one's

prejudices or presumptions to cloud the facts. It is important to remember that England at the time of exploration and settlement in the South Pacific was a country in which the sale of wives was common, and in which over 200 crimes warranted the death penalty (or transportation) with forfeiture of all property to the Crown by felons. Yet judges from subsequent eras have viewed other societies as 'uncivilized' or 'barbarous' at that time and thought of England as a mecca of sophistication.

Despite these criticisms, the Australian position stands apart for the failure of its judiciary recently, and its governments historically, to respect the dignity, laws and land rights of Aboriginal and Torres Strait Islander people. Why has there been this difference?

I can only suggest as an outsider that the answer lies in Australian history and the national identity. Accepting the existence of aboriginal title calls into question many myths about what Australia is today. It challenges the concepts of a bicentennial bases on the discovery of a new, vacant land in 1788. It challenges the fundamental assumptions upon which land ownership, the legal system and the law itself is based. It forces a reconsideration of Aboriginal stereotypes. Finally, it challenges the legitimacy of the Australian state and the wealth derived from land enjoyed by most Australians. It is not surprising, then, that courts and governments have shied away from addressing these issues in full

The issues, however, will not go away in Australia, just as they are being revived and reexamined in New Zealand, Canada and the U.S.A. The results of these endeavours may also have significant meaning for other Pacific Island states.

ENDNOTES

1. Milirrpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia (1971), 17 FLR 141 (N.T.S.C.).

2. Calder v. Attorney General of Bristish Columbia (1973), 34 DLR (3d) 145 (S.C.C.).

3. Kanatewat v. James Bay Development Corporation et al., [1974] RP 38 (Que. S.C.).

4. (1973), 42 DLR (3d) 8 (N.W.T.S.C.).

5. The legislation presently in force is the Indian Act, R.S.C. 1970, c. I-6.

6. In re Eskimos, [1939] SCR 104; 2 DLR 417.

7. For further information, see, Indian Conditions: a survey (Ottawa: Ministry of Indian Affairs and Northern Development, 1980); and Bradford W. Morse, "The Original Peoples of Canada". (1982) 5 Canadian Legal Aid Bulletin, No. 1, 1-16 (available from ALRU).

8. See, e.g., S.F.C. Milsom, Historical Foundations of the Common Law, (London: Butterworths, 1969) and Derek Roebuck, The Background of the Common Law, (Waigani, P.N.G.: University of Papua New Guinea Press, 1983).

9. For further discussion, see, Bradford W. Morse, ed; Aboriginal Peoples and the Law, (Ottawa: Carleton University Press, 1984).

10. Worcester v. State of Georgia (1832), 31 US (6 Peters) 515 at 542.

11. See, e.g., Felix Cohen "The Spanish Origin of Indian Rights in the Law of the United States", (1942) 31 Georgetown Law Journal.

12. Queen Elizabeth I, quoted in Sir Ernest Scott, "Taking Possession of Australia - The Doctrine of 'Terra Nullius' (No-Man's Land)", (1940) 26 J. Royal Australia Historical Society, No. 1, 1 at 4.

13. Sir Ernest Scott, ibid.

14. (1823) 8 Wheat 543 at 572.

15. See, e.g., notes 10 and 14, supra.

16. Reported in J.H. Smith, Appeals to the Privy Council from the American Plantations, (New York: Columbia University Press, 1950) 422-442 and referred to by Marshall, C.J., in note 14, supra.

17. For a discussion of this treaty see, Milirrpum v. Nabalco Pty. Ltd., note 1, supra.

18. Note 14, supra.

19. Note 10, supra, at 544.

20. Ibid.

21. U.S. v. Alcea Band of Tillamooks (1946), 329 US 40 at 45.

22. U.S. V. SANTA FE PAC. R.R. (1941) 314 US 339 AT 347.

23. For further information, see, e.g., Greg McIntyre, "Aboriginal land rights - a definition at common law" in Erik Olbrei, ed., Black Australians: The Prospects for Change (Townsville: James Cook University of North Queensland, 1982) p. 222.

24. Note 10, supra, at 543-44.

25. (1887) 13 SCR 577 at 608.

26. Id. 610.

27. [1973] SCR 313 at 328.

28. Id. 352.

29. Id. 376.

30. Id. 391.

31. Notes 3 and 4, supra.

32. R. v. Isaac (1975), 13 NSR (2d) 460 (N.S.C.A.) at 475.

33. Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al. (1980), 107 DLR (3d) 513 at 544.

34. Id. 542-544.

35. (1847) NZPCC 387 (N.Z.S.C.).

36. Nireaha Tamaki v. Baker, [1901] AC 561.

37. Note 35, supra, at 390.

38. Note 36, supra, at 383-385.

39. [1955] N.Z.L.R. 419 (N.Z.C.A.) at 465.

40. Note 36, supra, at 563.

41. For an excellent recent analysis of these matters, see, Paul G. McHugh, "Maori Land Laws of New Zealand", Studies in Aboriginal Rights No. 7 (Saskatoon: University of Saskatchewan Native Law Centre, 1983).

42. See, e.g., Bridges, "The Extension of English Law to the Aborigines for Offences Committed Inter-Se, 1829-1842", (1973) 59 J. Royal Australian Historical Society 264.

43. Note 1, supra, at 268.

44. (1979) 53 A.L.J.R. 403 (H.C.).

45. Id., at 412.

46. Id., at 408.