BOOK REVIEWS

International Law and Aboriginal Human Rights edited by B. Hocking (Law Book Company Limited, Sydney, 1988) pages i-xxi, 1-195. Price $29.50. ISBN 0 455 20807 7.

Two questions may occur to lawyers considering the relationship between the Anglo-Australian legal system and the original occupants of this country. The first is, by what legal right was Australian territory acquired from Aboriginal and Torres Strait Islander people ('aboriginal people')? Assuming the broad response is that the acquisition was made without due regard to the pre-existing rights of the aboriginal people and that they now have a right to legal remedy, the second question arises. That is, on what basis and in what form should a legal remedy be ordered?

These two questions are discussed in a book edited by Barbara Hocking entitled *International Law and Aboriginal Human Rights*.[1] The book consists of papers delivered at a conference organised by the Aboriginal Treaty Committee which was held at the Australian National University in late 1983. At that time the Hawke Labour Government had not long been in power, which probably explains the presence of a chapter by former Minister for Aboriginal Affairs, Clyde Holding, who was later to recant from Labour policy which required the introduction of uniform national land rights legislation. Despite some chapters being somewhat dated, even at the time of publication, the fundamental issues dealt with in the book are enduring. Fundamentally, a legal system must be assessed on the basis of the justice it serves, not to the rich and powerful but to the powerless and the dispossessed. Although the law can provide some remedy, it cannot be forgotten that colonization has caused severe dislocation and exploitation of aboriginal culture. The problems created are complex and cannot ultimately be solved by lawyers but by the general community through the political process. That is not to deny the important process the law can play as a catalyst to the political process.

On what basis was Australian territory acquired by the British? This question is likely to be considered by the High Court in the near future.[2] It was recently put to the High Court by Ron Castan Q.C. in an application for special leave in *Walker v. R.*[3] Although the High Court acknowledged that the applicant sought to raise 'important and fundamental questions of constitutional importance,'[4] the application was refused because the issues sought to be raised had not been adequately dealt with by the lower courts, where Walker represented himself. Mr Castan argued in the application that the legal basis for the colonial acquisition of territory was a justiciable issue and that the mere fact that the British had used overwhelming force to acquire the territory did not of itself render the acquisition valid.

It is often said that the issue is non-justiciable or that the common law cannot recognise aboriginal title because of the 'acts of state' doctrine, the intertemporal rule, or because of prescription. These arguments are deftly dealt with by Russel L. Barsh in one of his two chapters in the book.[5] The 'acts

[1] Law Book Company Limited, Sydney, 1988.

[2] Two cases are likely to raise the question. One of these is *Mabo v. Queensland and the Commonwealth*. The case is presently on remitter from the High Court to the Queensland Supreme Court for that Court to try the facts. The Supreme Court has completed hearing the facts in relation to the Murray Islanders claim for common law recognition of native rights to their territory. The High Court will then deal with the questions of law. The High Court has dealt with the question whether Queensland could arbitrarily extinguish native title in *Mabo v. Queensland and the Commonwealth* [1988] 63 A.L.J.R. 84. The other case which may raise these issues and in which the High Court has dealt with in relation to preliminary matters is *Northern Lands Council v. The Commonwealth* [1987] 61 A.L.J.R. 616.

[3] [1989] 7 Leg Rep C 1.

[4] *Ibid.* Chapter 2.

[5] *Supra* Chapter 4, 74-6.

of state' doctrine holds that the courts of the conqueror cannot deny the validity of the conquest by its own sovereign. That doctrine does prevent aboriginal applicants in an Australian court successfully denying ultimate crown title to Australian territory, but does not deny a claim that the common law can recognise underlying aboriginal possessory title.

It is sometimes argued, on the basis of the intertemporal rule, that the relevant principles to be applied to aborigines are those which existed at the time of European conquest, that is at 1776 or 1788. As Barsh confirms on the basis of rulings of the International Court of Justice, this rule normally applies to contracts and was never intended as a defence to territorial aggression.[6] The prescription argument holds that a legal right ripens over time. As Barsh points out, the common law requires the existence of acquiescence, which has never been conceded by aboriginal people.[7] Rosalie Balkin notes in Chapter 2 that the international law cases dealing with prescription have never considered the opposition of the indigenous population as sufficient to deny a state's claim of sovereignty. Rather, they have considered acquiescence by other states as being sufficient.[8] Thus, prescription may deny the aboriginal claim of sovereignty but not a recognition of their native title by the common law.

The unconvincing nature of the arguments which disregard aboriginal title are illustrated by the decision of the Queensland Court of Appeal in *R. v. Walker*.[9] The court, in explaining the loss of aboriginal title, appeared to approve the view that a legal system may properly be displaced by a process by which 'the courts transfer their allegiance to a new legal order when they recognise that the old order has been effectively overthrown, a process described as revolution, which may be violent or peaceful or a combination of both.'[10] This extraordinary reasoning, which Barsh may describe as 'right makes right'[11] has not been applied by British, Canadian, United States or New Zealand courts.[12] In the House of Lords decision of *Madzimbamuto v. Lardner-Burke*,[13] for example, it was held that Southern Rhodesia remained a British colony despite the unilateral declaration of independence in November, 1965 by the Smith regime. That is, the Smith 'revolution' was considered legally invalid despite its acceptance by the courts in Southern Rhodesia.

It may be that aboriginal people do not wish to concede non-aboriginal sovereignty to their land. In that case the inability of the domestic courts to concede sovereignty would require such a claim to be pursued in the international arena. Rosalie Balkin, in Chapter 2, is pessimistic about the success of such a claim in the International Court of Justice. She explains that the jurisdiction of the Court is governed by Articles 36 and 37 of the Court's Statute.[14] The consequence of these Articles is that states only may be a party and therefore no contentious proceedings can be brought by aboriginal people against their own government.[15]

Turning to the second question, what legal remedies exist? A number of authors in the book reiterate that aboriginal people must control their own destiny. This may be achieved by extending the international law concept of decolonisation to apply not just to international states but also to aboriginal people, thereby providing them a right to their own cultural, economic, social and political institutions. Marcia Langdon describes in Chapter 5 the process by which aboriginal people are seeking, through the United Nations Working Group on Indigenous Populations, an international convention recognising their rights. She states that indigenous people at a meeting she attended of the

[6] *Ibid.* 75. See also *Western Sahara Advisory Opinion* I.C.J. Reports 1975, 3 at 12 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion* I.C.J. Reports 1971, 16.

[7] *Supra* n. 1, 75 (*per* Barsh). See also Coe at 141-2 and Dodson at 137-8.

[8] *Ibid.* 35.

[9] Unreported decision no. 192 of 1988 delivered on 1st December, 1988.

[10] *Ibid.* 28.

[11] *Ibid.* 77.

[12] *Amodu Tijani v. Secretary, Southern Nigeria* [1921] A.C. 399, *Re Southern Rhodesia* (1918) [1919] App. Cas. 211, *Guerin v. The Queen* [1984] 2 S.C.R. 335, *Calder v. Attorney-General for British Columbia* (1973) S.C.R. 313, 416 (*per* Hall J.), *County of Oneida v. Oneida Indian Nation (Oneida II)* (1985) 470 U.S. 266, *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1, *New Zealand Maori Council v. Attorney General* [1987] N.Z.L.R. 641.

[13] [1969] 1 A.C. 645.

[14] *Supra* 32.

[15] *Ibid.*

Working Group were unanimously agreed that the most important issues are their right to life, to physical integrity and to security.[16]

Pat Dodson talks of the need for the establishment of an economic way that will sustain aboriginal life which is not aimed at profit, exploitation or development which does not include human development.[17] The National Aboriginal and Islander Health Organisation require that aboriginal people control their culture, their economy, their social lives and their indigenous political institutions. This includes control over health, housing, education, legal matters and land rights.[18] These requirements may be summarised as a demand for self-determination.[19]

Russel Barsh cautions however, on the basis of United States' experience, that self-determination may be illusory if not properly implemented. For example, under the Indian Self-Government Act 1975, the United States Federal Indian Department's administrative chores were transferred to the tribes resulting merely in 'a change in the colour and geographic location of the civil servants implementing national policies'.[20] The illusion of self-determination also exists in Indian tribal courts which mirror the procedures and rules of the United States court system rather than apply their own more traditional procedures of mediation or negotiation.[21] Barsh suggests that aborigines be enabled to rebuild their own effective justice procedures systems rather than to replicate non-aboriginal court procedures.[22]

As James Crawford (the Commissioner in Charge of the Australian Law Reform Commission's reference on the recognition of aboriginal customary law) points out, there are certain limits which should exist on the exercise of aboriginal law.[23] He states that there are 'obviously tensions between the values of self-determination or self-management and other human rights standards, and their detailed resolution is not a simple or straightforward matter.'[24] He believes that aboriginal law should be subject to the human rights requirements in the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant and the Racial Discrimination Convention as they express international rather than merely Western standards.[25] The Law Reform Commission suggested that corporal punishments including spearing would constitute a breach of those standards. Crawford believes that there is much room for experimenting with various possible forms of aboriginal justice systems. Possibilities include an independent justice mechanism, or a dependent mechanism operating in conjunction with the non-aboriginal justice system. A further possibility is the development or adaptation of forms of mediation or conciliation or other forms of diversion or settlement.[26]

The self-determination of aboriginal people will be greatly facilitated by the non-aboriginal legal and political process. The Aboriginal Treaty Committee, which organised the conference which formed the basis of the book, clearly saw a treaty as assisting the achievement of aboriginal self-determination. However, again on the basis of overseas experience, caution should be exercised in relation to any proposed treaty in Australia. It is worth quoting a paragraph from Barsh on this point:

> To be meaningful, community self-determination will have to be given time — time to explore alternatives and to make tough decisions for the future. It cannot be advanced by pressing for speedy, 'comprehensive' solutions, or by paying experts such as lawyers and academics to redesign native communities overnight. By the same token, it is fundamentally inappropriate to think in terms of 'settling' Aboriginal rights or claims. What is needed is not a final accounting, like a proceeding in bankruptcy, but a process of political empowerment giving Aboriginal communities some time and security to establish for themselves who they are, what they want to

16 *Supra* n. 1, 86.
17 *Ibid.* 138.
18 *Ibid.* 142.
19 *Ibid. per* Barsh 67-71.
20 *Ibid.* 103.
21 *Ibid.* 103-4.
22 *Ibid.* 105.
23 *Ibid.* 60.
24 *Ibid.* 61.
25 *Ibid.* 62.
26 *Ibid.* 63.

achieve, and what kind of relationship they feel they can have with Australia. The worst thing government can do is rush Aboriginal people into irreversible commitments which they will learn to regret later.[27]

International Law and Aboriginal Human Rights provides a very useful discussion on the important issue of the way the law can advance aboriginal rights. It is hoped that the common law in Australia will become more harmonious with the jurisprudence of the other former British colonies of New Zealand, Canada and the United States, whilst at the same time learning from their mistakes. As a first step the Australian common law must recognise aboriginal title based on prior possession. Such recognition could then establish a base for negotiating aboriginal self-determination.

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[27] *Ibid.* 107.

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