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The Rights of Indigenous Peoples in the International Year of the Family

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In the wake of the International Year of the World's Indigenous Peoples and year of intense national debate culminating in the passage of the Commonwealth's Native Title Act, the International Year of the Family offers an opportunity to crystallise further the issues of social justice for the indigenous peoples of Australia.

It seems appropriate that this year we will focus, as an international community, on the site where questions of human rights are confronted at the most intimate, practical and pervasive level: the family. If 1992 was the year in which the non-indigenous Australian law came to acknowledge indigenous law and indigenous rights, and 1993 was the year to bring those rights to the forefront of national consciousness, 1994 and beyond must be the years in which those rights become realities in the day-to-day lives of indigenous children, women and men.

The Indigenous Family and the State

Transformation and Disempowerment and Cultural Genocide

In indigenous societies, the extended family or kinship system traditionally managed virtually all areas of social, economic and cultural life. It regulated the distribution of food and property, the use of and the rights and responsibilities to land, relationships between people (including marriage and the responsibility for children), the education of children and the transmission of knowledge at all stages of life, the transmission of culture and language, all aspects of the law including criminal and family law, and relations with other kinship groups. The family was, to speak comparatively, the legislative assembly, the court system, and the agency for service delivery.

However, in twentieth century western societies the authority of the family has gradually given way to that of the state. It is now the state which regulates law, education, the economy, and the use and ownership of land and culture. In contemporary Australia the family is primarily seen as the site of procreation and cohabitation, the space of our private lives and intimate relationships.

But even given that transfer of power or authority, the transmission of culture has historically been, and largely remains, the responsibility of the family. It is generally accepted that: 'Everywhere in the world it has been the role of parents and children to pass on their beliefs, knowledge, customs, law and language to their children. In that way the culture of a group lives on in its distinctiveness, too, and consequently the pride of the people who own it' (Brandl 1983).

Certainly no family could claim to retain unique responsibility or authority in this realm. The transmission of culture does not take place in a vacuum, but is interwoven in all those areas of life which have now become public provinces. And potentially the increased influence on the family of a wider society could offer individuals access to more diverse opportunities and experience, a broader education, and greater justice than may be available within their given family environment. The family and the broader society could, in theory, work together in complimentary ways producing a richer culture than either would in isolation, but one not cutting across the other.

However, where the dominant culture differs from that of a particular group, the relationship may be neither complimentary nor mutually reinforcing. In fact, recognising this potential for conflict the International Covenant on Civil and Political Rights provides that everyone has the right to their religion or belief of their choice, and should be protected from all coercion which would impair the freedom to practice that religion or belief. The Covenant specifically provides that: 'State Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions,' (International Covenant on Civil and Political Rights, Article 18[4]).

Given that indigenous peoples have become a numerical minority in our own country, the state has a particular responsibility to ensure that Aboriginal and Torres Strait Islander families are not prevented from transmitting our cultures, and that we have the support to do so. Given that the transmission of culture through the family is crucial for the preservation of that culture, the failure to fulfil this responsibility would constitute the denial of our more general human right to retain and practice our distinct cultures.

Far from being mutually reinforcing, the state and indigenous families have been in constant structural conflict. For Aboriginal and Torres Strait Islander families the right to practice our own culture has been, and continues to be, subject to systematic violation. Both direct intervention, and the more indirect effects of the social environment and the dominant non-indigenous system have severely interfered with the ability of indigenous families to transmit our cultures. Indigenous families find ourselves in a culturally alien and at times hostile context, which constantly and insidiously denies our culture and values. Cultural conflict, and the denial of our right to practice our indigenous cultures pervade the education system, the media, the law, the workforce and the welfare system. Even where these systems do not actively deny our right to practice our culture, there is rarely active support or affirmation which would enhance, reflect or facilitate our identities and cultural practices.

The State and the Indigenous Family

Historical Background

The transition of authority from indigenous families to the colonising state has not been the result of organic social development, and it has rarely resulted in greater opportunity for indigenous peoples. Rather it occurred through the unilateral seizure of power and the uninvited encroachment of the state, and in most cases has had the effect of disempowering and impoverishing indigenous peoples.

As the anthropologist W. H. Stanner so eloquently wrote: 'The destruction of Aboriginal society was not the consequence of European development, but its price, which is a very different thing,' (Stanner 1979).

It is painfully evident that in this country the introduction of non- indigenous law did not take place through negotiation, but rather occurred through the systematic devaluation and destruction of the pre-existing system of law and regulation. As the fulcrum and the map of indigenous law and power, indigenous kinship systems were destined to be the target of a policy aiming to establish a new, absolute and unique sovereignty. The attack on the indigenous family was waged at every level. Uprooting peoples from their traditional lands, separating peoples within a kinship group, eliminating traditional means of survival and sources of food, forcing adult men and women to other parts of the country to work within the colonial system, and removing children from their families are but the most obvious forms.

It is sobering to read through the records from the Boards of Protection and to witness over and over again how a group of appointed white people assumed authority over the lives of people whom they had never met, and of whom they had not a modicum of understanding.

'It was agreed that the child 'Rees' proposed to be removed from Coranderrk should not be removed, as the parents are not fit guardians for the infant, that Police should be communicated with respecting the removal of half caste 'Burns'; that John Phillip should not be allowed to leave Coranderrk Station at present, and that Jemmy Barker should have a certificate given to him and be required to leave the Coranderrk Station. He should be refused rations and shelter.'

[Minutes of the Victorian Board for Protection of Aborigines, 6 May 1873, quoted in My Heart is Breaking, 1993, p.57]

And further:

'Mrs White requested that she be allowed to visit her grandchildren at Coranderrk. The local guardian is of the opinion that she is quite unfit to travel as she is old and feeble. She was informed that the request would be considered when the Winter was over.' [Report of the Board of Protection on a visit to Lake Condah Aboriginal Reserve, 27 May 1921, quoted in My Heart is Breaking, 1993, p.57]

At the grossest level, separation, starvation, massacre, rape and disease prevented families from surviving and reproducing. But even those which did were deprived of their right to live within their culture and control their own lives. Intervention from non- indigenous systems of law, welfare, education and land title interfered relentlessly with kinship obligations, the education of children by parents and members of the extended family, the transmission of culture and language, responsibilities to country, respect for proper laws and relations between people, and the performance of ceremony.

And in the International Year of the Family, it is sobering to reflect that the systematic dismantlement of indigenous families is certainly not unique to Australia. It is a history which can be witnessed with numbing regularity in virtually all countries in which an alien power came to claim sovereignty in a country already inhabited by indigenous peoples.

The Abiding Conflict

But this is 1994, and while we must not forget history, nor overlook its ramifications in the lives of indigenous peoples today, our primary focus must be on the contemporary relationships between the non-indigenous state and indigenous families.

Given the incontestable fact that the State has, to a large extent, taken over many of the family's traditional roles, and that it plays a major part in regulating the lives of family members, the points at issue are firstly whether that state is going to be complementary to the family, or if it will be antagonistic, and secondly, if there can be a process of negotiation where the family or the community can take back the role of regulating the lives of its members.

At the most general level, the problem we face is that the state system of this country is largely based on a set of cultural assumptions which conflict with those of indigenous peoples. The rhetoric of multiculturalism cannot belie the fundamental structures which exclude and disadvantage lifestyles which do not conform to the dominant white, male, Anglo-Saxon norm; and at the deepest level the exclusion of indigenous systems.

The legal challenges and consequent debate over Native Title have provided ample evidence of the rift between the dominant culture and its systems, and those of indigenous peoples. Whereas it was evident to indigenous land holders which land was whose, and who had rights for the various uses of that land, common law courts held that in the absence of 'deeds of title' no such system could be recognised. The comments of Mr Justice Blackburn in the Gove Land Rights case are a case in point: 'The Aboriginals have no written records or anything corresponding to them; that [certain sacred objects] are, amongst other things, charters to land, is a matter of Aboriginal faith; they are not evidence, in our sense, of title .... [And] the earlier anthropologists ... made statements in general terms, about land-holdings, but did not attempt to produce anything resembling a register of titles.... Apart from the sacred [objects] which, I understand, do not purport to convey precise descriptions of land, there is nothing in the Aboriginal world which corresponds to title deeds or registers.'

[Milirrpum v. Nabalco Pty Ltd and the Commonwealth of Australia {Yirrkala (Gove)(1971)} Federal Law Reports 141-4. Judgement of the Honourable Mr Justice Blackburn, 183-184 and at 176.

In other words, what I do not have the eyes to see does not exist.

The same pattern of cultural dissonance and cultural exclusion applies to families, and is manifested in practices which have the effect of depriving families of their right to live according to their culture and to transmit that culture. It may be the case that in 1994 we have moved beyond the situation where Aboriginal children were forcibly removed by a welfare system which found 'being Aboriginal' to be sufficient justification (Chisholm 1985). However, it would be naive to assume that the cessation of such undisguised racism indicates a profound change in the philosophy which ultimately informs and justifies the state's interference in the lives and cultural integrity of indigenous families.

Sites of Conflict

The Australian Law Reform Commission's report on the Recognition of Aboriginal Customary Laws provides copious illustrations of how contemporary systems undermine or disadvantage indigenous families. For example, where indigenous people marry outside the state system, the formal non-

recognition of their marriage places them at a disadvantage with respect to social security payments, accident compensation, superannuation and the distribution of property on death.

With respect to domestic violence, during the recent Inquiry by the Race Discrimination Commissioner into the conditions on Mornington Island, police officers described domestic violence in the Aboriginal community as 'their way'. In fact, the Inquiry found that although they were well aware of the occurrence of domestic violence police did not use domestic violence orders at all. On the other hand, there is an understandable reluctance amongst indigenous women to use a system of protection which they have experienced as itself a source of abuse, or which intervenes in a culturally inappropriate manner. For many indigenous women it would be an act of betrayal to their community and family to bring the police into a family dispute.

As acknowledged by the Queensland Domestic Violence Task Force (1988), finding an appropriate and effective approach to domestic violence in Aboriginal and Torres Strait Islander communities is a complex issue, and will require a careful marriage of community based and controlled action and the support of the law. Unfortunately, in the absence of such strategies, Aboriginal and Torres Strait Islander families still largely find themselves in the situation where, save those rare and under-resourced domestic violence organisations which are sensitive to indigenous families and which have indigenous workers and management, they are compelled into mainstream options which may be inappropriate.

Growing Up Children

Perhaps the most disturbing site of conflict has been the role of the state in the welfare of children. It is now well documented that since colonisation the state has constantly and abusively intervened in relation to Aboriginal and Torres Strait Islander children. Perhaps, what is less well known by non-indigenous people is that this practice continues today. In the past indigenous children were removed from their families by the welfare system on 'moral grounds', with the express intention of assimilating and thereby improving them. Today, the stated justification for removal by the welfare system is 'neglect'. Elsewhere lawful removal has taken a contemporary guise under the name of juvenile justice. In Queensland alone 42.8 per cent of youth under care and control orders in 1990 were Aboriginal, although they make up just 3.88 per cent of the population (Jowett 1993).

The disastrous effects of this practice are no better illustrated than by the finding that of the 99 deaths investigated in the Royal Commission Into Aboriginal Deaths In Custody, 43 of those who died had been separated in childhood from their natural families (Johnson 1991).

Create in your mind a picture of the indigenous children removed from their families and communities and surviving in alien and hostile systems and you could find little further from the enjoyment of the rights guaranteed in the United Nations Convention on the Rights of the Child:

'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.' [Article 30]

Given that Australia ratified this instrument in 1991, this country is under an obligation to the international community to ensure that its practices meet the benchmarks to which it has agreed.

Certainly there has been some progress. Assimilation is, at least at the stated level, no longer the unique paradigm. And it would be difficult to stand up in this country and state that our national ideal should be to phase out indigenous culture without facing strong opposition.

Specifically, the outcry concerning the placement of Aboriginal and Torres Strait Islander children outside their communities and with non-indigenous families (either through adoption or foster care) has led to a greater awareness amongst non-indigenous practitioners of the importance of retaining a link between indigenous children and their indigenous culture. Indeed in most States and Territories policy guidelines to this effect have been adopted, and limited legislation has been enacted. Similarly, determinations concerning custody of children upon the dissolution of a marriage (where one parent is not an indigenous person) have begun to take into account the importance of not severing the link between the indigenous child and their indigenous family.

However, I would concur with the Australian Law Reform Commission's conclusions concerning the need for concrete guarantees:

'The history of disproportionate intervention in Aboriginal families, and the evidence of continuing problems, strongly supports the case for special protection for Aboriginal children and their families . . In the Commission's view, legislation should deal expressly with the placement of Aboriginal children. It is not sufficient to rely on the sensitivity of particular welfare officers, authorities or magistrates in ensuring that appropriate principles be applied - and that concealed ethnocentric judgements are not applied - in deciding the future of children. Legislation providing a statutory basis for an Aboriginal child placement principle would help to ensure that those involved in making decisions on Aboriginal child placement make every effort to ensure that, wherever possible, Aboriginal children are placed within the care of their own families and communities.' [ALRC 1986]

While acknowledging progress in this area, it is a matter of concern that some eight years after the release of the report, and some twelve years since the Secretariat of the National Aboriginal and Islander Child Care began vigorous lobbying for a 'culturally relevant national legislation relating to Aboriginal and Islander child development' (SNAICC 1982), we are yet to see comprehensive National legislation.

Locking Up Children

Turning to the juvenile justice system, a survey of the disproportionate representation of Aboriginal youth in today's detention centres may well lead to the conclusion that today's detention centres have been substituted for yesterday's children's homes. The ethic of intervention, control and distrust of Aboriginal families remains, but now with a different manifestation. A system which basically views Aboriginal families as incapable of bringing up and disciplining their children in 'appropriate' or acceptable ways continues to keep our young people in check.

The statistics on youth in detention across the country provide a chilling snapshot of the situation. Recent figures indicate that in New South Wales, while Aboriginal youth are only 1.1 per cent of the overall youth population, they represent 23 per cent of young people in detention centres. In Victoria those figures are 0.3 per cent of the overall population, but 9 per cent of youth in detention; in South Australia 1.1 per cent compared with 28 per cent; in Queensland 2.4 per cent compared

with 32 per cent; in Western Australia 2.2 per cent compared with 73 per cent; and in the Northern Territory 22.4 per cent compared with 57 per cent (figures for Tasmania were not available) (Human Rights and Equal Opportunity Commission 1990; Cunneen 1993). That is an over-representation of approximately 20- 30 times in all but one case.

Asking why our young people are still ending up in custody at such an alarming rate opens a hornet's nest of questions about their social and economic situation, their sense of identity, and their relationship with the broader society. However, at the simplest level there is ample evidence that they are subject to discriminatory treatment at the hands of the criminal justice system. In New South Wales, numerous studies show quite clearly that Aboriginal Juveniles are disadvantaged in the treatment they receive from police. For the same offences they are less likely to receive cautions than their non-Aboriginal counterparts, they have a higher chance of being charged as opposed to being given a court attendance notice, and they are less likely to receive bail (Cunneen 1992). A study of seven country towns showed that of those apprehended, 31 per cent of non-Aboriginal kids received cautions compared with 10 per cent of Aboriginal kids (Cunneen 1992). This discrepancy applies whether they are repeat or first offenders. (1)

Quite apart from the immediate devastation of the young person, their family and community caused by their detention in custody, this type of intervention by the criminal justice system has far-reaching ramifications. Placement in custody will affect the young person's life chances in terms of education, employment, economic security and future criminality. When you start to reflect on the indirect effects on the entire family, and in particular siblings and future children and partners of the young person, you can begin to grasp the enormous negative impact that current policies will continue to have well into the future.

Empowerment or Just More Policy?

In the face of the ample evidence that indigenous families are not enjoying our basic human rights, detractors often point to the 'millions of dollars' and 'numerous services' directed to the improvement of the conditions of Aboriginal and Torres Strait Islander peoples. Without addressing the particular problems with many existing programs, suffice to say that as long as they continue to conceive of the issues as separate problems to be targeted, and continue to send non-indigenous experts in to provide a 'fix', they will fail to achieve social justice. At best they will be pacifying band-aids; at worst, yet further forms of control which disempower indigenous peoples, and take us further from the place where we can find and implement the solutions to our own problems.

The issues arising in the International Year of the Family, those of domestic violence, family breakdown, so-called neglect and criminality amongst children or youth must be viewed and addressed from a broad social, economic and cultural perspective. Unless we ask questions about the conditions in which indigenous peoples are living, the poverty, the unemployment, the ill-health, the spiritual desolation, the cultural deprivation and the pervasive racism, we will remain trapped in a cycle of short-term solutions and fixing (if not blaming) those who are themselves victims of greater injustice. Rather, what we need is the social, economic, cultural and political base which will ultimately support our families and our ability to care for ourselves and each other from the inside.

The Indigenous Family Beyond the State

Self-determination?

Indigenous peoples universally assert that our right to self- determination is fundamental to the exercise of all other human rights. 'It is to peoples what freedom is to individuals ... the very basis of their existence' (UNESCO 1984). It is also the right guaranteed to all peoples in the very first article of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Article 1 of the International Covenant on Civil and Political Rights provides that: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

Yet, although the right may be inalienable and inherent, one could hardly find a more poignant illustration of its abuse than in the story of indigenous families under colonising states. Australia is now a signatory to the international instruments which protect this right, and is thus under an obligation to ensure that it is enjoyed by all its peoples. And it is precisely here, at the coalface of issues such as child welfare and juvenile justice that the sometimes amorphous right to self-determination can, and must be translated into concrete practices.

The demand for self-determination is not something new, but has been the leitmotif of statements, submissions and recommendations from Aboriginal and Torres Strait Islander organisations and communities for as long as we have been denied that right. Indigenous child care and welfare organisations in particular assert that they must play a central role in developing and implementing policies and programs for indigenous children, and that they must have both the legal authority and the resourcing to do this.

Nor is the importance of indigenous control over decisions about indigenous children's welfare and education merely the assertion of some radical indigenous fringe. It has been endorsed by report after report in this country, and is already the guiding principle in other countries. The principle was unambiguously supported by the Australian Law Reform Commission and the IYC National Committee of Non-Government Organisations during the International Year of the Child:

To sustain the authority within Aboriginal groups which directly influence the power of Aboriginal people to deal with their children and their children's problems it is desirable that the legal processes in all types of Aboriginal communities is Aboriginalised to the extent desired by the communities. [IYC National Committee of NGOs 1979]

In the United States and Canada there are now far- ranging statutory provisions for the involvement of indigenous organisations in decision-making processes and service delivery.

And yet locally, despite some formal changes in provisions which allow for greater involvement of Aboriginal and Torres Strait Islander organisations, in practice in many parts of the country these organisations remain under-resourced and marginalised, and their role in the decision-making processes is little more than token consultation.

The Indigenous Family: Indigenous Rights

State Responsibilities and Prospects for the Future

The examples I have used provide but a glimpse of the experience of indigenous families, but are sufficient proof of the hardships they face and the abuse of their integrity, authority and rights.

However, in 1994 indigenous peoples in this country find ourselves in a position of strength which we have not previously enjoyed. The prospects for change are perhaps greater than they have been for the last 206 years. Until 1992, when we asserted our right to determine our own lives and to operate according to our own indigenous laws we relied on an appeal to morality or an ethics of justice which recognised the inalienability of inherent human rights. The only concrete guarantees we had were those contained in international instruments which seemingly carried little weight when they came into conflict with other powerful interests.

This era was brought to an end by the High Court Native Title decision, and the subsequent Commonwealth legislation, which provided formal acknowledgment of the existence of pre-colonial indigenous law, and recognition that in some instances those laws have continuing validity. The common law of Australia now acknowledges what we, the indigenous peoples have always known: that we have our own laws and systems which are not merely historical or cultural curiosities; that colonisation did not eradicate all of those laws; and that in some instances we have the legal right to apply those laws in our lives today. (2)

In simple terms, while our rights have not changed, their legal status has, and with that has come a shift in our relationship with the systems of non-indigenous law. No longer are we forced into a position where we must seek recognition through largess. We can now insist that what occurs is the result of a negotiated outcome between indigenous and parallel non-indigenous laws.

Extrapolating the Native Title decision, it could be argued that by recognising the validity of indigenous social and legal systems, there is a prospect for recognition of legal rights in areas other than land rights (including laws concerning the family and the care and control of children). It is certainly not yet clear how far this acknowledgment will extend. Nevertheless, the progress to date provides a direction for change in the relationship between indigenous peoples and the state, and an indication that we are moving away from unilateral imposition, and towards negotiation.

If this country is genuinely to move towards a just relationship between its indigenous and non-indigenous peoples, the dynamic of that relationship must shift from patronage, control and interference, to support, cooperation and respect. The spirit of reconciliation or self-determination must not be allowed to degenerate into words on placards displayed in celebration of 'international years'. They must be evidenced in every system, policy and practice which concerns indigenous peoples, appropriate education, economic security, indigenous controlled child care and juvenile justice systems, adequate and appropriate health care, and environmental health.

When the rhetoric and openings are over, and the committees have stopped meeting, we all go home to our own lives and face the bottom line reality which tells us whether we have achieved our high ideals of justice and human rights. When indigenous families can say that we enjoy the security,

health and cultural integrity which is our right, this country can move with clear conscience to the next international year.

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Notes

(1) Such findings were confirmed in the Report of Aboriginals and the Law Mission, (1922) by the International Commission of Jurists Australian Section, in which five members of the ICJ visited Bourke, Brewarrina and Walgett in NSW to report on the criminal justice administration, with particular reference to Aboriginal people. The report noted the use of police discretion, and the tendency to arrest, charge and bring proceedings 'in circumstances where alternative resolution may have been more appropriate' (p.29). It commented that this practice, as opposed by proceeding by way of summons or a court attendance notice is an 'inflexible approach (is) contrary to law and practice' (p.30)

(2) On this latter point there is much debate, and a distinction should be drawn between what people may assert as their 'human rights', and what is recognised as a legal right. Many indigenous people would assert that we retain an absolute right to practice our indigenous laws. However, only a subset of those laws have been given recognition as legal rights within the common law system.

Mick Dodson is Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner appointed under the provisions of the Human Rights and Equal Opportunity Legislation Amendment Act (No.2) 1992. The Federal Government's delegation of this position is a result of the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence.