background paper 11

Customary law, human rights and international law: some conceptual issues

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1. Introduction

The argument presented in this paper is relatively simple. The concept of 'customary law' is flawed, and relies on basic colonialist assumptions about the nature of law in Indigenous communities. As a result, the discussion about recognition of customary law functions within and reproduces a paradigm that assumes the centrality of non-Indigenous law and legal institutions. Such a paradigm (and the processes likely to flow from it) will in all likelihood remain unsatisfactory to Indigenous people.

A more appropriate starting point is recognition of Indigenous rights in relation to self-determination. Such recognition will entail basic self-governing and law-making powers. The question of whether those laws are 'customary' or not becomes irrelevant. The limits set on those law-making powers would derive from the negotiated relationship between the relevant non-Indigenous political authority and the Indigenous political entity, as well as from the need to comply with internationally recognised human rights standards. This line of thinking has support both within Australia and elsewhere. As the recent *Cape York Justice Study* noted:

> In Canada a growing body of literature is moving away from attraction with mainstreaming Aboriginal legal norms towards the belief that the right of self-determination must encompass the authority of Aboriginal communities to establish their own justice systems.[1]

2. The concept of customary law

It is argued in this paper that the initial question should not be how do we 'recognise' customary law, but rather there should be a series of prior questions about the meaning and nature of the concept of customary law:

- What do we mean when we speak of the concept of 'customary' law?
- How is it defined and what is it defined against?
- Is customary law essentially an 'imperialist' concept to construct and delimit the law of the other as lesser than the laws of the colonial state?
- Does the concept of 'legal pluralism' provide an adequate vehicle for recognising Indigenous rights?

It can be argued that the concept of customary law inevitably forces attention towards the specific content of the 'laws, traditions and customs' of Indigenous people, rather than encouraging a focus on the rights of Indigenous peoples to govern and make law. The concept of customary law is by its very nature retrospective and backward-looking. It forces us into a process of describing what 'traditional' Aboriginal law was, rather than focusing on what Aboriginal law might become. There are other problematic definitional issues attached to customary law, as well as there being potential flaws in the drive for legal pluralism in Australia. These are issues that look to the very structure of the examination of the place of customary law in the dominant legal system. Though such an examination of customary law might be undertaken in good faith, it is arguable that these issues render the project of 'recognising customary law' flawed at a fundamental level. This is a dynamic that requires serious attention.

In addition, the concept of customary law implies a strong focus on the specific content of particular customary law practices which in itself can create a range of subsidiary problems:

- Who defines customary law: Indigenous people or non-Indigenous experts?
- What evidence can be heard in the determination of customary laws: oral evidence or is documentary evidence privileged?
- Does the validity of customary law require continuous practice from colonisation to be recognised as valid?
- When has customary law been 'washed away' by the tide of history?

These problems are inherent to the use of the notion of customary law, and to the failure to link the discussion to rights of self-determination. The issue of Indigenous self-determination will be considered later in this paper, but we flag it here as the most important context in which any discussion of Aboriginal law might occur.

The meaning of customary law

It is important to question what we mean by the concept of customary law, and to consider how customary law is defined and what it is defined against.

1. State of Queensland, *Cape York Justice Study* (Advanced Copy, November 2001) vol 2, 112.

> The debate about whether 'law' exists in societies which do not have written laws, law courts and judges is an old one. Anthropologists now generally accept that all human societies have 'law', in the sense of principles and processes.[2]

The purpose of this paper is not to engage in an 'old debate' about whether law exists in Indigenous societies, but rather to explore the problems associated with the categorisation of that law as 'customary'.

The Law Commission of New Zealand notes that the phrase 'custom law' is used in a variety of ways.

> At the most basic level, the term 'custom law' is used in a legalistic and narrow manner to refer to particular customs and laws derived from England, and indigenous and aboriginal laws and customs that have met particular legal tests and thus are enforceable in the courts. In a broader sense, it is used to describe the body of rules developed by indigenous societies to govern themselves, whether or not such rules can be said to constitute 'custom law' in the former sense.[3]

In the broadest sense, we can understand customary law as the rules developed by Indigenous societies to govern themselves.[4] The necessary link between recognition of law and recognition of a right of governance is a basic point which underpins our discussion. We argue that it is not possible to consider Aboriginal law separate from Aboriginal governance. The New South Wales Aboriginal Justice Advisory Committee has defined Aboriginal customary law in the following manner:

> Aboriginal customary law is fundamentally a means of dispute resolution based on traditional spiritual beliefs and cultural traditions that provide sanction against those actions which are harmful to the community. In a criminal context fundamentally customary law is simply a means of a community establishing its set of basic values and providing a means to punish those who transgress against established community laws. It also provides a means where an aggrieved victim of an offence can have recompense, where any existing family or community tension resulting from the offence can be resolved quickly and a means to ensure that disputes within communities and between sections of communities do not fester and lead to greater ongoing tension and conflict. Customary law is fundamentally a means of maintaining social order, where local Aboriginal communities act to solve their own problems and resolve their own disputes.[5]

For our argument the importance of the Aboriginal Justice Advisory Committee's definition is not their use of term 'customary' but rather their linking of Aboriginal law with basic questions of social order and governance.

Historically, customary laws which were not seen as 'repugnant' to common law values and which had not been replaced by statute were recognised by colonial courts and the Privy Council in many parts of the British empire.[6] Australia, in general, proved an exception to the rule.[7]

Despite this limited recognition by British colonialists, customary law as a legal tradition has historically been viewed disparagingly by colonial law systems. Ironically, this was an attitude adopted despite the fact that it is 'custom' that is at the heart of common law itself.[8] In this context,

> the historical debate as to whether or not the tribes, in various parts of the far-flung British empire, had a legal system, or whether they were controlled 'merely' by custom, is indicative of myopic thinking of the worst order, or a lack of knowledge of the historical development of the law, or a deliberate denigration of the societies – or a combination of these factors.[9]

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Thus, despite the central place of custom in the common law, colonial approaches to customary law have been denigratory and superior.

James Zion has commented in the American context that 'it is unfortunate that the term 'custom' implies something that is somehow less or of lower degree than 'law'. There are connotations that a 'custom' is somehow outside the 'law' of government, which is powerful and binding'.[10] The New Zealand Law Commission notes that legal positivism,

2. New Zealand Law Commission, *Maori Custom and Values in New Zealand Law*, Study Paper No 9 (March 2001) 17.
3. Ibid 1 (footnotes omitted).
4. 'Customary law consists of rules and customs of a particular group or community', South African Law Commission, *The Harmonisation of the Common Law and the Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, Discussion Paper No 82 (May 1999) [2.1.3].
5. Thomas B, *Strengthening Community Justice: Some Issues in the Recognition of Aboriginal Customary Law in New South Wales* (Sydney: New South Wales Aboriginal Justice Advisory Council, 2003) 3–4.
6. Reynolds notes that legal pluralism was common throughout the Empire and discusses India, Penang and New Zealand in this context: Reynolds H, *Aboriginal Sovereignty* (Sydney: Allen and Unwin, 1996) 78–80. See also the New Zealand Law Commission, above n 2, 8.
7. See Reynolds, ibid ch 4.
8. See Sheleff L, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 1999) 79–90.
9. Ibid 83.
10. Zion JW, 'Searching for Indian Common Law' in Morse BW & Woodman GR (eds) *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 121, 123–24. See also Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law* (2003) 11.

'as the dominant jurisprudential tendency in the English legal system', has reinforced this view that 'law' is inherently linked with the modern political state.[11] A similar point has been made by Leon Sheleff who argues that both ethnocentrism and the effects of 'a narrow positivistic doctrine of jurisprudence' have served to denigrate customary law and to ignore that custom is at the basis of the common law.[12] The language of 'custom' thus skews the discussion of Indigenous law from the outset.

Historically, the general approach to Indigenous customary law was to treat it 'as analogous to particular customs in England or foreign law'.[13] In the same vein, the Northern Territory Law Reform Committee noted that the common law has always recognised the existence of certain customs as the valid local law of certain parts of England. The criteria for acceptance of such custom as valid, however, required that it be, inter alia:

- certain;
- exercised since 'time immemorial' without interruption;
- reasonable and not oppressive at the time of its inception;
- not inconsistent with any statute law.[14]

These criteria make clear how the 'customary' law discussion is weighted in a certain way, whereby common law criteria are applied as to what the parameters and content of such law should be. Such criteria are certainly not imposed on state law in determining its validity. This highlights the fact that in conceptually identifying Indigenous law as 'customary' law, the state does not approach Indigenous law on equal terms. It requires Indigenous law to meet validity thresholds that it does not require of itself, making its legality subject to consistency with the dominant system. Linguistically and conceptually, then, the common law eclipses a notion of Indigenous law as a current, responsive and legitimately evolving system of governance.

Many of the practical problems of applying the criteria referred to above have been commented upon previously. The New Zealand Law Commission has noted that difficulties have arisen for courts trying to find and apply relevant customary law because of:

- the multiplicity of different tribal laws;
- the uncertainty regarding the limits of the operation of customary law;
- the fluid nature of customary law;
- the problems of applying tests of reasonableness, morality and public policy to different cultures and religions; and
- the artificiality of particular tests.[15]

The state, then, does not recognise customary law as a freestanding political/legal construct grounded in Indigenous law. Rather, it is seen in relation to the processes and interests of colonial law, defined in a way which rejects the sovereign nature of Indigenous law and limits its functioning to areas manageable within the colonial legal status quo.[16]

This skewed power dynamic is reflected in the summary of recommendations of the Northern Territory Law Reform Committee's *Report on Aboriginal Customary Law*. Its first point is that:

> Australian law does not recognise traditional law as '*law*'. Traditional law can be recognised by judges and government decision makers where relevant *as long as it does not conflict with Australian law*.[17]

Likewise, the Committee's report notes that:

> There is only one legal system in Australia, and only one 'law' and that is Australian law … Aboriginal law can only be recognised if Australian law says so.[18]

Not surprisingly, the Northern Territory Law Reform Committee concluded that 'whether or not Aboriginal law exists, the courts can legally ignore it' unless a specific law says that it is required to take it into account.[19] Thus, the colonial (and post-colonial) validation of Aboriginal law has taken place entirely subject to the criteria of the imposed legal system and in relation to it. This has occurred independent of the factual existence of Aboriginal law which, of course,

11. New Zealand Law Commission, above n 2, 18.
12. Sheleff, above n 8, 83.
13. New Zealand Law Commission, above n 2, 8.
14. Northern Territory Law Reform Committee, *The Recognition of Aboriginal Law as Law,* Background Paper No 2 (2003) 18.
15. New Zealand Law Commission, above n 2, 8–9. In relation to the artificiality of tests, the requirement of custom being practiced since 'time immemorial' was interpreted as dating from the first year of the reign of Richard I.
16. Jackson M, 'Changing Realities: Unchanging Truths' (1994) 10 *Australian Journal of Law and Society* 115, 123.
17. Northern Territory Law Reform Committee, above n 10, 6 (emphasis in original).
18. Northern Territory Law Reform Committee, above n 14, 9, citing *Mason v Tritton* (1994) 34 NSWLR 572, 578 (Kirby P).
19. Ibid 11 (emphasis in original).

does not rely on external validation for its relevance to Indigenous communities. Yet in the eyes of state law, the validity of Indigenous law has been and is dependent on recognition by the imposed law of the colonisers.

3. Customary law as an imperialist concept

The discussion introduces the argument that, despite the common law's ability to incorporate aspects of customary law, the idea of customary law is essentially an imperialist concept which has been used to construct and delimit Indigenous law as lesser. The delegitimisation of Indigenous law was part of the 'civilising' process which was deemed to bring the superior political and legal institutions of the West to the native.

On colonisation, Indigenous society was considered 'possessed only of lore and custom, which needed to be suppressed and destroyed in order that the monist ideas of 'one (English) law for all' should prevail.[20] If necessary, the process of unification could draw upon elements of customary law, 'but only as part of a process of building a national legal system which would apply equally and identically to everyone'.[21]

With this history in mind, Moanna Jackson states that considerations of Indigenous people and the law are

> best addressed by acknowledging the dialectic of colonisation. Any debate which fails to acknowledge that dialectic will inevitably seek only to describe the operations and biases of the imposed law. It will not address the measures necessary to being about the structural change which will enable indigenous people to seek their own explanations … and their own solutions.[22]

Jackson has identified several consequences of the process of legal colonisation which resonates through the discussion of the contemporary recognition of customary law. First, it has meant the continued subjection of Indigenous peoples to legal processes that are systematically biased. Secondly, it has led to an equation of justice—both in general public consciousness and within Indigenous communities themselves—with the operations of the law of the colonising power.[23] It is clear that the result of a state recognition of customary law can be seen, in continuation of this process, as entrenching the idea that Indigenous people 'no longer source their right to do anything in the rules of their own law'.[24] Rather, they have their rights defined by the colonial system and have to seek permission to exercise their law from that system. Speaking of the situation of Indigenous Hawaiians, Haunani-Kay Trask comments that 'by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonisation'.[25] Moana Jackson makes a similar point when he notes that Maori may be compelled into

> seeking a culturally 'sensitive' process within an ideological framework that actually forces them into adopting the very consciousness which they wish to transform, and which maintains the illusion that law (and hence justice) is isolated from issues of political power.[26]

South Africa's colonists similarly recognised customary law not to acknowledge a right of self-determination, but because it was necessary in the colonial process to maintain order and through that order their own power.[27] The size of the Indigenous population was a factor in this recognition (as was the belief that English law was too advanced to be applied to the Indigenous peoples). In any event, recognition was considered not a right, but a privilege that could be easily taken away.[28]

What emerges here is that in acknowledging customary law, colonial power is further consolidated at the same time that it encourages Indigenous acceptance of the good faith and efficacy of colonial institutions.[29] The discussion about recognition of customary law becomes part of the continuing story of colonisation. The dominant power captures Indigenous concepts with the result of freezing Indigenous cultural and political expression within parameters that the state finds acceptable.[30] As Mark Findlay confirms:

20. Jackson, above n 16, 117, speaking of the Maori experience.
21. McLachlan C, 'The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm – A Review Article' (1988) 37 *International and Comparative Law Quarterly* 368, 382.
22. Jackson M, 'Justice and Political Power: Reasserting Maori Legal Processes' in Hazlehurst KM (ed), *Legal Pluralism and the Colonial Legacy* (Sydney: Avebury, 1995) 262.
23. Jackson, above n 16, 117–18.
24. Ibid 127. See also McLachlan, above n 21, 382.
25. Quoted in Watson I, 'There is No Possibility of Rights Without Law: So Until Then, Don't Thumb Print or Sign Anything!' (2000) 5(1) *Indigenous Law Bulletin* 4, 5. Haunani-Kay Trask continues with the further comment that 'once indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe'.
26. Jackson, above n 16, 118.
27. Ludsin H, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law' (2003) 21 *Berkeley Journal of International Law* 62, 65–66. See also du Bois F, 'The Past and Present of South African Law' (2004) 32 *International Journal of Legal Information* 217.
28. Ludsin, ibid 66. Ludsin also notes that 'today there are two types of customary law practices in South Africa: (1) official customary law, and (2) living customary law. Official customary law is customary law that has been recognised in anthropological studies, court judgments, restatements and in legal codes. Living customary law, in contrast, denotes the practices and customs of the people in their day-to-day lives': at 71.
29. Jackson, above n 16, 126.
30. Jackson, ibid 127; Jackson, above n 22, 254.

> The colonisation of customary ceremonies and resolutions may be more about the securing of the hegemony of introduced systems of justice, rather than the reassertion and recognition of custom-based alternatives.[31]

Instead of destroying culture through direct rejection or denigration, the state attempts to 'imprison it within a perception of its worth that is determined from the outside'.[32]

In such a context, the meaning of self-determination with respect to Indigenous peoples is 'affected by eurocentrism, global politics, global conflict and the increasing paranoia of states to protect 'their' territorial integrity'.[33]

4. Legal pluralism and customary law

A further question that needs to be asked is whether legal pluralism provides an adequate vehicle for recognising Indigenous rights. It has been argued that 'legal pluralism, as a concept, is inherently assimilative and racist'.[34] This is because what must flow from the recognition of Indigenous law—which is ultimately the recognition of a right to *make* law—is an acknowledgement of Indigenous legal sovereignty. And yet the idea of Indigenous sovereignty remains political anathema and is kept out of discussions and off the negotiating table. Ultimately, legal pluralism 'enables the imposed status quo to mask that anathema in a guise of sensitivity and good faith'.[35] An attempt is made to incorporate Indigenous law without addressing the question thus begged – that of the impliedly recognised Indigenous sovereignty to make those laws.[36] Legal pluralism seeks to 'incorporate and redefine indigenous legal concepts to maintain the overall control of its own processes. It thus perpetuates the same assimilative and racist base of colonisation, which it purports to abhor',[37] denying Indigenous peoples the justice which it proclaims to strive towards at the same time that it prides itself in its ability to act in good faith towards its Aboriginal 'partner'.[38]

Speaking of the process of recognition of Indigenous law in New Zealand, Jackson concludes that in 'redefining the base of Maori aspiration and by seeking to co-opt Maori legal and cultural processes, the law maintains its place as a colonising leviathan that can choose which norms of the oppressed will be validated and which will be dismissed'.[39] Colonial powers 'examine which part of indigenous law they can splice and incorporate into the colonial system of laws and which unsavoury, uncivilised parts are best left out'.[40] This process may be influenced and limited by the fact that the colonialist legal order 'began with their own image of customary society as, above all, unchanging and hierarchical', drawing, amongst other things, on the noble savage tradition.[41]

Clearly, to presume the content of Indigenous law on these or any grounds is to utterly compromise the right to self-determination. Yet the propensity for such an approach is noted by the Northern Territory Law Reform Committee. The Committee states that in looking for customary law,

> there has been a tendency to treat law as divinely inspired revelations and not rules deriving their content and form from social needs; to treat law as religious rules, and not as dispute resolution mechanisms.[42]

On this approach, contemporary recognition of customary law is riddled with continued colonial relations of power. There is, however, another point of view on the potentialities of the recognition of incorporating Indigenous law. Campbell McLachlan argues that legal pluralism provides a negotiating space for Indigenous law to interact with the colonial legal order. This is expressed in the belief that the road to legal pluralism is inevitably an 'ongoing process of conflict and compromise … a dialectic in which state law must continuously re-evaluate its own limits in relation to the separate sphere of indigenous customary law'.[43] From this position, the 1986 Australian Law Reform Commission report on the recognition of Aboriginal customary law can be understood as covering new ground in seeking to provide a 'principled response to legal and cultural diversity',[44] rather than attempting to provide just another government

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31. Findlay M, 'Decolonising Restoration and Justice' (1998) 10 *Current Issues in Criminal Justice* 85. See also Blagg H, 'A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia' (1997) 37 *British Journal of Criminology* 481; Blagg H, 'Restorative Visions and Restorative Justice Practice'(1998) 10 *Current Issues in Criminal Justice* 5.
32. Jackson, above n 16, 127; Jackson, above n 22, 254.
33. Watson I, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 55.
34. Jackson, above n 16, 116.
35. Ibid 118.
36. This dynamic is recognised by the Northern Territory Law Reform Committee, above n 14, 16. It is this very model that was proposed by the Northern Territory Statehood Convention (March–April 1998).
37. Jackson, above n 16, 118.
38. Ibid 125.
39. Ibid.
40. Watson, above n 33, 58.
41. McLachlan, above n 21, 380–81.
42. Northern Territory Law Reform Committee, above n 14, 12.
43. McLachlan, above n 21, 368–69.
44. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* Report No 31 (May 1986) [1037], quoted in McLachlan, ibid 372. The Northern Territory Law Reform Committee framed its inquiry in the same post-colonial context: see Northern Territory Law Reform Committee, *Aboriginal Communities and Aboriginal Law in the Northern Territory,* Background Paper No 1 (2003) 4–5.

'service' to Indigenous people. Here, the aim of law reform projects is not to define and delimit customary law, but rather to reflect on the general legal system and on its proper role, functions and limits in relation to the Aboriginal community.[45] On this approach, law reform initiatives must recognise that the real issue is not the codification of Indigenous law, but rather the problem of interaction between customary law and the general legal system.[46]

Characteristics of the 1986 Australian Law Reform Commission inquiry, which are said to distinguish it as transcending the colonial paradigm, include that:

- It does not conceive customary law as something immutable and rooted in pre-colonial times, recognising that the patterns of Aboriginal living have changed;
- It does not attempt to co-opt Aboriginal institutions to serve the end of the state but respects the separate and independent sphere of customary law;
- It does not take a monolithic approach to identifying Aboriginal aspirations;
- It does not predetermine the legal spheres in which customary law might operate or be recognised;
- It does not envisage an eventual withering away of customary law.[47]

In these ways, McLachlan argues, the state recognises that its proper role is not to codify customary law but to 'take account of its existence and adjust itself accordingly'.[48]

It should be noted that the 1986 Australian Law Reform Commission report states that a better approach than theirs is to look at the customary law issue in the context of a wider negotiation for self-determination. The report identifies this as the only way that 'elements of ethnocentricity' can be avoided.[49] This is essentially the argument we wish to develop in this Background Paper: unless the debate is rephrased as one of Aboriginal law (rather than customary law) and in the context of the recognition of autonomy rights of Indigenous peoples to make law (rather than have their law 'recognised'), then inevitably the result will be biased, partial and reflect the interests of the dominant colonial state.

Some commentators such as McLachlan disagree with the argument concerning the primacy of self-determination or autonomy, and alternatively stress that 'self-determination is not wholly, or even principally, about customary law'. That is because it is not customary law,[50] but recognition of the right of Indigenous people to self-determine, which is the principle issue. Since, according to McLachlan, questions of self-determination are, to some degree, political questions, the role of a Law Reform Commission in progressing them is limited at best.[51]

Distinct from this approach, our argument is that it is not possible to adhere to a concept of customary law separate from a discussion about Aboriginal law and law-making power. The attempt to maintain a position for customary law separate from discussions of self-determination is ultimately untenable,[52] because self-determination is fundamentally about governance, which includes law-making power. We argue that it becomes irrelevant whether those laws are deemed 'customary' or not. At the end of the day, Indigenous communities may choose to adopt state law as their preferred method of legal governance, and that is a matter for them alone. Indeed we might reasonably expect a hybridity of law to develop, incorporating a range of influences. The crucial point is that communities should have the opportunity to meaningfully exercise choice in relation to these questions on their own terms. Far from a limited role of Law Reform Commissions in progressing these issues as suggested by McLachlan, we would see a fundamental role in developing options for governance and law-making powers.[53]

The link between self-determination, governance and Aboriginal law has been made by others. For example, the former Aboriginal and Torres Strait Islander Social Justice Commissioner notes that:

> Customary law should be treated by the Government as integral to attempts to develop and maintain functional self-determining Aboriginal communities. Customary law is therefore more than a mitigating factor in sentencing processes

45. McLachlan, ibid 372. The Northern Territory Law Reform Committee took a similar stand in refusing to attempt to codify customary law: see Northern Territory Law Reform Committee, above n 10, 11–12.
46. McLachlan, ibid, 372.
47. Ibid 385.
48. Ibid 386.
49. Australian Law Reform Commission, above n 44, [1035], quoted in McLachlan, ibid 376.
50. McLachlan, ibid 377.
51. Ibid.
52. McLachlan suggests that the Australian Law Reform Commission was perhaps aware of this, 'having been made to put the cart before horse by considering the recognition of customary law before any negotiation between Aboriginal people and the Australian government on self-determination, but that does not invalidate the exercise': ibid.
53. In this regard see the Queensland Legislation Review Committee, *Inquiry into Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland,* Final Report (Cairns, 1991). See also subsequent community governance project reports: Office of Aboriginal and Torres Strait Islander Affairs, *Local Justice Initiatives Program* (Brisbane: Department of Families, Youth and Community Care, 1996); Office of Aboriginal and Torres Strait Islander Affairs, *Alternative Governing Structures Program* (Brisbane: Department of Families, Youth and Community Care, 1996).

> before the courts. It is about providing recognition to Aboriginal customary processes for healing communities, resolving disputes and restoring law and order.[54]

We are in broad agreement with the position argued by the Aboriginal and Torres Strait Islander Social Justice Commissioner. However, we would distinguish our argument on the basis that the reference to Aboriginal customary law serves no useful purpose. The link between self-determination and governance rests on the recognition, development and observance of Aboriginal law. Whether it can be characterised as customary or not is irrelevant.

5. Customary law as a 'recognition concept'

In addressing the limitations of the concept of customary law, we turn now to the idea of customary law as a 'recognition concept'. That is, as a notion that creates a space between Aboriginal law and Anglo-Australian law, as a way of bridging the two. The idea of a 'recognition concept' derives from a discussion of native title by Noel Pearson.[55]

Pearson has argued that native title is a bridging concept between Aboriginal law and common law real property title. It is not a legal title in itself. It is neither a part of Aboriginal law nor common law property, but is 'the space between two systems, where there is recognition'.[56] Native title becomes the means through which the common law can configure Aboriginal law. Pearson's discussion of native title from this perspective, set out below, is translatable to the discussion of the concept of customary law. This is because customary law may be understood as analogous to native title as being neither common law nor Aboriginal law, but rather a space between where Anglo-Australian law might recognise some aspects of Aboriginal law. It is also instructive to review the way that the courts have conceived of and dealt with native title, since it stands as the major example of the state's attempt to come to grips with an aspect of Indigenous law. This may give some indication of the way that a court might approach issues of customary law.

Pearson has noted that 'our inability to clearly articulate the concept of native title has implications therefore for our understanding of its recognition, its extinguishment and its content'.[57] Equally, there have been problems in articulating the concept of customary law, particularly in the context of seeing *Aboriginal* law separate from custom and as an ongoing, changing and adaptive process of Aboriginal law-making rather than a static set of relationships indicative of a pre-modern society.

There is a range of problems in thinking about native title as a recognition concept, arising out of its 'configuration' by the colonial system. These problems include that:

- There is no universal right to Aboriginal law title to land;
- Aboriginal claimants must satisfy the requirements of proof established by Anglo-Australian law;
- Claims are assessed on a case-by-case basis;
- There is a high susceptibility to extinguishment;
- There is no defence against extinguishment by grant of an inconsistent interest. Thus native title is relegated 'to the bottom of the hierarchy of title that characterises Anglo-Australian land law'.[58]
- Extinguishment can also occur where the courts decline to recognise native title 'in fact'. That is, the courts are required to make a determination as to the existence of, and content of, native title.

The effect of these problems is that the concept of native title serves to essentialise Aboriginality. It requires 'authenticity' to be demonstrated, requiring that Aboriginal relations be made comprehensible to the court. French J has commented on some of these issues in relation to the High Court's decision in *Western Australia v Ward* where the emphasis was placed on Aboriginal use of land in customary practices, rather than cultural knowledge. French J noted that:

> The confinement of native title by its statutory definition means that it is a pale reflection of the reality of the connection to country. Indeed the joint judgment [in *Ward*] acknowledges the difficulty of expressing, solely in terms of rights and interests, the essentially spiritual relationship between an Aboriginal community and its country, which imposes responsibilities as well as conferring rights.[59]

In *Ward* the High Court noted that the *Native Title Act 1993* (Cth) required that:

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54. Jonas W, 'Recognising Aboriginal Customary Law and Developments in Community Justice Mechanisms' Background Paper No 26 (presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid,12–14 November 2003) 2.
55. Pearson N, 'The Concept of Native Title at Common Law', in G Yuninpingu (ed), *Our Land is Our Life* (Brisbane: University of Queensland Press, 1997) 154.
56. Ibid.
57. Ibid 151.
58. Bhuta N, '*Mabo*, *Wik* and the Art of Paradigm Management' (1998) 22 *Melbourne University Law Review* 36.
59. French R, '*Western Australia v Ward*: Devil (and Angels) in the Detail' (Paper presented at the Native Title Conference, Geraldton, 3 September 2002) 5.

> [T]he spiritual and religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[60]

French J has characterised the decision in *Ward* as foreshadowing the limited development of the common law of native title and according the provisions of the *Native Title Act 1993* (Cth) primary importance in identifying the content of native title. The judgment 'eshews analysis of the metaphors of 'recognition' and 'extinguishment' which lie at the heart of the common law of native title' and favours a statute-based characterisation of native title as a bundle of rights which may be extinguished in part or incrementally.[61]

It is possible that similar problems would arise in a 'recognition concept' approach to customary law. The very notion of a bridging concept presupposes that one paradigm needs to be altered in order for it to be rendered comprehensible to the other in the other's terms. The requirements imposed upon Indigenous law to translate it into the colonial paradigm, and its essentialisation in that process, result in violence being done to Indigenous law in order to make it intelligible to the state. Some specific ways that this has occurred in relation to native title are now examined for their relevance to customary law.

Tradition

Under s 223(a) of the *Native Title Act 1993* (Cth), native title is recognised where 'the rights and interests are possessed under traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. The High Court in *Yorta Yorta* understood 'traditional' as based on a 'normative system'.[62] This means that the origin of the traditional customs and laws must be found in normative rules, which must have existed before the assertion of sovereignty to be considered traditional customs or laws.

Further, this normative system which existed prior to the assertion of sovereignty, and under which the traditional law existed, must have had a continuous existence and vitality since sovereignty. It was on this latter point that the Yorta Yorta's claim failed. The High Court upheld the trial judge's finding that there was a lack of continuity in observing traditional law and customs. Lavery has argued that the main implications of the normative systems approach is that only those Indigenous rights and interests that survived the intersection of the normative systems of the common law and the pre-colonial Indigenous system can be recognised and styled as 'native title'. Further the concept of tradition which is used is narrow and constrictively defined.[63]

This shows how the forcing of an Indigenous law concept into a non-Indigenous legal paradigm can serve to limit Indigenous law. Such an approach can be problematic when a concept of 'customary' law clearly demands some type of connection to tradition.

Continuity

In native title matters the courts have preferred the written evidence of colonialists over the oral testimony of Aboriginal people. Further, there has been no presumption of continuity of native title. This is further compounded by the fact that the burden of proof falls on the Aboriginal claimants to demonstrate the existence of native title.[64] In *Yorta Yorta*, continuing physical presence and customs of Aboriginal people were not adequate to demonstrate native title. In Olney J's turn of phrase, European settlement disturbed Aboriginal practices, languages and customs and 'the tide of history' washed away Aboriginal evidence of their native title. Bartlett has been critical of this approach because it makes the establishment of native title in settled regions of Australia almost impossible.[65]

There is a danger that similar shortcomings will result from the state legal position on customary law. In its discussion of customary law, the New Zealand Law Commission noted that:

> The common law doctrine of aboriginal rights is based largely on the presumption of continuity … In the colonisation context, this means that aboriginal rights and titles are continued as a matter of law after a declaration of sovereignty

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60. *Western Australia v Ward* (2002) 191 ALR 1, 15–16 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
61. French, above n 59, 1.
62. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 553 (Gleeson CJ, Gummow and Hayne JJ).
63. Lavery D, 'A Greater Source of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determinations' (2003) 10(4) *E-Law* <http://www.murdoch.edu.au/elaw/>.
64. *Yorta Yorta v Victoria* [1998] 1606 FCA (18 December 1998).
65. Bartlett R, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australian Law Review* 35–46.

> and the imposition of English law throughout a particular territory. The presumption applies regardless of whether the new territory was acquired by conquest, cession or settlement.[66]

The presumption of continuity was a principle which gave rise to '[t]he potential for the common law to be flexible in its treatment of indigenous customary laws'.[67] While the Law Commission noted that during the 19th century many judges refused to accept that Indigenous laws could be recognised by the common law because they were 'barbarous' and 'uncivilised', such rules of 'discontinuity' are 'now regarded as a detour from proper common law principles'.[68] Yet in the Australian context and the *Yorta Yorta* decision, the 'rule of discontinuity' seems to hold sway.

Oral testimony

A particular problem in native title determinations, which may have ramifications for customary law, is the weight given to written testimony and the view that oral evidence is *inherently* unreliable. In the High Court decision in *Yorta Yorta*, Callinan J observed that:

> [T]he lack of a written language and the absence therefore of any Indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows, is at risk of being influenced and distorted in transmission through the generations, by, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest.[69]

The Chief Justice noted that 'the conclusion the primary judge reached did not begin from the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject'.[70]

The result of this is the difficulty Indigenous people will experience in having their oral testimonies of history and culture accepted in court, particularly if there are colonialist written narratives which differ or contradict their testimony. The impact of these difficulties for the determination of the existence of customary law is clear.

The possibility of revival

One interesting and potentially important part of Pearson's discussion on native title as a recognition concept revolves around the question of whether native title might be revived. According to Pearson, if the extinguishment of native title is merely the extinguishment of recognition and not the extinguishment of the fact or reality of Aboriginal law and its connection to land, then, should the inconsistency which gave rise to extinguishment be lifted, native title might be revived.

There may be parallels in this thinking with Aboriginal law more generally. Although customary law might not be recognised by Anglo-Australian law, this says nothing about the existence or otherwise of Aboriginal law. The courts have generally assumed the extinguishment of Aboriginal law relating to criminal matters on the assertion of British sovereignty and via subsequent English statutes.[71] For example, in *Walker v New South Wales* the Chief Justice of the High Court noted the following:

> It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle … even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it is extinguished by the passage of criminal statutes of general application.[72]

Mason CJ went on to state that there was no analogy between the finding of native title and the survival of Indigenous criminal law. 'English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it'.[73] Leaving aside the possible errors in the Chief Justice's reasoning,[74] if Pearson's argument is followed then a reappraisal of the extinguishment thesis could allow for the revival of Aboriginal law. The possibility of future revival, despite present extinguishment, is perhaps the most useful aspect of the 'recognition

66. New Zealand Law Commission, above n 2, 11.
67. Ibid 10.
68. Ibid 11.
69. *Yorta Yorta* above n 62, [190] (Callinan J).
70. Ibid [63] (Gleeson CJ).
71. See Reynolds, above n 6, ch 4. See also Lofgren N, 'Aboriginal Community Participation in Sentencing' (1997) 21 *Criminal Law Journal* 127.
72. *Walker v New South Wales*, (1994) 182 CLR 45, 49 (Mason CJ).
73. Ibid 50.
74. See Lofgren, above n 71.

concept' approach. If such revival was possible in the native title context, it would be likely to apply equally to customary law.

A recognition concept

The point of this discussion on native title as a 'recognition concept' is to demonstrate the potential problems in the use of a concept of customary law in this way. If we see the concept of 'customary law' as a recognition concept between Aboriginal law and Anglo-Australian law, then the problems outlined above in relation to native title are also likely to become evident.

In particular we can foresee that a range of evidentiary problems around proof of authenticity will be manifest, and that ultimately, customary law will be separated from any intrinsic connection to Aboriginal governance. The link between law and governance, which we have argued is a crucial one, is now discussed in the international law context.

6. Self-determination and international human rights

Our discussion will now move to a consideration of the frameworks in which Indigenous law—as distinct from customary law—can be recognised, and in which the right to self-determination may be actualised. It is not the purpose of this paper to discuss all aspects of international human rights law relating to Indigenous peoples. These have been detailed elsewhere.[75] Rather the point is to consider those aspects of international human rights law which relate specifically to questions of self-determination, autonomy, self-governing powers and the recognition of Aboriginal law. We do this in order to advance the argument that the site of real progress will concern self-determination and governance, on the terms of Indigenous communities themselves, rather than focussing on notions of customary law recognition. In the international law treatment of Indigenous issues, support is found for this point of view.

In the following discussion, some mention is made of the *International Covenant on Civil and Political Rights* (ICCPR)[76] and *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169).[77] However, most discussion centres on the *Draft Declaration of the Rights of Indigenous Peoples* for two reasons: it provides a comprehensive approach to Indigenous rights, and it is widely recognised as an aspirational document of what Indigenous people see as their fundamental rights.

International Covenant on Civil and Political Rights

The ICCPR recognises a wide range of human rights and prohibits discrimination on a number of grounds, including race. Of importance to the current discussion is Article 1 on the right of self-determination, and Article 27 on the right of minorities to enjoyment of their own culture

> Article 1
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 27
>
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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While there is debate over whether Indigenous peoples are 'peoples' in the international law sense of the term, it is clear that Indigenous peoples see themselves as such and demand the right to self-determination.[78] Article 27 recognises a right to enjoyment of culture for minorities, an integral part of which, it might be argued, is the enjoyment by Aboriginal peoples of recognition of Aboriginal law. It is important to note that while Article 27 creates a positive obligation on states to protect minorities, limits have been imposed on what can be recognised and protected. Importantly, the Human Rights Committee notes that none of the rights protected under Article 27 may be legitimately

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75. Northern Territory Law Reform Committee, *International Law, Human Rights and Aboriginal Customary Law,* Background Paper No 4 (2003); Pritchard S & Heindow-Dolman C, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473; McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues* (Sydney: Thomson Law Book Co, 3rd ed., 2003).
76. [1980] ATS 23.
77. Australia is not a party to the ILO Convention 169 (entered into force 15 September 1991).
78. See discussion below pp 442–43.

exercised in a manner or to an extent inconsistent with other provisions of the ICCPR.[79] In other words, minority cultural practices must accord with international human rights standards.

Convention Concerning Indigenous and Tribal Peoples in Independent Countries

ILO Convention 169 has been ratified by few governments. However, it is referred to by major international funding agencies such as the World Bank and Regional Development Banks as the framework for their policies and programs in relation to Indigenous and tribal peoples. James Anaya has suggested that the Convention reflects an emergent minimum body of customary international law on indigenous rights.[80]

The ILO Convention 169 affirms the equality of Indigenous peoples and their cultures, and it proposes general rights of autonomy (see Article 7). The convention places affirmative duties on states to advance Indigenous cultural integrity, uphold land and resource rights, and secure non-discrimination in social welfare spheres.

> Article 7
>
> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.
>
> Article 8
>
> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
>
> 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 8 states that Indigenous peoples should have the right to retain their own customs and institutions. It makes the same point as that discussed above in relation to Article 27 of the ICCPR, which is that maintenance of these customs and institutions should take place 'where these are not incompatible with other fundamental rights defined by the national legal system and with internationally recognised human rights'. While these articles do not overcome the issues discussed earlier in this paper regarding the use of the concept of 'customary law', they establish a principle of recognition of Indigenous law in relationship to principles of self-determination.

The Draft Declaration on the Rights of Indigenous Peoples

The greatest single impetus to the international recognition of Indigenous rights has been the development of the *Draft Declaration on the Rights of Indigenous Peoples*, drafted by the Working Group on Indigenous Populations (WGIP). Members of the WGIP expressed confidence that the Draft Declaration was 'comprehensive and reflected the legitimate aspirations of indigenous peoples as a whole, as well as a number of suggestions and concerns advanced by Observer Governments'.[81]

Part I: Fundamental rights

Part I sets out fundamental rights of Indigenous peoples. It states that Indigenous peoples have the same rights as other peoples including the right of self-determination and the right to keep their distinct characteristics. Indigenous peoples base their claims to self-determination on the fact that they were the first peoples in their territories. Self-determination means the right of Indigenous peoples to choose their political status and to make decisions about their own development.

> Article 3 (Self-determination)
>
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

79. Jonas, above n 54.
80. Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).
81. Pritchard S, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group* (Canberra: ATSIC, 2001) 8.

Article 4 (Distinct characteristics)

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 4 is relevant to the discussion on the right of acknowledgement of Indigenous law. Its language makes clear that maintaining and strengthening the distinct characteristics of Indigenous peoples includes a right to specific legal systems. There is nothing which specifies that these legal systems should be 'customary'.

Part II: Life and security

Part II sets out the right of indigenous peoples to exist as distinct peoples.

Article 7 (Cultural integrity)

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures.

Article 7 is a prohibition against ethnocide and cultural genocide. Article 7(d) is of particular relevance because it prohibits imposed assimilation or integration. Arguably the denial of recognition of Aboriginal law and the imposed requirements, terms and conditions of non-Indigenous legal systems is a fundamental process of assimilation and integration.

Part III: Culture, religion and language

Part III affirms that Indigenous people have a right to their cultural tradition and customs, their spiritual and religious traditions, their histories, languages and oral traditions. Article 13 specifically refers to a right to practice and develop 'traditions, customs and ceremonies'.

Article 13 (Spiritual and religious traditions)

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

The recognition of the right to 'develop' tradition is worth noting. This is significant language because it acknowledges that Indigenous practice will not remain static and may rightly be expected to change over time. As has been argued throughout this paper, this is a much better construction than one that requires contemporary Indigenous practice to stay close to pre-colonial custom – a construction that is, as discussed above, implied in the notion of customary law.

Part VII: Self-government and Indigenous laws

Part VII sets out guidelines for the exercise of self-determination through self-government. It recognises the right of Indigenous peoples to determine their citizenship and their own laws and customs. As with the instruments discussed above, international human rights standards provide the context of the recognition of Indigenous laws and customs. It recognises the right to maintain relations with other peoples across borders, and to treaties and agreements with governments.

Article 31 (Self-government)

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32 (Indigenous citizenship)

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33 (Indigenous laws and customs)

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Self-determination: The right to law and governance

The Draft Declaration contains a number of basic principles, including self-determination, which directly impact on the development of law and governance structures. It affirms 'the right of Indigenous people to control matters affecting them' including the right of self-determination.[82] We argue that the establishment of the general right to law and governance is more important than the subsidiary references to custom or tradition (ie, 'customary law'). The question of custom and tradition is really a subset of the right to establish law-making powers and to (re)negotiate a suitable political relationship between Indigenous people and the state.

Article 3 of the Draft Declaration describes the right of self-determination as involving the free choice of political status and the freedom to pursue economic, social and cultural development. Article 4 provides for the right of Indigenous peoples to maintain and strengthen distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining the right to participate fully, if they choose, in the political, economic, social and cultural life of the state. Article 31 sets out the extent of self-governing powers of Indigenous peoples – the right to autonomy or self-government in matters relating to their internal and local affairs.

Taken together, it is clear that Articles 3, 4 and 31 provide a basis for Indigenous people to maintain cultural integrity and exercise legal jurisdiction over a range of economic, social, cultural activities and other matters, if they so choose. The form which self-determination might take in Australia, or elsewhere, is something that will be worked out through negotiation and over time, and will no doubt vary from place to place. The Draft Declaration is not prescriptive. Furthermore, self-determination is not a single act but rather a political process. Self-determination is not pre-determined in form or outcome.

At the same time, the provisions provide for the right of Indigenous people to participate fully, if they choose, in the political, economic, social and cultural life of the state. The principle of non-discrimination is also paramount. In other words, the Draft Declaration provides for the full exercise of citizenship rights within existing states.

Erica-Irene Daes, the chairperson of the WGIP, has referred to the requirements of self-determination as a form of 'belated state-building …This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the state, on agreed terms'.[83] In this context it can be argued that Draft Declaration is fundamental to the decolonisation of existing state institutions and the reconstitution of new institutions that are inclusionary. Integral to this process will be a working out of the place for Indigenous law.

Much of the debate between Indigenous people and states over the formulation of the Draft Declaration has concerned the issue of self-determination. Indigenous organisations have maintained that the right is fundamental to all other rights articulated in the Draft Declaration. State concerns have centred around whether the right implies the right to secession.

Australia's position, as it was articulated in 1995, was that self-determination was not a static concept,

> but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct people within a state to make decisions and administer their own affairs.[84]

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82. Coulter, R 'The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?' (1995) 13 *Netherlands Quarterly of Human Rights* 128.
83. Daes EI, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples,* UN Doc E/CN 4/Sub 2/1993/26/Add 1 (12 June 1993) 6.
84. Australian Delegation to the UN Inter-Sessional Working Group on a Draft Declaration, *Self-Determination: The Australian Position*, Position Paper, UN Doc E/CN 4/1995/WG 15/2/Add 2 (10 October 1995) 8.

Only in the most exceptional circumstances would self-determination equate to a right of secession, and must in general be exercised in ways which are consistent with the territorial integrity of the state.

Australia's position has now moved to oppose self-determination. However, a majority of states involved in the development of the Draft Declaration have supported the principle of self-determination of Indigenous peoples, without prejudice to the territorial integrity and sovereignty of the state. This involves a division between 'external' and 'internal' self-determination. The 'internal' right could include a continuing right of self-government but would not normally include a right of secession or separation. Exceptional circumstances would arise where a state is not representative. Daes has stated that 'the right of self-determination of Indigenous people should ordinarily be interpreted as their right to freely negotiate their status and representation in the State in which they live'.[85] Peoples are only likely to be able to justify creating a new state for their security and safety when the existing political system is so exclusive and non-democratic that it fails to represent the whole people.

Indigenous organisations have made it clear that they do not wish to 'dismember' existing states. However, they do wish to renegotiate their relationship with those states. Seeking to establish a dichotomy between 'internal' and 'external' self-determination can be misleading and was opposed by many Indigenous delegates to the WGIP. Further, the concept of secession implies that Indigenous people were once submitted to the sovereignty of the colonising state and now wish to withdraw. Yet Indigenous people point out that generally they were not part of state-building and that their dispossession occurred by force and without consent. Indigenous people now seek to renegotiate their political status as part of the constitutive process of state building. The development of Indigenous law in this context may be seen as fundamental to developing this new relationship between Indigenous people and the state within a postcolonial framework.

Such state-building may also involve changing or discarding constitutional doctrines that were at the heart of the original dispossession. A priori limitation of sovereignty to 'internal' self-government may prejudice this state-building function and relegate Indigenous rights to an inferior status compared to other colonised peoples.[86]

Pritchard has argued that equating external self-determination with secession obscures the fact that the external dimension of self-determination will address opportunities for Indigenous peoples to enjoy independent relationships in the international sphere. These include possible international supervision of decisions by Indigenous peoples about their political status, the provision of assistance to Indigenous peoples, assistance in the provision of procedures outside of national constitutional and legal systems for the resolution of disputes, and for the enforcement of treaties and other agreements between Indigenous peoples and states.[87]

It is also argued that the international law on self-determination already limits the conditions under which independent statehood can be achieved. Article 45 of the Draft Declaration provides that it cannot be used to engage in any activity or perform any act contrary to the *Charter of the United Nations 1945*. The United Nations *Friendly Relations Declaration 1970* provides for the inviolability of territorial integrity for states 'conducting themselves in accordance with the principles of equal rights and self-determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

Populations, people or peoples

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Early United Nations discussions on Indigenous peoples used the word 'population', so as not to imply that Indigenous peoples were 'peoples' within the meaning of international law. This is significant because international law recognises self-determination as a right of all *peoples*. Hence, the WGIP was established as the Working Group on Indigenous Populations. Current debate tends to be over the question of Indigenous 'people' versus 'peoples', with the abiding view being that the use of the singular 'people' does not imply the international law rights of 'peoples'.

A 'people' is a group which has an objectively distinct identity with ethnic, linguistic, cultural or historical characteristics and subjectively perceives itself as such. Daes describes Indigenous peoples as united by histories as distinct societies, by languages, laws, traditions and unique spiritual and economic relationships with the territories in which they have lived. Indigenous peoples are, according to Daes, 'unquestionably' peoples, 'in every political, social, cultural and ethnological meaning of this term [and] it is neither logical nor scientific to treat them as the same 'peoples' as their neighbours, who obviously have different languages, histories and cultures'.[88]

85. Daes, above n 83.
86. Pritchard, above n 81, 85.
87. Ibid 86.
88. Daes, above n 83, 6.

There is a strong argument for seeing Indigenous peoples as *peoples*, as Daes argues. It is also clear that self-determination is a key aspirational human right for Indigenous peoples, and the right to self-determination is to a large extent predicated on the view of Indigenous peoples as peoples. However, there is also a more minimalist argument for autonomy rights for Indigenous people that has been accepted without agreeing that Indigenous peoples are peoples within an international law framework. This is the position taken in ILO Convention 169 where the use of the term 'peoples' is deemed to have no implications in international law. In this sense, there is a strong argument for the right of Indigenous people to a form of autonomy and law-making power independently of a position on the 'peoples' question.

Commission on Human Rights

An Expert Seminar on Indigenous Peoples and the Administration of Justice was convened by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people. Its conclusions and recommendations were reported to the United Nations Commission on Human Rights.[89]

Among these conclusions was the concern that Indigenous peoples were the victims of discrimination and racism in the administration of justice. This discrimination and racism was said to be caused by, inter alia,

> (f) The weakening or destruction of indigenous legal systems as a result of acculturation;
> (g) The criminalisation of indigenous cultural and legal practices;
> (h) The lack of official recognition for indigenous law and jurisdiction, including indigenous customary law;
> (i) The subordination of indigenous law and jurisdiction to national or federal jurisdiction, and restricting indigenous authorities to hear minor cases;
> (j) The failure to introduce adequate mechanisms and procedures that would allow indigenous legal systems to be recognized and to complement national systems of justice;
> (l) The non-recognition of indigenous law, culture and legal traditions by judges and other judicial officers.[90]

Among the recommendations it was noted that, inter alia,

> 17. States should help to restore indigenous legal practices, in cooperation with indigenous legal experts, where these might contribute to the development of an impartial system of justice that is in full compliance with international human rights law, particularly in relation to women's rights.
>
> 23. States should recognize indigenous peoples' own systems of justice and develop mechanisms to allow these systems to function effectively in cooperation with the official national systems. These mechanisms should be based on constructive arrangements with the peoples concerned.
>
> 24. Both states and indigenous peoples should incorporate internationally recognized human and indigenous rights into their systems of justice.
>
> 25. States should take into account the mechanisms used by indigenous peoples to settle disputes, their regulatory and legal capacity and their authority to develop their own procedures without outside interference.
>
> 26. National legal systems should incorporate the use of the relevant indigenous customs, traditions, symbols and customary law in cases involving indigenous peoples or individuals. This can be achieved by means of special procedures involving indigenous leaders and dispute settlement methods.
>
> 28. States should establish a separate indigenous juvenile justice system.
>
> 30. In applying national laws and regulations to indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practiced by indigenous peoples in dealing with offences.[91]

The conclusions and recommendations from the meeting again reinforce the importance of recognition of Indigenous legal systems and law by states. An overarching context for both Indigenous and state law and practice is respect for international human rights.

Conflicting rights

It has been recognised both internationally and domestically that there may be conflict between 'customary practices' and individual human rights.[92] For example, in addressing the potential for conflict between customary practices and women's rights, the Office of the High Commissioner for Human Rights has stated that:

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89. *Conclusions and Recommendations of the Expert Seminar in Indigenous Peoples and the Administration of Justice,* E/CN.4/2004/80/Add.4 (Madrid, November 2003).
90. Ibid 5–6.
91. Ibid 7–8.
92. For a discussion of these issues, see Northern Territory Law Reform Committee, above n 75, 16–28; Davis M & McGlade H, *International Law, Human Rights Law and Aboriginal Law*, LRCWA Background Paper No 10, above pp 381, 392–94; Goward P, Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003).

> Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.[93]

Some aspects of Aboriginal law could conflict with rights and protections established, for example, in the *Universal Declaration of Human Rights*,[94] the ICCPR, the *Convention on the Elimination of All Forms of Racial Discrimination Against Women*,[95] the *Convention on the Rights of the Child*[96] and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[97]

It is not the purpose of this paper to itemise possible areas of conflict. To a large extent this has been done elsewhere.[98] It is important, however, to reiterate the point that both Article 33 of the *Draft Declaration on the Rights of Indigenous Peoples* and Article 8 of the ILO Convention 169 establish the requirement that Indigenous juridical customs, traditions, procedures and practices comply with international human rights standards. The Human Rights Committee has noted that none of the rights protected under Article 27 of the ICCPR can be exercised in a manner inconsistent with other rights in the Covenant. The former Aboriginal and Torres Strait Islander Social Justice Commissioner has confirmed that 'all proposals for the recognition of Aboriginal customary law have taken as their starting point that any such recognition must be consistent with human rights standards'.[99]

Similarly, in her submission to the Northern Territory Law Reform Committee's Inquiry into the Recognition of Aboriginal Customary Law, the federal Sex Discrimination Commissioner noted that women's individual human rights must ultimately prevail in any conflict with customary law:

> While all attempts should be made to reconcile women's individual human rights with the minority rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. Particularly in the context of this Inquiry, HREOC considers that the recognition of Aboriginal Customary Law must also take active steps to ensure women's right to individual safety and freedom from violence.[100]

Both the Federal Sex Discrimination Commissioner and the former Aboriginal and Torres Strait Islander Social Justice Commissioner have noted that conflicts can be worked out on a case-by-case basis.[101] Importantly, the former Social Justice Commissioner noted that 'the potential for conflict should not be used by government as an excuse to avoid the recognition of Aboriginal customary law or by Aboriginal communities to condone breaches of human rights'.[102] While the discussion above has been framed in the context of 'customary' law, we would hold that the same argument is valid for potential conflict between Indigenous law and human rights standards. Internationally recognised human rights standards should prevail over inconsistent Indigenous or non-Indigenous law.

7. Thinking through the process of self-determination – *Bringing Them Home*

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*[103] spent considerable time discussing self-determination and related processes applicable to the contemporary removal of Indigenous children. We discuss the recommendations of the Inquiry as an example of a recent attempt to create a space for Indigenous self-determination and governance in relation to Indigenous families and children. The recommendations of the Inquiry provide a practical example of how Aboriginal law might be 'recognised' within a negotiated framework and consistent with international human rights standards.

The Inquiry found that existing non-Indigenous systems of juvenile justice and child welfare have failed miserably to solve the problems facing Indigenous families, children and young people. Nowhere is this failure more profoundly

93. Office of the High Commissioner for Human Rights, 'Harmful Traditional Practices Affecting the Health of Women and Children' (Fact Sheet No 23), cited in Goward, ibid.
94. GA Res 217A(III), 10 December 1948.
95. [1975] ATS 40.
96. [1991] ATS 23.
97. [1989] ATS 21.
98. See, eg, Northern Territory Law Reform Committee above n 75, 16–28; Davis & McGlade, above n 92, 390–96.
99. Jonas, above n 54.
100. Goward, above n 9.
101. Ibid; Jonas, above n 54.
102. Jonas, ibid.
103. Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney, 1997).

reflected than in the inability of states to reduce the number of Indigenous children placed in care, held in police cells and sentenced to detention centres. The Inquiry argued for a new framework which respects the right to self-determination for Indigenous people while complying with other international obligations for the treatment of children and young people. It advocates a two tiered approach – national framework legislation for negotiation and self-determination in areas (including juvenile justice and welfare) that affect the wellbeing of Indigenous children and young people, and the development of national minimum standards applicable to juvenile justice and welfare interventions.

Self-determination

The Inquiry considered in detail the *Draft Declaration on the Rights of Indigenous Peoples* in relation to the emerging human rights norms that reflect the aspirations of Indigenous people. The Inquiry also noted the widespread desire of Indigenous people in Australia to exercise far greater control over matters affecting young people as reflected in many written submissions and evidence presented at hearings. It found that self-determination could take many forms, from self-government to regional authorities, regional agreements or community constitutions. Some communities or regions may see the transfer of jurisdiction over juvenile justice matters as essential to the exercise of self-determination. Other communities may wish to work with an existing modified structure which provides greater control in decision-making for Indigenous organisations. The overarching guiding principle is that the level of responsibility to be exercised by Indigenous communities must be negotiated with the communities themselves.[104]

The recommendations from the Inquiry stress the importance of self-determination, as well as of greater controls over decision making in the juvenile justice system, and matters relating to welfare. Recommendation 43 is the key recommendation pertaining to self-determination. It requires that national legislation be negotiated and adopted between Australian governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination. The suggested national framework legislation would adopt principles which

(a) bind Australian governments to the Act;
(b) allow Indigenous communities to formulate and negotiate an agreement on measures best suited to their needs in respect of their children and young people;
(c) make available adequate funding and resources to support the measures adopted by the community; and
(d) ensure the human rights of Indigenous children.

Part (c) of Recommendation 43 advocates negotiations for the complete transfer of juvenile justice and/or welfare jurisdictions to Indigenous control, the transfer of policing, judicial and/or departmental functions or the development of shared jurisdiction where this is the desire of the community.[105]

Recommendation 43 significantly advances the discussion of self-determination in Australia. It provides the framework for transfer of jurisdiction to Indigenous communities in situations where those communities see the development of self-government powers as an appropriate response to ensuring the wellbeing of Indigenous children and young people.

National minimum standards

Recommendation 44 of the Inquiry is concerned with the development of national legislation which establishes minimum standards for the treatment of all Indigenous children and young people, irrespective of whether those children are dealt with by government or by Indigenous communities and organisations. This legislation is to be negotiated by the Council of Australian Governments and key Indigenous peak bodies. Recommendation 45 requires a framework for the accreditation of Indigenous organisations that perform functions prescribed by the standards.

The Inquiry sets out a number of minimum standards which provide the benchmark for future developments in the treatment of Indigenous children and young people. Standards 1–3 consider principles relating to the best interest of the child. Standard 4 sets out the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person. In juvenile justice matters this includes decisions about pre-trial diversion, bail and other matters. Standard 5 requires that in any judicial matter the child be separately represented by a representative of the child's choosing or appropriate accredited Indigenous organisation where the child is incapable of choosing.

104. Ibid 575–76.
105. Ibid 580.

Standard 8 of Recommendation 53 deals specifically with matters relating to juvenile justice. There are 15 rules established within the standard. Rules 1 and 2 seek to minimise the use of arrest and maximise the use of summons and attendance notices. Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained. Rule 4 requires consultation with the accredited organisation before any further decisions are made. Rules 5 to 8 provide protection during the interrogation process. Rules 9–12 ensure that Indigenous young people are not denied bail and that detention in police cells is eliminated except in truly exceptional circumstances. Rule 13 prioritises the use of Indigenous-run community-based sanctions. Rule 14 establishes the sentencing factors which need to be considered. Rule 15 requires that custodial sentences be for the shortest possible period, and that reasons must be stated in writing.

In summary, *Bringing Them Home* adopted an approach designed to create a legislative and political space where Indigenous decision-making might occur. In the context of the recognition of Aboriginal law, the approach advocated here is one where Indigenous law might exist within a framework developed through negotiation with state, territory and federal governments and in consistency with broader human rights standards.

8. Aboriginal justice institutions

The development of Aboriginal justice programs, mechanisms and processes are one way of facilitating the development of Indigenous self-determination in the criminal justice arena. It provides the opportunity to open a space in which Aboriginal law can function. It is not perfect because these mechanisms operate, by and large, within the broader parameters of non-Indigenous state law. But perhaps we can also see them operating in the interstices between Anglo-Australian law and Aboriginal law, as a hybridisation that will facilitate the development of both systems of law. In this sense it can be argued that Aboriginal justice programs provide an avenue for the development and operationalisation of Aboriginal law. It is not suggested that this be a haphazard approach. As the recommendations from the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* indicate, there is a need for a negotiated political and legal framework to provide form, certainty and legitimacy to these changes.

Our argument here is that the development of Aboriginal justice programs is perhaps better understood as the facilitation and development of 'Aboriginal justice institutions'. This emphasises the important governance aspect of self-determination, and stresses that modern Indigenous justice institutions are not primarily about the 'recognition of Aboriginal customary law', but rather present a process through which Aboriginal communities are empowered to apply their own laws and legal processes within a negotiated relationship to state legal institutions. These institutions are fundamentally about the process of governance within a negotiated political and legal space.

The linking of Aboriginal law, governance and dispute resolution has been made by many Indigenous leaders, lawyers and activists. The New South Wales Aboriginal Justice Advisory Committee notes that:

> One direct way to recognise and support Aboriginal customary practices is to provide a greater role for Aboriginal community involvement in the administration of justice. Particularly the administration of justice locally within Aboriginal communities. In recent years there have been a number of examples where local Indigenous communities have been allowed to have a direct decision making role in local justice administration and where justice processes have been adapted to incorporate local Indigenous views and needs.
>
> These examples show that a greater flexibility in justice administration can allow for Aboriginal customary law to be recognised and provide a role for a local Aboriginal community and its culture to play. Further what we do know is that where this has been done, and local Indigenous communities have had a direct role in justice administration, where procedures and punishments are designed and delivered according to local culture and need, that the greatest impact on rates of offending/re-offending are achieved.[106]

While agreeing with the statement above by the New South Wales Aboriginal Justice Advisory Committee, we would omit the reference to 'customary' law. In practice one of the significant developments initiated in New South Wales by the committee has been circle sentencing – a practice derived from Canada and not specifically associated with 'traditional' Aboriginal practices in Australia.

Mark Harris has made a similar argument in relation to the recent development of Aboriginal courts as a potentially transformative process:

106. Thomas, above n 5, 9.

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> While the recognition of Aboriginal law may remain an unattainable goal in certain parts of Australia, the task remains to ensure that the momentum of the Aboriginal courts transforms the relationships that exist between Indigenous and non-Indigenous Australians both in the criminal justice system and also in the broader context of society itself. Failure to do so will perpetuate the cycle of over-representation of Aboriginal offenders in the nation's gaols and will certainly spell the end of any dreams of reconciliation.[107]

Paul Chantrill has made similar comments in relation to the development of Aboriginal community justice groups in Queensland:

> The achievements at these communities centre on increasing emphasis on community development strategies designed to improve opportunities for young people, the re-establishment of community authority and discipline based on the authority of community elders as well as efforts to improve the community's relationship with community and external justice agencies – the police, children's services and juvenile justice, corrective services and visiting magistrates.[108]

It is not the purpose of this paper to review the nature or content of existing Aboriginal justice mechanisms. Nor is it our purpose to comment on how these processes might be further developed and enhanced. It should be noted that considerable literature already exists relating to these initiatives, including their establishment, processes and evaluation.[109] Our purpose is to argue more broadly that a wide range of Aboriginal justice institutions exist and should play an integral and practical role in providing a bridge between self-determination, governance and Aboriginal law on the one side and the non-Indigenous legal system on the other. In brief, the following are noted as perhaps the major current developments nationally.

Aboriginal courts

Aboriginal courts (Koori Courts, Murri Courts and Nunga Courts) have been established for both adult and juvenile offenders in Victoria, Queensland and South Australia over the last few years. The courts involve an Aboriginal Elder or justice officer sitting on the bench with a magistrate. The Elder can provide advice to the magistrate on the offender to be sentenced and about cultural and community issues. Offenders could receive customary punishments or community service orders as an alternative to prison. Aboriginal courts may sit on a specific day designated to sentence Aboriginal offenders who have pled guilty to an offence. The Court setting may be different to the traditional sittings. The offender may have a relative present at the sitting, with the offender, his/her relative and the offender's lawyer sitting at the bar table. The magistrate may ask questions of the offender, the victim (if present) and members of the family and community in assisting with sentencing options. The Port Adelaide Nunga Court has increased the rate of attendance by Aboriginal people (80%) as compared to attendance in other courts (less than 50%).[110]

Circle sentencing

Circle sentencing, or circle courts, began in Canada in early 1992 following a Supreme Court decision of the Yukon in the case of *R v Moses*.[111] Circle courts are based on traditional Indigenous forms of dispute resolution and have been adopted by a number of more traditionally oriented first nations people in Canada, but have subsequently been adopted in Canadian urban settings and are also now used in the United States and Australia. Pilot circle sentencing began in Nowra, New South Wales in February 2002 and the program has subsequently been expanded to other areas such as Dubbo and Brewarrina. The Nowra trial was evaluated by the New South Wales Aboriginal Justice Advisory Committee and the New South Wales Judicial Commission. The evaluation found, among other things, that circle sentencing:

- helps to break the cycle of recidivism;
- introduces more relevant and meaningful sentencing options for Aboriginal offenders;
- reduces the barriers that currently exist between the courts and Aboriginal people with the help of respected community members;
- leads to improvements in the level of support for Aboriginal offenders;

107. Harris M, 'From Australian Courts to Aboriginal Courts in Australia: Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 39.
108. Chantrill P, 'Community Justice in Indigenous Communities in Queensland: Prospects for Keeping Young People Out of Detention' (1998) 3 *Australia Indigenous Law Reporter* 163.
109. For an overview, see Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Crime Prevention Division and Aboriginal Justice Advisory Council, 2001); *Aboriginal Justice Plan,* Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 2002).
110. Harris, above n 107; Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues*; Cunneen, *Aboriginal Justice Plan*, ibid.
111. *R v Moses* (1992) 11 CT (4th) 357. For further discussion see Green R, *Justice in Aboriginal Communities* (Saskatoon: Purich Publishing, 1998).

- incorporates support for victims and promotes healing and reconciliation; and
- increases the confidence and generally promotes the empowerment of Aboriginal persons in the community.[112]

Community justice groups

Different types of Aboriginal Justice Groups have been established in several jurisdictions. Perhaps the most successful and certainly best evaluated have been the Aboriginal Justice Groups in Queensland.

Evaluations of justice groups indicate they can:

- achieve a reduction in juvenile offending and school truanting;
- achieve a reduction in family and community disputes and violence;
- increase the more effective use of police and judicial discretion;
- increase community self-esteem and empowerment;
- provide better support for offender reintegration; and
- generate cost-savings for criminal justice agencies.[113]

Aboriginal Community Justice Groups have been established in New South Wales, as have community justice forums. Aboriginal Community Justice Groups can work with police to issue cautions, establish diversionary options, support offenders, assist in access to bail, provide assistance to courts, and develop crime prevention plans. In the Northern Territory there are law and justice groups operating in communities such as Ali Curung and Lajamanu.[114]

Night patrols

One of the longest running community-controlled initiatives in Indigenous communities has been the 'night patrol'. They are also one of the few types of initiatives that have been evaluated at a more systematic level. Generally the evaluations have been very positive.

Evaluations of night patrols indicate they can achieve:

- a reduction in juvenile crime rates on the nights the patrol operates, including for offences such as malicious damage, motor vehicle theft and street offences;
- enhancement of perceptions of safety;
- minimisation of harm associated with drug and alcohol misuse;
- encouragement of Aboriginal leadership, community management and self-determination; and
- encouragement of partnerships and cultural understanding between Indigenous and non-Indigenous communities.[115]

Recently, Blagg and Valuri identified over 100 self-policing initiatives operating in Aboriginal communities throughout Australia. They suggest that underpinning these initiatives is 'a commitment to working through consensus and intervening in a culturally appropriate way to divert Indigenous people from a diversity of potential hazards and conflicts'.[116]

Other initiatives

There are many other Indigenous justice initiatives occurring throughout Australia including:

- diversion programs such as youth conferencing for juveniles, which may have specific Indigenous convenors;
- community support programs such as mentoring (South Australia, Western Australia), the Koori Justice Workers (Victoria), and post release programs aimed at re-integration;
- community supervision of offenders through probation and parole; and

112. Potas I, Smart J, Bignell G, Lawrie R & Thomas B, *Circle Sentencing in New South Wales. A Review and Evaluation* (Sydney: New South Wales Judicial Commission and Aboriginal Justice Advisory Committee, 2003).
113. Chantrill, above n 108; Young UK, *Aboriginal Child Welfare and Juvenile Justice Good Practice Project,* Final Report (Canberra: ATSIC, 2001); Department of Aboriginal and Torres Strait Islander Policy and Development, *Local Justices Initiatives Program: Interim Assessment of the Community Justice Groups* (Brisbane: Queensland Government, 1999).
114. For discussion of community justice groups in jurisdictions other than Queensland, see Cunneen, *The Impact of Crime Prevention on Aboriginal Communities,* above n 109; Jonas, above n 54.
115. Lui L & Blanchard L, 'Citizenship and Social Justice: Learning from Aboriginal Night Patrols in New South Wales' (2001) 5(5) *Indigenous Law Bulletin*; Hearn L, *Gosnells Community Justice Program Evaluation Report* (Perth: Centre for Police Research, Edith Cowan University, 2000); Centre for Peace and Conflict Studies and Koori Centre, *The Impact of Aboriginal Night Patrols as a Juvenile Crime Prevention Strategy. An Evaluation of four Pilot Programs in New South Wales*, (Sydney: Centre for Peace and Conflict Studies and Koori Centre, University of Sydney, 2000).
116. Blagg H & Valuri G, 'Self-Policing and Community Safety: The Work of Aboriginal Community Patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 207.

- community operated programs that address offending behaviour (eg Aboriginal family violence programs and alcohol and other drug programs in all jurisdictions).

Some of these programs have been evaluated and the extent to which they are Indigenous-controlled varies significantly.

An area where Australia lags well behind Canada, but where there is now some interest, is the development of Aboriginal community-based and controlled residential 'correctional' centres. Canadian federal sentencing law[117] allows for Aboriginal offenders to serve their sentence in Indigenous-operated 'healing lodges'. There has been some discussion in Australia of these types of facilities.[118]

Taken together, there exist at least in skeletal form the institutional processes for Indigenous justice which operates alongside the Anglo-Australian system. What we need to think about is opening the space for these initiatives to flourish into what Fitzgerald referred to in the *Cape York Justice Study* as 'pods of justice':

> There needs to be institutional space or spaces created for the accommodation of Aboriginal law within the broader Australia legal system. There must be institutional design for the administration of a local order by Aboriginal communities. There must be 'pods of justice' distinct in form and function, autonomous but contributing to a federal whole. Authority must be devolved to Aboriginal communities so that they may first determine the law and order issues of their [own].[119]

9. Conclusion

Concepts like 'customary', 'recognition' and 'extinguishment' are essentially metaphors that attempt to relate Aboriginal law to state law on terms set by the state. The centrality and universality of Anglo-Australian law is assumed. State law, using tests and criteria of its own making, determines whether aspects of Aboriginal law exist or not. There is then a significant gap between this legal positivist pretension and the question of whether Aboriginal law imbues meaning to the social, cultural and religious worlds of Aboriginal peoples. Perhaps a more meaningful metaphor is the one used in the Cape York Justice Study of 'pods of justice', which provides for an understanding of autonomy and diversity.

The argument developed in this Background Paper is straightforward. It advocates a movement away from a discussion of customary law and towards a discussion of Indigenous law, governance and self-determination. This transition has real implications for the way in which the debate over the recognition of customary law might develop.

First, we recommend dropping any reference to Aboriginal 'customary' law and argue for a discussion of Aboriginal law. This would avoid the necessity of defining customary law and its content and all the associated problems that are likely to arise (especially reflecting on the experience with native title). We further argue that the concept of customary law is essentially an imperialist concept which has been used to delimit the law of the native in colonial contexts.

Secondly, we argue for a move away from the 'ad hoc' recognition debate to a consideration of the political/legal processes by which Indigenous people themselves decide on their position, vis-a-viz state law. That is, we see Aboriginal law as fundamentally linked to the question of self-determination and governance by Aboriginal peoples. What becomes important is not 'customary law' per se, but rather the ability of Indigenous people to affect their own laws where they see this as appropriate, within broader negotiated political and legal contexts and boundaries.

Thirdly, we argue that the link between self-determination, governance and Aboriginal law is well-founded in international human rights standards. The recognition of Aboriginal peoples' minority rights and collective rights 'have the capacity to strengthen social structures with Aboriginal communities as well as the observance of law and order'.

Fourthly, we look to the recommendations of the *National Inquiry into the Separation Aboriginal and Torres Strait Islander Children from Their Families* for a practical consideration of how a negotiated political framework and minimum standards can provide a framework for the development of Aboriginal law. We also argue that there is a skeletal framework in place of Indigenous justice institutions which can be significantly enhanced, but note the danger of co-optation and 'indigenisation' unless there is a strong framework for negotiated settlement of justice issues in place.

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117. See *Corrections and Conditional Release Act 1992* (Canada) s 81.
118. Cunneen C, 'Residential Alternatives for Indigenous Offenders' (Paper presented at the Australian Institute of Criminology Conference, *Best Practice Interventions in Corrections for Indigenous People*, Sydney, 8–9 October 2001).
119. State of Queensland, above n 1, 113.