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**THE INTERNATIONAL IMPACT OF
CREATIVE PROBLEM SOLVING:
RESOLVING THE PLIGHT OF INDIGENOUS PEOPLES**

RHONA K.M. SMITH^{*}

Indigenous peoples are growing more vocal with their claims as the international community becomes more aware of their plight. Traditional legal approaches are proving unsatisfactory in addressing the relevant issues. New solutions which reflect the underlying principles of creative problem solving are now being invoked—conciliation is the new keyword.

The initial examination of the plight of indigenous peoples focuses on the main areas of contention. The difficulties encountered in applying traditional legal formulae to these problems will be identified. The creative solutions to these claims will then be addressed. Finally the obvious advantages of employing creative problem solving in this field will be highlighted.

I. INTRODUCTION

Internationally, indigenous populations are one of the most obvious examples of groups whose very existence is vulnerable due to the extinction of some aspect of their cultural identity. There is no internationally accepted single definition for indigenous peoples. However, guidelines have been developed by the International Labour Organisation:

Indigenous persons are descendants of the aboriginal population living in a given country at the time of settlement or conquest (or of successive waves of conquest) by some of the ancestors of the non-indigenous groups in whose hand political and economic power at present lies. In general these descendants tend to live more in conformity with the social, economic and cultural institutions which existed before colonisation

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or conquest . . . than with the culture of the nation to which they belong; they do not fully share in the national economy and culture owing to barriers of language, customs, creed, prejudice, and often out-of-date and unjust systems of worker-employer relationship and other social and political factors. When their full participation in national life is not hindered by one of the obstacles mentioned above, it is restricted by historical influences producing in them an attitude of overriding loyalty to their position as members of a given tribe; in the case of marginal indigenous persons or groups, the problem arises from the fact that they are not accepted into, or cannot or will not participate in, the organized life of either the nation or the indigenous society.¹

Many indigenous peoples find their traditional culture in serious decline and/or being transformed by modern technology. An ancient world of Navajo, Hawaiian, Aboriginal Australian, Dani, Quecha, Inuit, and Maasai peoples is struggling for survival against the influence of modern technology and ideology.

Before the benefit of creative problem solving in this field can be appreciated, it is necessary to first identify the problems encountered by indigenous peoples, and examine the traditional legal solutions to these problems. During this process, the inherent problems in applying traditional legal criteria to the plight of indigenous peoples will emerge.

Indigenous peoples have a long and unique history, and their internal rules and laws have little resemblance to accepted traditional "western" concepts of law.² As will become apparent, a conventional legal approach to indigenous peoples is inappropriate because their customs, laws, and social structures are so different from those of modern society. Therefore, innovative approaches are necessary to address the claims of indigenous peoples: approaches which recognize the historical disadvantages they have encountered, including the dispossession of their lands, health problems, forced assimilation, and the lack of control such peoples have over their own destiny. Creative problem solving provides the most viable solution to their plight.

Creative problem solving is underpinned by various key concepts: genuine listening and mutual learning, full respect for others and real flexibility in seeking solutions. Moreover, creative problem solving considers each problem on an individual basis, seeking the best tool for the individual task. All of these criteria have proven successful when applied to indige-

1. GENEVA INT'L LABOR OFFICE, INDIGENOUS PEOPLES: LIVING AND WORKING CONDITIONS OF ABORIGINAL POPULATIONS IN INDEPENDENT COUNTRIES §§ 25-26 (Geneva International Labor Office Studies and Reports Series No. 35, 1953). Inevitably there are many inherent flaws in these guidelines—today characterization as an indigenous person tends to be a matter of self-classification. Guidance as to the scope of the term "indigenous" can also be found in Indigenous and Tribal Peoples Convention, June 27, 1989, art. 1, 28 I.L.M. 1384.

2. In this context, "accepted traditional western concepts of law" should be taken as referring to the legal systems employed throughout Europe and the territories of the old European Empires—these legal systems are European (Anglo-American, Franco-Romano) in origin.

nous peoples. Today, reconciliation is the most popular and successful vehicle for addressing their claims. Conciliation processes are underway in countries such as South Africa and Australia.

II. THE CLAIMS OF INDIGENOUS PEOPLES

Throughout the world, indigenous peoples are suffering. Their numbers are declining due to exposure to diseases³ imported by the immigrant population, their traditional land is being mined and stripped of natural resources,⁴ and they are losing control over their traditional lives, forced to live in conformity with the laws of incomers.⁵

The knowledge of these indigenous populations, passed down by word of mouth from generation to generation, has enabled some of the world's oldest cultures to survive cataclysmic changes to the land, environment, and climate. Hundreds of tribal populations have died out, their civilizations extinguished. To some extent, natural evolution may be responsible. However, frequently these vulnerable groups have been harshly oppressed, forcibly assimilated, or even exterminated.

Many of these groups are now taking positive action to halt this continuing decline. They have articulated claims and sought to legitimize their demands. The claims of indigenous peoples are many, ranging from the basic right to an existence (enshrined in the international prohibition on genocide),⁶ through the prohibition of racial or ethnic discrimination,⁷ to the more vexed issues of self-determination and land rights.

A. Right to an Existence

Indigenous peoples have frequently been denied the most fundamental

3. For example, within two years of white settlement, it is estimated that disease (probably smallpox) killed almost half of the Australian Aboriginal population in the area surrounding Port Jackson (i.e., Sydney Harbour). See COMMONWEALTH OF AUSTRALIA, ABORIGINAL PEOPLE OF NEW SOUTH WALES (1991). Even today, diabetes, hepatitis B, eye and ear diseases, and respiratory disorders have a major effect on the indigenous population of Australia as the aboriginal population had little or no natural immunity to most immigrant diseases.

4. Deforestation is a major problem in the Amazon basin in South America, while in Asia, the search for minerals has encroached further into traditional lands in islands such as Papua New Guinea and the Indonesian archipelago.

5. Many States operate a policy of forced assimilation in an attempt to integrate indigenous peoples into society.

6. See Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III), Dec. 9, 1948, 77 U.N.T.S. 277 [hereinafter Convention on Genocide]. For a detailed exposition of this Convention, see NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION (1960).

7. See International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter International Convention].

right of all—the right to live.⁸ Today, genocide (the destruction with intent of a whole or part of a national, ethnical, racial or religious group⁹) is recognized as an international crime.¹⁰ Yet for many indigenous groups, their very existence is being threatened by the erosion of some aspects of their cultural identity. Cultural genocide was, however, excluded from the ambit of the Genocide Convention¹¹ although the provisions of the Genocide Convention prohibiting the forcible removal of children from their parents¹² imply recognition that such removal of children clearly precludes continuation of the group's identity. Moreover, many academics acknowledge the existence of cultural genocide and identify examples.¹³

Indigenous peoples are now *prima facie* in a strong legal position *vis-à-vis* their right to an existence. However, two problems remain facing indigenous peoples: proving the existence of an intent to destroy the group¹⁴ and enforcement. Perhaps it would be more realistic to view the Genocide Convention as a deterrent. Moreover, while the international community should aspire to progressively abolishing the stringent requirement of proof of a declared intent to destroy the group, the scope of genocide should be extended to cover blatant acts of cultural genocide. Only then will indigenous groups have steadfast legal standing against their forced extinction, and the progressive erosion of their identity.

B. Freedom from Ethnic Discrimination

It is not enough that indigenous peoples be protected from ethnic cleansing, cultural, and other genocides. Indigenous peoples demand and deserve to be treated as equal to the other inhabitants of their State.

Indigenous peoples are often discriminated against on grounds of racial origin. Today, "discrimination" is used in the "pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction" which applies to "any

8. For a recent example, consider Rwanda. The extermination of peoples on the grounds of ethnic origin in Rwanda is currently being considered by the International Tribunal for Rwanda. See *Security Council Resolution Establishing the International Tribunal for Rwanda*, U.N. SCOR, 3453d Sess., U.N. Doc. S/RES/955 (1994).

9. See Convention on Genocide, *supra* note 6, art. 2.

10. See Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

11. Cultural genocide was originally included in the draft convention. See *Draft Genocide Convention*, U.N. Doc. E/794 (1948).

12. See Convention on Genocide, *supra* note 6, art. 2(e).

13. For example, the Indonesian military action on the island of East Timor in Nusa Tenggara is presented as a prime example of cultural genocide by James Dunn, *East Timor: A Case of Cultural Genocide?*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 171 (George J. Andreopoulos ed., 1994).

14. Article 2 of the Genocide Convention refers to "acts committed with intent to destroy. . . group[s]." See Convention on Genocide, *supra* note 6, art. 2. Ulterior motives for genocide are discussed in, Lawrence J. Le Blanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding*, 78 AM. J. INT'L L. 369 (1984).

act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society."¹⁵ The principal international instrument prohibiting discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination 1969; Article 1(1) provides a working definition of "racial discrimination":

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁶

Lerner considers this definition broad enough to include "all discriminatory acts, whether intentional or not, and whether successful or not, provided the purpose *or* effect exists."¹⁷ The United Nations General Assembly specifically mentions a condemnation of all doctrines of racial differentiation or superiority as being morally and socially unjust and dangerous.¹⁸

From the standpoint of indigenous peoples, it is perhaps interesting to note that, in certain circumstances, what may be positive discrimination is, in effect, permitted.¹⁹ Consequently, it would be acceptable for a State to accord indigenous persons favored treatment for the time necessary to elevate their standing to that of the rest of the community. Ultimately, full equality must be enjoyed (before the law) by all nationals of a State, irrespective of their racial origin.²⁰

The Convention established a Committee on the Elimination of Racial Discrimination²¹ to oversee the implementation of the Convention. Four procedures are used to oversee the Convention's application: the examination of submitted periodic reports;²² the settlement of Inter-State issues raising questions of compliance with the Charter;²³ the consideration of individual complaints from consenting contracting parties;²⁴ and the examination of petitions and reports from non self-governing and trust territories.²⁵

The effect of the Convention cannot be underestimated. However, a

15. WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 10-11 (1983).

16. International Convention, *supra* note 7, art. 1(1).

17. NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 26 (1991).

18. *See UN Declaration on Elimination of All Forms of Racial Discrimination*, Declaration 1904 (XVIII), 18th Sess., U.N. Doc. A/RES/1904 (1963).

19. *See* International Convention, *supra* note 7, art. 1(4).

20. *See id.* art. 5.

21. *See id.* art. 8.

22. *See id.* art. 9.

23. *See id.* arts. 11-13.

24. *See id.* art. 14.

25. *See id.* art. 15. This is in furtherance of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

system of reports and an optional procedure for individual complaints throws a wide net through which many instances of discrimination against indigenous peoples freely slip. The question of proof is fraught with difficulties, and enforcement of international law against the States is highly problematic.²⁶ Moreover, discrimination on grounds of language, religion, or cultural practices may have the same effect.²⁷

The abolition of racial discrimination and the promotion of universal equality in law is clearly of crucial importance to indigenous peoples. Once accepted as equals to other nationals of a State, indigenous groups will be able to commence establishing their unique cultures, unhindered by legal impediments. However, even when full equality is achieved, indigenous peoples may still desire the right to be different, as it is only through preserving those differences that indigenous cultures survive.

C. Right to Self-Determination

Self-determination has been a pivotal claim in the articulation of the desires and rights of indigenous peoples. Indigenous peoples view the realization of their right to self-determination as a logical progression from the recognition of full equality with the people of their State. However, the realization of self-determination for all indigenous groups would, while satisfying many of their claims, simultaneously alter the map of the world.

The invocation of self-determination, as the means to justify overthrowing an alien governing power, was traditionally considered to be a political rather than a legal tool. Self-determination is a concept of liberation,²⁸ achieving prominence through its promotion by the United Nations²⁹ as the legitimate method by which decolonization may be secured.³⁰ Therein lies the problem—many indigenous peoples do not live in dependent territories or colonies. Consequently, their plight lies outside the accepted parameters of self-determination. However, the United Nations' goal of decolonization is almost a reality, and international attention is now turning to the plight of minorities and indigenous populations. The possibility of extending the doctrine of self-determination to, for example, indigenous peoples is being

26. A discussion on the enforcement of international law is beyond the scope of this paper.

27. See *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR 3d Comm., 36th Sess., Agenda Item 75, U.N. Doc. A/RES/36/55 (1982); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR 3d Comm., 47th Sess., Annex, Agenda Item 97, U.N. Doc. A/RES/47/135 (1992).

28. See *The Saskatoon Statement on Self-Determination*, Adopted at the Martin Ennals Memorial Symposium on Self-Determination (Mar. 6, 1993) (on file with author).

29. See U.N. CHARTER art. 1, para. 2.

30. Dependent territories through the exercise of self-determination would, in time, become independent.

mooted.³¹

Various stumbling blocks must be overcome by proponents of this school of thought. First, it must be proven that indigenous peoples are "peoples" in whom the right to self-determination is vested. As noted by one commentator on President Wilson (one of the original proponents of self-determination): "[o]n the surface, it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who are the people."³² Second, the fears of the anti-secessionists must be placated—the partition of States is almost inevitable if indigenous peoples are granted self-determination.³³ Such a result would be untenable given the overriding importance in international law of the doctrine of State Integrity.³⁴

A possible solution may be granting indigenous peoples the right of internal (self) autonomy.³⁵ This would allow indigenous peoples the right to determine their internal membership and to develop, promote, and maintain their institutional structures, juridical custom, and cultural practices.³⁶

In Australia, the Torres Strait Islanders (who inhabit a group of islands off the northeast tip of Australia) are in the process of achieving internal autonomy; the aspirations of the islanders for autonomy by the end of this century look set to be realized. Many other small island "states" effectively operate autonomously with responsibility for their external relations vested with their traditional colonizing power.³⁷

Self-determination is considered synonymous with self-preservation for indigenous peoples.³⁸ Self-determination is essential for indigenous groups as it encapsulates the right to autonomy over their political, social and cultural development—the freedom from State hegemony necessary for the survival of indigenous groups and the transmission of their cultures to future generations. Many indigenous groups are happy to remain part of the State in which they live if they are guaranteed autonomy in other aspects. However, the exercise of this autonomy will be eroded if the indigenous peoples

31. See, e.g., R. McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857 (1994).

32. SIR IVOR JENNINGS, *THE APPROACH TO SELF GOVERNMENT* 56 (1956).

33. Few indigenous peoples live in clearly defined non-self-governing dependent territories.

34. See U.N. CHARTER art. 2, para. 4.

35. See, e.g., *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Commission on Human Rights, 46th Sess., at 101-15, U.N. Doc. E/CN.4/1995/2, revised in E/CN.4/Sub.2/1994/56 (1995).

36. However, the right of internal (self) autonomy must be in conformity with the internationally recognized and overriding human rights provisions.

37. For example, the Cook Islands and New Zealand, or the Falkland/Malvinas Islands and the United Kingdom.

38. See Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 593 (1992).

are not permitted to participate in the official debates surrounding their future, and issues that affect them.

D. Land Rights

Official recognition of indigenous land rights is often viewed as fundamental to the survival of the indigenous group because it provides the group with a focus. Indigenous peoples may live on their traditional lands as their ancestors did, with free access to traditional hunting grounds and sites of religious significance. Moreover, they may be compensated for any loss or damage to these lands. In such ways, a degree of their dignity will be returned as their prior "rights" over the land is recognized. To date, much of the history of indigenous peoples has revolved around their attempts to "defend" their land from incomers. Possession of most indigenous land has now been assumed by foreign colonizing or conquering powers—many traditional lands are being exploited for economic purposes (mining, housing, farming, etc.) without prior consultation with, and/or the reallocation of, the indigenous peoples.

The principal problem lies in the concept of "ownership" or title to the land. Indigenous peoples do not own their lands, the land owns them. A Fort McPherson Indian provided the following succinct exposition of the relationship between indigenous peoples and their land:

We see our land as much, much more than the white man sees it. To Indian people our land is really our life. Without our land we cannot—we could no longer exist as a people. If our land is destroyed, we too are destroyed. If you take our land, you will be taking our life.³⁹

Thus, the claim of indigenous peoples is not to a specified area on behalf of an individual, but to the spiritual content of a whole territory on behalf of the group, in order that the places made sacred in the beginning can be carefully safeguarded and tended.

Most groups of first peoples have been displaced from their land by colonization, invasion, or treaty. Today, the confrontation between the rights of modern industry/development and traditional indigenous practices renders land rights increasingly controversial. However, the principal problem with land rights is the question of ownership: similar concepts of "ownership" are not shared by indigenous and non-indigenous groups. Land such as Australia was declared as *terra nullius*, a land empty of inhabitants, when the First Fleet of non-indigenous peoples arrived from the United Kingdom. The High Court of Australia concurred with this view that Aus-

39. Thomas R. Berger, *The Persistence of Native Values, in* ETHNICITY AND ETHNIC RELATIONS IN CANADA: A BOOK OF READINGS 87 (Jay E. Goldstein & Rita M. Bienvenue eds., 1980) (quoting a McPherson Indian at the Mackenzie Valley Pipeline Inquiry in Canada).

tralia was a land belonging to no one (at least in terms of the contemporary European standards) at the time of colonization.⁴⁰

Indigenous land rights are now slowly being recognized throughout the world: limited recognition is accorded indigenous peoples in countries such as Brazil,⁴¹ Canada,⁴² and Australia.⁴³ Land rights are expected to be included in any future Convention on the rights of indigenous populations. With land rights recognized, self-determination will undoubtedly be proclaimed as the next logical step.⁴⁴

III. CREATIVE MOVES TOWARDS NEW SOLUTIONS

For centuries, indigenous peoples around the world have been persecuted, ignored, and assimilated. Today, indigenous peoples are fighting back. Their approach is essentially two pronged: (1) they are forming networks of likeminded peoples to advance their cause internationally; and (2) they are pushing for talks with national Governments to develop a mutual understanding of positions, and ascertain the best way to move forward.

Indigenous peoples are finally recognizing that their traditional ways may not be understood by most non-indigenous peoples. Moreover, there is a growing realization that most indigenous peoples share similar aspirations and endure similar difficulties in preserving their identity—a common bond is developing and can be exploited.

A. *Changes on the International Scene*

Indigenous groups are now pooling their limited resources and forming non-governmental organizations (“NGOs”). Such NGOs work as “ambassadors” for indigenous peoples, representing their interests at international conferences, meetings, and official events. The NGO represents the general interests of all indigenous peoples, rather than purely the needs of a specific group.⁴⁵

There are many advantages to this pooling of resources. The indige-

40. See *Mabo v. Queensland*, 175 C.L.R. 1 (Austl. 1992).

41. See BRAZIL C.F. art. 198.

42. The Northwest Territories were split in two, in accordance with the vote on May 5, 1992, granting the Inuit peoples outright ownership of 350000 square kilometers on Nunavut and cash settlement in compensation for the extinction of title to the remainder. See *Inuit Win Majority for New Territory in Canadian Arctic*, AGENCE FRANCE PRESSE, May 5, 1992; Robert Kozak, *Canada's Inuit Move to Wrest Control of Arctic*, REUTERS LIBR. REP., May 5, 1992.

43. See AUSTL. NATIVE TITLE ACT OF 1993.

44. The problems associated with self-determination have been discussed *supra* Part II(c).

45. For example, an NGO may represent the world's indigenous peoples in general and address the common claims thereof, whereas an individual indigenous group will be concerned solely with advancing their own cause.

nous peoples can present a united front, thereby giving more power to their demands. Vocalizing their claims as one is more likely to facilitate a positive response.⁴⁶ In addition, one group representing all indigenous peoples is more likely to be consulted and heeded than a large number of smaller groups. Moreover, it is financially more cost effective to send a small delegation on behalf of many groups than to fund a separate delegation for each group of indigenous peoples. NGOs are a comparatively new phenomenon. Traditionally laws relating to indigenous groups have been drafted without consultation, and laws have been imposed in a paternalistic fashion.⁴⁷ However, the formation of NGOs has spawned a growing recognition of indigenous peoples, and an acknowledgment⁴⁸ of the part they play in society. Today, their claims are being taken seriously and addressed by the international community. When the International Labour Organisation drafted its revised Convention on tribal and indigenous populations, a limited number of indigenous organizations were accorded observer status at the General Conference of the International Labour Organisation, and thus provided direct input during the deliberations. However, their participation was limited: ten minutes per organization for an address to the Committee and a collective ten minutes on each section of the draft Convention. They had no right to participate in internal debates.⁴⁹

Five years ago, when the United Nations convened the Vienna Conference on Human Rights, NGOs participated. Representatives of over 800 groups participated fully in the Vienna Conference with the exception of actually drafting the resulting Vienna Declaration.⁵⁰ The drafting of the Vienna Declaration was an important activity in which their involvement was, unfortunately, somewhat limited. The 800 groups included representatives of indigenous peoples, appropriate as 1993 was designated as the International Year for the World's Indigenous People.

46. This is particularly so in the international arena whereby the possible conflicting interests of all States present enough problems and should not be compounded by a multitude of claims from each and every indigenous group.

47. The International Labour Organization, though an early advocate of indigenous rights, did not consult the indigenous peoples concerned when drafting its original Convention on tribal and indigenous peoples.

48. See, e.g., *The Rio Declaration on Environment and Development*, 48th Sess., Agenda Item 21, at princ. 22, U.N. Doc. A/CONF.151/5/REV.1 (1992).

49. This is perhaps all the more amazing since the Convention itself requires governments to work with indigenous and tribal peoples in developing systems for ensuring the guarantee of the rights enshrined in the instrument. *Indigenous and Tribal Peoples Convention*, June 27, 1989, art. 1, 28 ILM 1384.

50. U.N. Doc. A/CONF.157/24, at pt. 1 (1993). See also Susan Marks, *Nightmare and Noble Dream: The 1993 World Conference on Human Rights*, 1994 CAMBRIDGE L.J. 54 (1994); *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* (Louis Henkin & John Lawrence Hargrove eds., 1994).

B. Changes at the National Level

At the national level, indigenous peoples are pressing for official recognition, and are entering into negotiations with State Governments. Indigenous peoples have recognized that discussion is the best way forward—violence and radicalism will only cause animosity. In many States, “talking shops” (reconciliation or conciliation committees and groups) are being established to encourage the exchange of views by indigenous and non-indigenous peoples in a supportive atmosphere, thereby promoting an environment conducive to mutual agreement.

For example, in Australia, an increasing number of Australians (from all backgrounds) have acknowledged that they “have to find a way of living together in this country, and that will only come when our hearts, minds and wills are set towards reconciliation. It will only come when thousands of stories have been spoken and listened to.”⁵¹ In May 1997, the major reconciliation conference held in Melbourne, Victoria dominated the Australian media, focusing national attention on the benefits of a full and frank exchange of views between all factions in Australia.

Chapter 38 of the Australian Royal Commission into Aboriginal Deaths in Custody-Final Report⁵² is devoted to the process of reconciliation. In that report, the division between aboriginal and non-aboriginal people at all levels was considered a major problem in Australian society. The Commission opined that much work was required to reconcile the views of the aboriginal people with those of the white Australians. To achieve this, the Commission stated that great patience would be required, particularly on the part of Australia’s non-aboriginals, who were after all the people who had created and sustained the divisions.⁵³ Consequently, Recommendation 339 of the Report concludes as follows: “the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.”

Partly as a response to this recommendation, the Prime Minister of the day, the Honorable Robert J.L. Hawke, M.P., announced on December 13, 1990, that the Government was supporting the advancement of a reconciliation initiative. The Council for Aboriginal Reconciliation Act 1991 was unanimously passed and its provisions implemented. The year 2001 was marked as its deadline. Thereafter, the Act will cease to have effect. The date is symbolic: it is the date of the centenary of the Australian Federation—the establishment of the Australian nation. The Honorable Robert Tickner, then Minister for Aboriginal and Torres Strait Islander Affairs,

51. THE LOST CHILDREN: THIRTEEN AUSTRALIANS TAKEN FROM THEIR ABORIGINAL FAMILIES TELL THE STRUGGLE TO FIND THEIR NATURAL PARENTS (Coral Edwards & Peter Read eds., 1989).

52. ROYAL COMMISSION REPORT INTO ABORIGINAL DEATHS IN CUSTODY (1991).

53. *See id.* at 38.32.

considers that:

[t]here can be no higher objective for our country and its people, as we count down towards the centenary of the Australian Federation, than that we achieve a just reconciliation between the wider community and the original inhabitants, the Aboriginal and Torres Strait Islander people of this country, the first Australians.⁵⁴

The Government hopes that Australia will be able to enter the twenty-first century showing tangible results of a decade of discussion and negotiation with, as well as recognition of, the First Australians. The views of the First Australians on these proceedings are best illustrated through the work of the Council for Aboriginal Reconciliation.

The Council for Aboriginal Reconciliation consists of a maximum of twenty-five people including an Aboriginal Chairperson, a Deputy Chairperson, persons nominated by the various Parliamentary parties, and both the Chair and Deputy Chairperson of the Aboriginal and Torres Strait Islander Commission. The Council must be comprised of at least twelve Aborigines and two Torres Strait Islanders.

The Council for Aboriginal Reconciliation has, at its heart a vision: "A united Australia which respects this land of ours, values its Aboriginal and Torres Strait Islander heritage and provides justice and equity for all."⁵⁵ Its objective is essentially to improve relations between the Aboriginal and Torres Strait Islander peoples and other Australians or, as one of the Council's information leaflets (*Walking Together*) succinctly phrases it: ensure that everyone can have justice and a "fair go."

Among its statutory functions are: (1) promoting Aboriginal and Torres Strait Islander cultures and history; (2) considering various reconciliation initiatives; (3) advising Ministers of State; (4) developing strategic plans; (5) providing a forum for reconciliation discussions which is open to all Australians; (6) recommending whether there should be a formal reconciliation document (if so, its nature and contents); and (7) reporting on progress to the Government.

The concept of a treaty, a *Makarrata*, a compact, or other instrument of reconciliation is crucial to the work of the Council.⁵⁶ In both North America and New Zealand, the British entered into agreements with the native population ceding usage of the land to the new occupying forces. In New Zealand, the Treaty of Waitangi (although its wording and interpretation may be controversial) was signed by both the British contingent and representatives

54. See COUNCIL FOR ABORIGINAL RECONCILIATION, ANNUAL REPORT SEPTEMBER 2, 1991-JUNE 30, 1992 (Council Activities), at 12.

55. Patrick Dobson, Chairperson, Council for Aboriginal Reconciliation, *quoted in* THE COUNCIL FOR ABORIGINAL RECONCILIATION, TRIENNIAL STRATEGIC PLAN 1992-1995 (1992).

56. See STEWART HARRIS, *IT'S COMING YET . . . AN ABORIGINAL TREATY WITHIN AUSTRALIA BETWEEN AUSTRALIANS* (1979).

of the Maori communities.⁵⁷ The absence of such an agreement in Australia distinguishes the aboriginal Australians from those in other areas of the globe.

Three steps to reconciliation were originally identified by the Council:

(1) Mutual recognition of the need for change [Looking together at issues]; (2) Agreeing on change [Looking Forward]; and (3) Implementing change [Doing it]. These stages will be achieved through the four "Cs": Communication, Consultation, Cooperation and Community Action.

The Council for Aboriginal Reconciliation is now fully established in Australia. Its work is percolating into the public domain, with white and black Australians now enthusiastically following and contributing to its work. The then Prime Minister stated that the Council was undertaking a "big challenge" but he had the greatest faith that it could succeed.⁵⁸ As to the goal of 2001, with the Australian Federation Centenary looming and the Olympic Games being held in Sydney, Australia in the year 2000, sufficient impetus exists to realize the goal set by the Act—thereby achieving real improvements in the lives of the First Australians.

IV. CONCLUSION

Indigenous peoples are slowly achieving prominence through the recognition of their valuable contributions to contemporary society. The goal of mutual understanding is slowly becoming a reality. Today, indigenous peoples are acknowledged as a group who should be allowed to participate fully in the affairs of State, with the same rights and responsibilities as other citizens.⁵⁹ Recognition is the first stage of the path to conciliation. As indigenous peoples band together as one voice, their claims can no longer be ignored. National and international bodies are recognizing the need for dialogue, and the opening of channels of communication between all parties. Genuine listening leads to better understanding; open channels of communication facilitate diplomacy. History cannot be rewritten, but the "mistakes" made in the past can be redeemed, at least in part, by more positive cooperation in the future. Creative problem solving is the key to resolving the claims of indigenous peoples—it has the potential to succeed where centuries of traditional legal approaches have failed.

Many new Australians are becoming increasingly aware of the injustices suffered in the past by the original Australians. Today, city life for mainland aboriginal people can often mean deprivation. However, special schemes now operate to assist aboriginal people in education.⁶⁰ Access

57. See IAN BROWNLIE, *TREATIES AND INDIGENOUS PEOPLES* (1992).

58. *Mr. Keating's Speech at the Reconciliation Council*, KOORI MAIL, Feb. 26, 1992, at 20.

59. Aboriginal Australians were only accorded Australian citizenship and the right to vote in 1967 pursuant to a referendum.

60. For example, special assisted and funded places at universities are available for aboriginal students. These access and funding schemes encourage able students to attend universities.

schemes exist to help indigenous Australians earn university degrees. Aboriginal studies are now offered at degree level in many universities. Such courses aim to give non-aboriginal people an understanding of the lifestyle, customs, and history of aboriginal people.⁶¹ Similarly, aboriginal culture has been incorporated within the permanent displays of museums throughout the country.⁶² Many aboriginals living in the city, however, still live in comparatively deprived inner city areas.⁶³

The abolition of racial discrimination and the promotion of universal equality in law is clearly of crucial importance to indigenous people. Once accepted as equals, indigenous populations will be able to commence establishing their individual identities and preserving their unique cultures, unhindered by legal impediments. Even when full equality is achieved, indigenous populations may still desire the right to be different. In Australia, dramatic changes have occurred during the last thirty years with respect to indigenous groups. From living in reserves, not even accorded full citizenship, native Australians are making a major comeback. They are now full citizens of the Commonwealth of Australia, and have experienced improvements in health, employment, and education. There is indisputably a long way to go,⁶⁴ but Australian law seems to be on the right track. With their new-found recognition, indigenous Australians now seek to consolidate their position by developing their own self-managed territories and strengthening the demand for self-determination. Only then will Australia truly be the golden land of opportunity with equality for all its citizens.

Other indigenous peoples are finding themselves in similar positions to the native Australians. They are also entering into dialogue with ruling powers, and seeking mutually acceptable solutions to problems. There is clearly hope for indigenous peoples—where the law encounters difficulties, common sense can prevail. The problems encountered by indigenous peoples cannot be resolved by traditional means. The invocation of new approaches heralded by the recognition of creative problem solving permits all parties involved to employ a specifically tailored solution to each and every identified problem. The precedents have been set; it is now up to the indigenous peoples themselves to take the initiative, present a vocal, reasoned, united front, and open the channels of communication. True equality may be achieved, though it should be remembered that:

The scheme aims to rectify the disadvantage suffered by the students but has angered some of the non-aboriginal students by seeming to lower the standards of entry to higher education. Moreover, no such attractive financial packages are offered to non-aboriginal domestic students.

61. Paul Berhendt offers two courses at the University of New South Wales through the University's Aboriginal Research and Resource Centre.

62. For example, the State museums of New South Wales and South Australia. In Queensland, aboriginal centers run by the indigenous people themselves trace the rich culture of the native Australians—for example the Aboriginal Cultural Dreamtime Centre outside of Rockhampton.

63. Redfern in Sydney was a classic example.

64. Not least in fighting the inherent white prejudices.

[e]quality, . . . is not uniformity. A regime of absolute respect for human rights must reconcile unity with diversity, interdependence with liberty. The equal dignity owed to all seeks respect for the differences in the identity of each person. It is in absolute respect for the right to be different that we find authentic equality and the only possibility of the full enjoyment of human rights without racial, sexual or religious discrimination.⁶⁵

The problems associated with addressing the claims of indigenous peoples are manifold. It is now time for the law and its practitioners to recognize that traditional methods of solving disputes may not always be the most effective. Absolute recognition of the right to be different requires an understanding of those differences—a contextualized approach. Creative problem solving, in essence, breaks down the barriers of traditional legal theory, freeing those involved to select the most appropriate solution to each and every problem. A multi-disciplinary approach is essential. Clearly with regard to indigenous peoples, the problems are self-evident yet the traditional method of applying law has had limited success. The problems remain. A new solution is needed. Creative problem solving provides the only realistic approach currently available.

65. *Study of the Current Dimension of the Problems of Intolerance and of Discrimination on Grounds of Religion and Belief*, at para. 17, U.N.DOC E/CN.4/SUB.2/1987/26 (1986).

