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# From Land Rights to Political Rights

## Hunter-Gatherer Politics and the Contemporary Australian State

Patrick Sullivan

## Introduction[1]

Before colonisation some two hundred years ago, the Australian continent was owned by peoples who roamed defined territories in small bands. The composition and size of these bands varied according to season, age, marital structure, and regional particularity. In the southern areas, semi-permanent settlements existed near permanent food and water sources (Flood 1983). Little is known of the social structure of these groups due to the very early and severe impact of colonisation (but see Berndt and Berndt 1993). More typically the presence of water, and the consequent ability to exploit food resources, was highly variable. Most Aboriginal groups would split into very small family units spread over a large area for the dry season, coming together into much larger camps of several months duration when water was plentiful. It is common in Aboriginal anthropology to distinguish between these land-using groups and the land-owning groups (Berndt 1959; Peterson 1986). The classical model (Hiatt 1984), derived from Radcliffe-Brown's ethnographies of the 1920s and 30s (although these were by no means as highly systematised), describes a patrilineal descent group, or clan, as that group owning a defined territory with primary rights both to its subsistence produce and its creation mythology for ritual and sacred designs. These groups were exogamous, and polygyny was common, so there were formal means for an individual to affiliate with more than one descent group. There were also alternate means to form recognised attachment to areas otherwise controlled by a descent group, among them residence, kinship and/or ceremonial links, and ritual interests derived from conception, birth, initiation, or burial (Peterson 1986: 59-60). Consequently, groups comprising members of a number of patrilineal clans formed hunting and gathering bands which had access to resources across a variety of clan territories (see Stanner 1965).

With colonisation, much of the southern portion of the country was annexed for

[1] Some parts of this paper were first delivered to a conference celebrating 20 years of land rights sponsored by the Central Land Council and the Northern Land Council in Canberra, August 1996.

farms, and those Aborigines that survived the introduced diseases were separated and placed on mission settlements (see Haebich 1988). In the north and centre of Australia, land was leased by the colonial governments to cattle and sheep ranchers who carried out campaigns of attack against the original occupants, greatly reducing their numbers. The latter were forced into an eventual accommodation with their use as labour or relegated to mission reserves (Reynolds 1987, 1990, 1996). Beginning in 1974 with the *Aboriginal Land Rights (Northern Territory) Act*, statutory measures to allow Aboriginal claims to unused land were introduced in several Australian states (Western Australia and Tasmania excepted). In 1992 the High Court of Australia determined that the common law of Australia, which has derived from precedent as well as legislation since the beginning of recorded British jurisprudence, recognised a form of customary land holding of colonised peoples called «Native Title». The doctrine that Aborigines held title to colonized land had not previously been recognised. The government introduced the Native Title Act in 1993 to allow for a process of claim and registration of native title where it continued to exist.

The High Court judgement established principles that make it difficult for all Australian Aborigines to claim the continued existence of their title, as they need to demonstrate: that they are a coherent social group with a system of land title; that the group has a continued connection to its traditional land; and that the Crown has not legitimately extinguished the title by a grant to another person that is inconsistent with the exercise of native title. Until December 1996, many Australians believed that the grant of a lease for cattle or sheep grazing extinguished any native title, but the High Court determined that the two forms of land holding may coexist to the extent that the exercise of native title is not incompatible with the exercise of the activity which is the purpose of the lease. Much of the Australian land area is held under this form of lease and the Australian government is currently considering legislation to deal with the problem that this decision has caused them.

Considerably more could be said both about traditional land tenure and contemporary land rights, but that is not the purpose of this brief introduction to the current situation in Australia. The intention of this paper is to concentrate on the neglect of sovereign political rights enjoyed by Aborigines prior to colonisation and to argue that this is a necessary component of any real reconciliation between colonisers and colonised. This is the dimension of Aboriginal rights that commonly goes untreated when land rights or native title rights are discussed. The political right of self-governance is bound up with the concept of territoriality that provides the foundation for modern land rights. It is the right of separate and distinct peoples to political and economic self-determination. This right is recognised in international law in the two covenants implementing the Declaration on Human Rights – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is also currently being debated as Article Three of the U.N. Draft Declaration on the Rights of Indigenous Peoples (Iorns 1992). Although national governments are generally keenly aware of the ways in which collective rights over land, sea and natural resources are bound up with political rights to self-government, in Australia the public denial of this obvious linkage is complete. The Australian approach has always been to divide political rights from rights in land, to make of land rights a form of property, and to subsume the political rights of its indigenous peoples into those of the general population. In this way political self-determination is denied and the land rights that are recognised are regulated, circumscribed, and controlled by statute.

This paper begins with an extended discussion of traditional Aboriginal authority as a means of identifying a pre-colonial

political system. The existence of such a system continues to be ignored in Australia in much the same way that the indigenous system of land law was ignored until recently. It is a system adapted, necessarily, to the uniquely Aboriginal way of utilising and conceptualising the land. It is therefore very difficult to describe the political system in structural terms which are comparable to other social and political systems, particularly that so radically different as the modern state. Yet the one continues to exist within the other, though it may have been modified, and continues to govern the lives of large numbers of Australian Aborigines. In the subsequent sections of this paper, the attempts of Aboriginal people to come to a position of political accommodation with the Australian state, particularly through their participation in the United Nations drafting of a Declaration on the Rights of Indigenous Peoples, is discussed. The paper argues first that Australian Aborigines are separate and distinct peoples with prior political autonomy that requires recognition. It then describes ways in which the Australian state is struggling to deal with the international need for that recognition as a right of all indigenous peoples in principle while continuing to resist any such accommodation in actual fact.

## Hunter-Gatherer Politics

Anthropology as a discipline has always recognised the link between territoriality and indigenous political systems (Peterson 1986). Indeed, it is often forgotten that when Radcliffe-Brown produced the concept of an estate, over which an Aboriginal descent group held absolute sway, he felt he had also discovered the prehistoric origins of the state. Radcliffe-Brown claimed that the Aboriginal land-using *horde* «has some of the qualities of corporate ownership, but also partakes of the nature of the relation of a modern state to its territory, which we may speak of as the exercise of "dominion". Rights of ownership over land and rights of dominion have seemingly both had their origin by development and differentiation from such a simple relation as that exemplified in the Australian horde» (Radcliffe-Brown 1935-40: 288).

Although the «classical» model of land tenure derived from Radcliffe-Brown – in which all pre-contact Aboriginal groups consisted of patrilineal descent groups owning defined estates and jointly exploiting land in what he called «hordes» – has proved too simple, this quote is a useful reminder of how much of the political dimension apparent in Radcliffe-Brown's conception has been stripped from current theories of Aboriginal land use and ownership. This has happened for two reasons. The first is that a more sophisticated understanding of Aboriginal land use has developed, particularly in the last two or three decades. Hand in hand with this has gone a re-examination of Aboriginal political life. The model of a clan group with a distinct territory fits well with assumptions of decision-making by a council of elders, under the leadership of a headman, which directs the community of women and young males. Elements of this model can be found in the work of Elkin (1954: 82) and later Berndt (1965: 167). Actual community political dynamics are considerably more complex than this. As the clan/horde land-use model came under scrutiny (Hiatt 1962; Meggitt 1975; Stanner 1965; see also Gumbert 1984: 74-76) so did its corollary in political life. Hiatt (1986) summarised contemporary approaches well in his *Aboriginal Political Life*. Myers' (1986) work is also highly significant in that it does away with the idea of a formal structure and replaces it with a dynamic of «relatedness» and «autonomy» which produces the line of tension along which intra-group political activity occurs, a political system that Hiatt has characterised as «ordered anarchy» (Hiatt 1986: 4). It is in the particular way that the «relatedness» of the individuals within a group counters their tendency to

extreme personal autonomy that the «order» is introduced into the «anarchy». Hiatt goes on to point out that: «to the European mind, accustomed as it is to positions of authority and hierarchies of command, a state of ordered anarchy poses a set of intellectual and emotional problems» (1986: 4). This has traditionally been dealt with by imputing a political structure to Aboriginal groups that has never existed, and accounting for its absence today with the assumption of collapse and decay following the fatal impact of colonisation.

The prevailing view during the colonial era is characterised by an almost (in passing) comment by Elkin but was later taken up by Berndt. Elkin said: «The male elders are those who exercise authority in the local groups. There is usually one headman for each group who unofficially presides at meetings, settles quarrels and makes decisions bearing on the group's economic, social and ceremonial activities, though other elders also express opinions» (in Berndt 1965: 167). Radcliffe-Brown (1940: xix) shared this view: «amongst the Australian aborigines the independent, autonomous, or, if you will, the sovereign, group is a local horde or clan which rarely includes more than 100 members and often as few as thirty. Within this group, order is maintained by the authority of the old men. But for the celebration of religious rites a number of such hordes come together in one camp. In the community so assembled there is some sort of recognized machinery for dealing with injuries inflicted by one person or group on another... Each assembly constitutes for the time being a political society.»

But he was also aware of larger political structures; earlier in the same work he says: «Every human society has some sort of territorial structure. We can find clearly defined local communities the smallest of which are linked together in a larger society, of which they are segments. This territorial structure provides the framework, not only for the political organization, whatever it may be, but for other forms of social organisation also, such as the economic, for example.» (Radcliffe-Brown 1940: xiv)

He concludes that hordes from time to time belong to «different larger temporary political groups» but fails to elaborate on the difficult problem, brought about by his insistence on the horde as the basic political unit, of how a grouping can be an effective political entity and temporary simultaneously (Radcliffe-Brown 1940: xix).

When small groups are observed making decisions, informal discussion and consensus arrived at by a group of relatives co-resident by mutual consent can appear as an institutionalised gerontocratic authority structure. We need to ask whether small-group gerontocracy is really an institution of government that characterises this society and has a formal existence in some sense independent of human practice. The political group may be better characterised at the larger level where a residential grouping gives temporary form to an enduring underlying law-holding community characterised by a succession of such temporary groupings (Sutton 1996).

The concepts of «headman», «council of elders» and «gerontocracy» imported from European experience to formalise an essentially informal Aboriginal process were later subject to criticism, particularly by Sharp's claim that they had «seeped into and seriously rigidified the discussion of Australian Aboriginal social structure» (Sharp 1969; Hiatt 1986: 4). However, in describing Aborigines as a «people without politics» he did not mean, as Myers implies, that they flexibly exercise essentially personal power in relationships. On the contrary, Sharp believed that all relations between individuals were fixed from the beginning by the regulations of kinship obligations. Decision-making structures and political authority were unnecessary because every person experienced an exact balance between their obligations to others and others' obligations towards them (Hiatt 1986: 5). Meggitt supported the view that there were «no recognized political leaders, no formal hierarchy of

government» (1975: 250), but differed from Sharp in emphasising the inflexible application of mythological precedent rather than kin obligations and added to the debate the concept of an ethic of egalitarianism, later taken up by Myers. Attempting to re-instate Elkin's model of a gerontocratic council of elders, Berndt (1965: 174) pointed out that kinship is not a rigid prescription for activity, but produces a variety of behaviours according to circumstances (see also Tonkinson 1978: 126-127); and Hiatt (1986: 6) argued that myth, similarly, is «not so explicit and unequivocal, nor sanctions so unerring, as to constitute a set of instructions which people follow automatically».

The concepts of «clan» and «estate» as the building blocks of Aboriginal social life have given way to consideration of relations between clans or family groups, dialectical divisions, religious lodges, and ordered regional communities or social domains, all of which make up a wider and more complex group structure. Likewise, the concept of how authority is asserted within these groups has also expanded. The «headman» approach to political authority works in a limited way for small groups (Anderson 1988) but for large-scale community relations Hiatt's phrase «ordered anarchy» is more appropriate and requires elaboration. Myers shows that this «ordered anarchy» is structured by the competing needs: 1/ to re-affirm relatedness within local culture (particularly by kinship mores and status in ritual) and 2/ to insist upon personal autonomy[2]. He says that there are no general figures of authority, only older people with particular relations of authority to particular individuals towards whom they also have a nurturing responsibility. He isolates the concept of «looking after» as central to Aboriginal (Pintupi) social life, permeating both ritual and secular domains. A major part of nurturing is the transmission of esoteric knowledge. The principal dialectic of Aboriginal social life is the tension between the need to express, demonstrate, and re-affirm «relatedness» and the equally strong demand for personal autonomy. The idiom of nurturing recognises both of these. There is, then, a hierarchy in Aboriginal social organisation, but it is not necessarily a hierarchy of power.

«Hierarchy is therefore not perceived as a human creation. Instead, it is simply the form taken by the transmission of something of extraordinary value that predates human relations. Authority and responsibility are passed on to younger people, embodied in an object that is not their product [ceremonial and secret / sacred knowledge]. In the Pintupi view, the capacity for authority does not reside within the person. In this transmission, subordinate and passive juniors become superordinate and autonomous seniors. This feature of social life is the foundation of the way in which Pintupi conceptualize their physical environment and larger cosmos.» (Myers 1986: 241)

In Aboriginal society power is fluid. If we insist on looking for an institutional expression we may locate its ultimate foundation in ritual knowledge, but it is also intensely personal and involves the exercise of will in interpersonal relations. This makes a formal characterisation of the system difficult to achieve, although its actual operation in daily life can be described. It may be useful to put aside a tendency to look for a political system through which power is exercised, and to conceptualise the system as itself coming into being as a result of the patterned acts of the exercise of power in the life of the community. This produces the system, which does not in any sense pre-exist and produce the acts. This is one of the characteristics of the problem of accommodation as between Aboriginal and non-Aboriginal political systems. They require some structural correspondence in order to engage with each other, and this is hard to discern. Whether determining the conduct of daily activities, accumulating resources through control over others, or regulating conflict, it is not possible to distinguish in observation between the

[2] At the risk of appearing to support a form of reductionist materialism, it must be pointed out that the ethic of personal autonomy was related to the very real economic autonomy of each individual. In childhood, both boys and girls learned the skills of food gathering and preparation. Post-puberty young men learned to hunt large game such as kangaroo. Each individual made his or her own tools (spear, boomerang, dig-

operation of impersonal laws upheld by persons of position and the negotiation of outcomes through personal interaction between closely related individuals on the basis of mutually held standards. These three forms of power – the authority to direct the action of others, the control over resources, and the coercive power to enforce law or resist violence – should be considered in turn. Although they are distinguished in the following discussion, taken together they constitute a political system that still governs the lives of most Aborigines in northern and central Australia, yet receives no recognition from the dominant society.

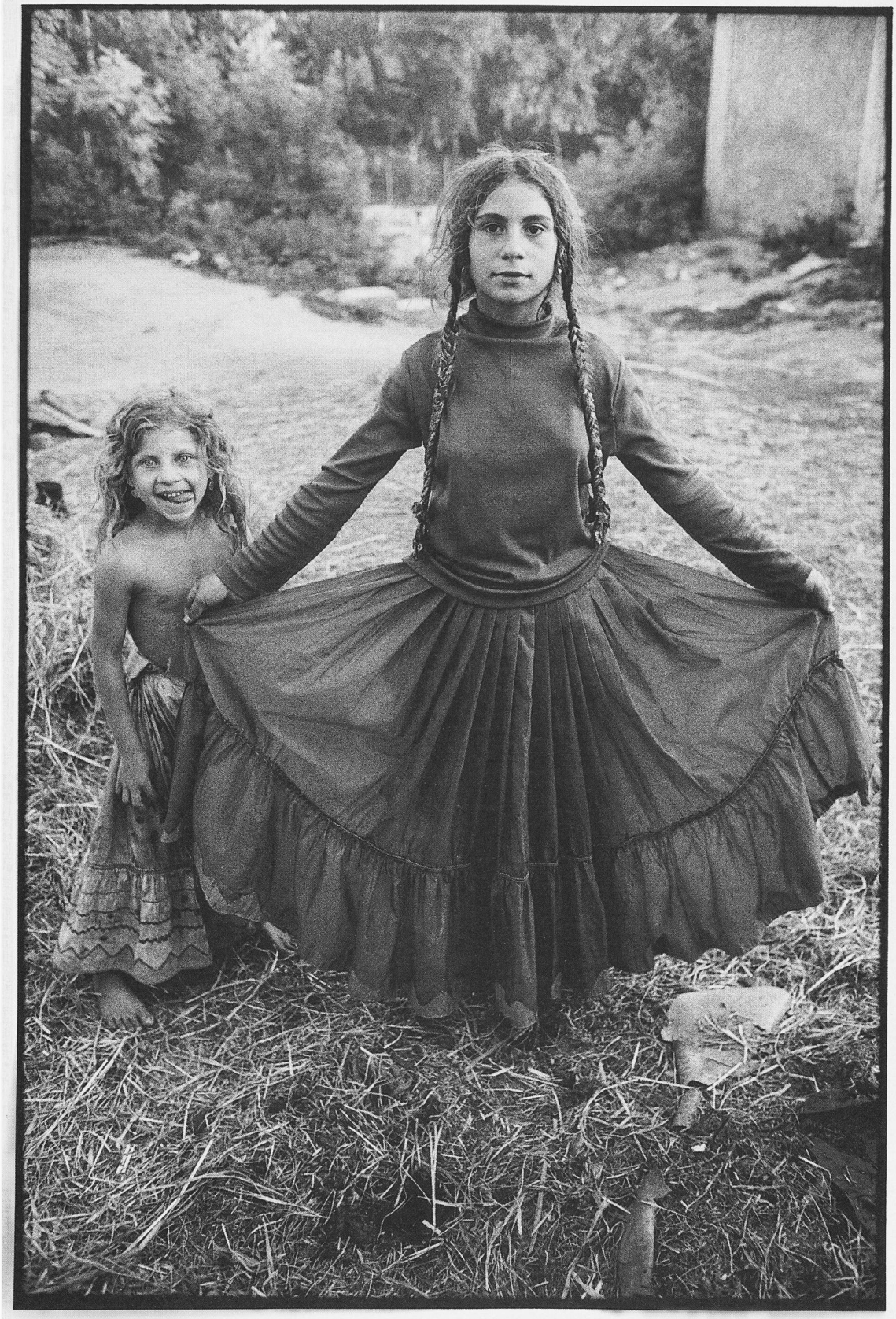
## Power, Sacred and Profane

It is in the sphere of Aboriginal ritual that the power to regulate the behaviour of others is most clear-cut. The local community is under an intense obligation to participate both for fear of supernatural and physical sanctions, and out of a need to progress as social individuals. In contemporary circumstances in some areas, progression through ritual marks a person's Aboriginality as distinction from the non-Aboriginal culture of the surrounding population. Power is therefore in the control of the few who exercise authority by virtue of their superior and essential ritual knowledge. While ritual experts are dependent on negotiation with others for the success of rituals, there is little doubt that they hold the balance of power in such negotiations, giving them the ability to produce consensus. This is certainly one area where older males exert control over women and juniors, and make decisions binding on large numbers of people. It is no accident that the practice of ritual is called in Aboriginal English «business» and the mythology it celebrates «the law». This is the area where the Aboriginal system of authority almost mirrors our own. On this basis some authors have assumed the authority of male elders to permeate all other aspects of social life. Berndt, for instance, states that ritual authority overlapped into secular life (1965: 204-205) while Meggitt states that it did not (1975: 249-251). The connection has never been convincingly demonstrated. Bern (1979) argues that the control of ritual represents the control of the single most prized resource. This is a circular argument on materialist lines which is ultimately unable to demonstrate its own material connections. It suggests that value in Aboriginal society is represented by ritual knowledge. Old men reserve this to themselve,s excluding women and youths from its possession, yet using their labour and resources in food gathering and the distribution of the hunters' kill for the duration of the ceremonies to further their own control over ritual resources. However, accumulating more ritual knowledge by investing ritual knowledge already acquired cannot be said to be the operation of power if it does not spread beyond the ritual sphere, regardless of whether ritual knowledge is the primary value in society.

Here the second approach to the concept of power, outlined above, is introduced. This approach defines power as the control of resources which results from an individual's successful strategic manipulation. Again, this «transactional» view runs the danger of simply projecting values from modern commercial society, where economic relations are often described in such a way, onto Aboriginal power relations. Three factors mitigate against the understanding of Aboriginal power as centred in the control strategising males have over the resources and labour of others. Firstly, material wealth is minimal; secondly, power entails obligations of nurturing and generosity towards those over whom power is exercised; thirdly, the ethic of loyalty to a ritual «boss» is matched by the equally strong ethic of personal autonomy.

Power, then, is relative and contextual and does not adhere in a fixed manner to an individual or an office. It is particularly

ging stick) from materials ready at hand. It was a society highly unusual in that each individual maintained control of the means of subsistence production. Social and biological reproduction is, of course, another matter. Individuals were not dependent on the group for survival, at least in the short term, and often took advantage of this to split from the group at times of conflict and dissension, either as a male/female pair or alone. With the ethic of personal autonomy also goes a very common idea among Aborigines that they are not responsible for, or in any sense in control of, each other's behaviour, even that of very close kin. Clearly, the very highly developed social and religious life of Aborigines is related to the fissuring tendencies of their material circumstances; it is the necessary mortar that binds. Nowadays, despite greatly changed material life, these tendencies still characterise Aboriginal political and collective activity and pose significant problems as acknowledged by Aborigines themselves (see Smith and Finlayson 1997). This may be one of the reasons for a resurgence of participation in Aboriginal ritual where it still survives.



determined by a person's location relative to the country where he or she has particular rights of descent or assigned roles regarding local mythology. Contrary to the image of a central male figure amassing power for himself, both men and women can be seen as exercising power over a range of others and accumulating wealth in the form of non-material rights which fluctuate according to changes in the composition and location of their group.

In the past women when advancing in age would ideally exercise influence over a camp of co-wives and their daughters and nieces. Nowadays, community influence tends to adhere in the strongest among a group of female siblings and her sometimes putative nieces and nephews (Birdsall 1988). Women possess secret ritual knowledge in many areas and have usually been involved throughout their lives in alliances ensuring rights over a range of home territories, whether or not they currently have access to them. A man, similarly, exercises strong influence over some of the women and junior males with whom he has developed ties over the course of his life, while accumulating a range of territorial rights and esoteric knowledge as a value in its own right. None of these social advantages acquired with age are devoid of concomitant obligations (Meggit 1975: 250). What distinguishes big men from lesser men was the ability to control their obligations towards others while enforcing the obligations of others towards themselves. As Myers (1986: 256-257) points out, this exercise of control is constantly shifting in time and space in relation to the composition of co-resident family groups. The attention of group members, then, is not on subordination to a community grouping, but to an ego-centred person-specific series of obligations. The temporary nature of the polity, as groups come together and then split during the course of the hunting and gathering season, produces the necessity for continuous re-negotiation between autonomous individuals. The assertion of power associated with ritual knowledge in no sense contradicts the assertion of personal autonomy. By placing the origin of obligations outside the community in the mythic creative period of the Dreamtime, subordination to others with knowledge, paradoxically, becomes the means of achieving personal autonomy (Myers 1986: 266).

One last aspect of the exercise of power remains to be discussed – the regulation of violence. Power in Aboriginal society is unequivocally exercised through an act of violence by one person against another and/or through the organising of violence or retribution by one group against another. Rates of death by killing were probably quite high in pre-colonial Australia (Peterson 1986: 36). In the desert areas, men and women are still proud of their fighting ability, and tales of fighting bands in the period before sedentarisation abound (Myers 1986: 160-161, 167-170). In the north Kimberley region, Deakin reports stories of fighting in living memory on each patrilineal estate visited (Deakin 1978: 174). The memoirs of Grant Ngabidj, in the East Kimberley, confirm this impression (Shaw 1981), and the relatively recent migration of West Kimberley groups into the areas they occupied at the start of the period of European conquest possibly also indicates a degree of group conflict (Kolig 1981: 19). Most desert sources stress the extreme ethnocentrism of cultural and linguistic blocs. Outsiders were regarded with fear, suspicion, and contempt (Meggitt 1975: 34-35; Tonkinson 1978: 118; Kolig 1977). There was also considerable interpersonal fighting within groups, and violence was often used as a form of punishment for social offences. These three common forms of violence were connected, and are related to violence in interpersonal authority today.

Physical chastisement for wrongs was frequently practiced between adults. Conflict would flare up and subside quickly. Arguments between men, among women, and between the two could result in beatings, and it was not unusual for women to beat men (Tonkinson 1978: 123-125; Love 1936: 33-34; Kaberry 1939: 25-

26). These conflicts always occurred within a group and the degree of conflict was regulated by others. Women in particular worked hard to moderate men's violence (though occasionally also inciting it) (Tonkinson 1978: 126-127). Roles taken in conflict were greatly influenced by conventional kin obligations (Tonkinson 1978: 126-127). The many conventional means of regulating conflict indicate a strong tendency to keep violence at the verbal level (Tonkinson 1978: 123-124) and it swiftly returned to this level once it had escalated. If there was lingering dissatisfaction, or if the fighting had provoked further grievances, a more formal procedure was used. The matter would be discussed by elders in terms of breaches of sacred law and customary punishment. If the offence concerned women's sacred law, women would make the determination (Myers 1986: 249-250). More commonly, initiated men would retire to the ceremonial ground, where violence was forbidden, to discuss the merits of the case and the means of resolving it[3].

Apart from petty squabbling, and perhaps as a consequence of it, conflict usually erupted over murder, elopement, sorcery, and breaches of taboo. The rights and wrongs of the case were not usually at issue nor was the punishment. What provoked dissension was whether the offence had been committed by the accused. Where the culprit admitted the crime, he or she usually submitted willingly to punishment by spearing or beating. This was just as likely to be carried out by the culprit's own close kin as by the wronged party (Tonkinson 1978: 118). Frequently where the sense of injustice arose between two different groups it led to punitive raids by kin of the aggrieved party against any available member of the accused group (see e.g. McKenzie 1969: 70-72; Myers 1986: 167-170). It is quite likely that sporadic attacks were an every-day part of life in pre-contact Australia. These attacks, counter attacks and sorcery accusations could become so distressing to both sides that ritual expiation was arranged and the dispute laid to rest (Tonkinson 1978: 119). Conflict could also be sublimated or resolved through certain rituals (Peterson 1970).

Aboriginal society, then, had and has a system of political authority embracing the regulation of conflict and control over groups and resources, without overt or easily identifiable institutions through which it is exercised. Political authority is more easily observed as inhering in particular individuals than in the offices they exercise or the institutions of which they are members. It is highly contextual and variable according to circumstances, group composition and location. This poses problems for recognising in a formal sense continuing Aboriginal political authority as part of the process of self-determination for colonised peoples. Decolonisation has always proceeded by first constructing indigenous organs of government reflecting more or less the colonised's cultural practices and traditions, and then transferring or somehow devolving power onto them. This has as yet to be attempted in Australia. The Australian alternative to instituting self-governing structures is, at the highest level, the Aboriginal and Torres Strait Islander Commission (ATSIC), and at the community level, corporate bodies incorporated under the *Aboriginal Councils and Associations Act* (1976). Neither of these forms of incorporation meet Aboriginal political aspirations neither in their effectiveness in requiring dominant culture to treat Aboriginal peoples as equals, nor in their ability to reflect Aboriginal cultural norms of the kind described above. As a result they tend to be more institutions for the continuing control and administration of Aborigines than expressions of self-determination.

[3] Tonkinson (1978: 125) suggests that the reason for prohibiting violence during secret-sacred activities is not simply the fear of supernatural retribution, but the fact that in the absence of women as moderators men need to be more careful of provoking conflict.

## Aboriginal Political Rights and the Australian State

Political authority of the type described here is still exercised in many remote area Aboriginal communities, although it receives no official recognition. In many other areas, practices have changed but the system of values that underlie them has not. At the time of European colonisation there was clearly a self-regulating polity in which control of land and political authority went hand-in-hand, mediated by land-related myth and ritual. The polity survives, embedded in the wider Australian state. The difficulty of recognising it, both in practical and conceptual terms, has led to the comfortable assumption that Aborigines are not constituted as a people in the same way as other indigenous peoples. Indeed, in some political circles there is repugnance at the idea that they should be seen as anything other than a special interest group in a plural society. Thus, land rights have become property rights while their political dimension is ignored, subsumed in general Australian administrative processes.

As the studies cited above show, impartial scholars have always regarded Aboriginal political organisation as part and parcel of Aboriginal land relationships. However, its complex, flexible and sophisticated nature is difficult to translate into practical administrative terms which provide guidelines for community self-determination in the same way that they have provided rules governing land rights and native title rights. This is the primary difficulty that leads to the parting of ways between indigenous political and land rights in contemporary Australia. A second reason is that it is difficult for states to come to terms with Australian Aborigines as constituting embedded, previously sovereign, peoples. Put simply, statist ideology insists that states embody national populations and have relations with other states. Peoples can only be dealt with to the extent that they mimic states. This point calls for brief elaboration. To put the case in very broad terms, it can be said that the modern European form of the state was at the beginning of its historical evolution when the various technological and commercial accidents of history came together to permit world-wide colonisation by European powers (see e.g. Falkowski 1992; Hale 1993). At the end of this five-hundred year period, the European type of state had become the dominant form of political organisation in the world. Post World War II decolonisation was essentially a legal exercise in creating states on the European model to which formal independence could be granted. Some of these were already state-like social and political entities at the time of colonisation, many others were not. This made no difference; states were created. However, the problem that we now face world wide is that of peoples embedded within states who have every right to demand decolonisation and political autonomy as well, but for whom the creation of states may be impossible or undesirable.

Colonial powers did not want to grant independence to their colonies. They were forced to so by a complex of circumstances at the end of the World War II. It is noteworthy that the Committee of Twenty-Four (the common name for the committee which monitors implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples set up by the United Nations to oversee the process) did not initially include any representatives of colonised peoples. Now that decolonisation is a *fait accompli* with which all states have learned to live, it is hard to remember that many hoped to manipulate, stall and control the process. It remains to be seen whether the tide of events will again be too strong to prevent the later stages of decolonisation, the decolonisation of embedded peoples. This time resistance comes not only from ex-colonial masters but from many of the newly decolonised states themselves. In Australia, this slowly unfolding interna-

tional drama goes unremarked because the situation is felt to be so firmly under control. The preceding discussion will have shown the obstacles to coming to terms with the rights of Aborigines as a separate and distinct people in the same way as in New Zealand/Aotearoa, for example, where the Treaty of Waitangi has recently revived and implemented. Control over Aborigines is achieved in Australia by the absorption of those elements of Aboriginal culture that can be readily translated into mainstream Australian administrative forms. The result is that the problems of Australian Aborigines continue to be treated within and on the terms of the Australian polity, and not in terms of relations between the latter and a separate political entity. The *Land Rights Act* (1976), the *Aboriginal and Torres Strait Islander Commission Act* (1989) and the *Native Title Act* (1993) are all «successful» examples of this.

All of these acts of Parliament have produced or will produce substantial material benefits for Aboriginal people, but at a price – the price of autonomy. ATSIC is an organisation struggling to service a massive problem of underdevelopment in a culturally appropriate way. It replaced two administrative bodies (the Department of Aboriginal Affairs and the Aboriginal Development Commission) and one indigenous political forum (the National Aboriginal Conference). The latter had its provenance in movements for a nationally independent form of political expression. Analysis of both the way that ATSIC operates and its structure under the ATSIC Act (Sullivan 1996) show that its political representative function has been sidelined by its development function. This has two negative consequences. First, by restrincting the role of elected Aboriginal representatives to that of distributing government grants and labeling this «self-determination» this system controls Aboriginal political development by severely limiting its parameters from the outset. Second, dependency and control are further institutionalised in response to widespread political sensitivity to the expenditure of public money by and for Aborigines. There is an entrenched prejudice in Australian politics against putting money into Aboriginal hands caused by scepticism about Aboriginal ability to deal with it honestly. This leads to the imposition of unwieldy and administratively inefficient superstructures for financial accountability. As a consequence, the ATSIC, struggling as it is to meet the practical needs of its constituency in an effective manner under the twin constraints of inadequate resources and government meddling, is in no position to work towards promoting the political organisation of Australia's indigenous peoples.

ATSIC Commissioners are elected from geographical zones by the members of Regional Councils (a number of regions make up a zone), who are themselves elected at large in their regions. Regional Councils serve as advisory bodies to regional development offices and Commissioners advise the central office and, in theory, government. None of this reflects the traditional processes described above, although these may still influence the process at the local level despite, rather than because of, the formal structure. Thus, the establishment of the ATSIC is not an act of recognition of the Aboriginal people by the Australian government. The structures that might have been expected to arise out of recognition of Aboriginal land rights are even less so.

The *Land Rights (Northern Territory) Act* (1976) allows for the creation of trust bodies to hold the land granted to successful claimants under the Act. It also establishes Land Councils whose responsibility it is to consult with traditional land owners over use of their land and to administer the distribution of benefits. The trust bodies that hold the land have no other function. Most of the procedures designed to meet the terms of the Act in relation to use of Northern Territory Aboriginal land are negotiated with the Land Council as the intermediary between the developer and the Aboriginal owners. The organisations

that run community life on the land and receive grants from the ATSIC (and in some cases royalty benefits) are not the trust bodies but are generally established under the *Aboriginal Councils and Associations Act* (1976), about which more will be said below. In contrast to the Northern Territory trust bodies, the bodies that will be set up by law to hold and deal in native title land are required to incorporate under the *Aboriginal Councils and Associations Act* (1976).

Considerably more could be said about the land holding mechanisms of both the *Land Rights Act* and the *Native Title Act*, but this would take us too far from our main point. This is that the self-governing political body associated with land ownership in traditional culture becomes, by the operation of both acts, an administrative structure firmly regulated by Australian law, founded on European cultural principles, and primarily concerned with mundane matters of financial grant administration.

The *Aboriginal Councils and Associations Act* (1976) allows for the creation of Aboriginal Corporations. As Mantziaris points out, «the incorporation procedure presupposes a group of incorporators – an unincorporated association – which comes forth to register as a corporation» (Mantziaris 1997: 11). The assumptions underlying the Act can be discerned as being:

- Aboriginal Australians may join together in voluntary associations in a way already familiar to corporations law. As such an Aboriginal community is not different in principle to a group of people who play tennis together wishing to form a club, or to a knitting circle.
- The association may wish to incorporate under the appropriate Act so as to receive whatever benefits there are from having legal corporate status (in the case of Aborigines, principally receiving government grant funds).
- The association must provide information on who its governing committee is, what its rules are, what its aims and objectives are, and who its members may be.
- As long as these do not conflict with the terms of the Act the association is duly incorporated and registered, and is bound by the terms of the Act.

Were it not for the fact that Aboriginal Corporations have become a feature of the Aboriginal affairs landscape as familiar as the appalling material conditions that they confront, such an approach to the provision of a legally recognised entity reflecting community governance would be stunning in its cultural arrogance, crudeness, paternalism, and sheer unworkability. It is worth quoting at length here from a report to ATSIC, later published (Sullivan 1997), which elaborates the reasons for this strong assessment.

«There are clearly numerous elements of the *Aboriginal Councils and Associations Act 1976* that contravene custom, and possibly therefore the common law rights that derive from this. Yet many of these provisions have been seen to be necessary for the efficient and accountable operation of Aboriginal corporations. To remove them could be tantamount to allowing Aboriginal corporations to do anything they like in respect of their members and society at large. The difficulty arises because the *Aboriginal Councils and Associations Act 1976* goes further than the regulation of a corporate body to the regulation of entire social communities. Not surprisingly there is a clash of norms and concepts of right, and the effect is widely experienced as culturally oppressive. The situation can, briefly, be said to have arisen like this: there is a need for a corporate expression of an Aboriginal commonality (today, common law native title holders); there is also the need for corporate bodies that manage Aboriginal needs in a manner compatible with self-determination. Entirely inappropriately, the European model of a voluntary association is applied to cope with both these needs at once. There is assumed to be an "association" already in existence with common purposes that wishes to incorporate. Membership and leadership are natural products of the fact of an association. On incorporation the association is

required to meet certain norms of corporate behaviour for the good of members and the general public. In this way an entire community, with deeply felt sets of social relationships evolved over millennia, is required to assimilate to a narrow and formal series of requirements that are not appropriate to their social characteristics.»

The report concludes: «control of land in a manner that is both commensurate with the custom from which the title derives and meets the just requirements of every owner of that communal title, does require a structure that is clear and open and subject to review. But it does not demand a corporate administrative structure along the lines an association, corporation or trust. What is required is a social and political structure that will unite once more the system of custom with the fact of land holding. The assumption that native title is a property right bearing with it no political rights, and that it therefore need only be administered by a corporation established by the general law, is manifestly contradictory. A parallel political and legal system necessarily exists side-by-side with the mainstream European-based law, it is from this that native title derives in the first place. Of course, it will vary from place to place and be affected by the historical experiences of the group. The parallel system must be recognised or it will continue to clash with non-Aboriginal expectations. The situation is rather like someone who refuses to believe in plate glass doors because he cannot see them; he is doomed to continue walking into them. The systems and structures that need to be devised for social communities are not those of European corporate practice but post-colonial self-governance.» (Sullivan 1997: 24-25)

The *Aboriginal Councils and Associations Act* (1976) is the principal means by which an independent and sovereign people remain colonised in Australia. The twin elements of the ownership of territory and self-governance are sundered. The first is belatedly recognised by bestowing property rights as defined and limited by Australian law. The second is swept aside with corporate legislation appropriate to the European institutions of trusts, voluntary associations, and representative organisations, with statutory accountability to non-indigenous political and administrative structures. Yet, as the Australian Law Reform Commission report on customary law attests (Australian Law Reform Commission 1986), as numerous heritage controversies remind us, and as those of us involved in Aboriginal life experience on a daily basis, an Aboriginal system of governance still exists side by side with the imposed colonial system. It is no wonder that Aboriginal affairs continue to be the open wound of Australian politics: political accommodation between the two systems founders on non-indigenous Australians' refusal to recognise the existence of an indigenous political system.

## Aborigines, Australia, and the International Recognition of the Rights of Peoples

Today, change towards a policy of regional governance for Aboriginal groups has appeared on the horizon of the Australian political landscape for two reasons. The first is the need for a political solution to the legal problems produced by the High Court's native title judgements. Fortunately, although neither Australia's politicians nor public are generally aware of it, Australia has been developing a doctrine to deal with this phenomenon. It has been driven by a debate beyond Australia's borders, in which Australia takes a leading role, which is predicated on entirely different principles, and which Australians must become more aware of in order to bring some truth and common sense to the confusion reigning in Australian administrative law. This debate entirely changes the perspective on Australian domestic-indigenous relations so far described.

Every year since its inception, Australian Aboriginal groups have journeyed to the United Nations Working Group on Indigenous Populations (WGIP) where together they represent indigenous Australia to the member states of the U.N. including Australia. The WGIP was founded in 1982 by a resolution of the United Nations Human Rights Commission as a result of world-wide mobilisation of indigenous groups for greater recognition of their human rights. It is a working group established by the Economic and Social Council under the supervision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Iorns 1992: 204-209; see also Sanders 1989; Alfredsson 1989). The WGIP is a body of experts in international law and indigenous issues which meets annually. Principally it considers two matters – human rights standard-setting in relation to indigenous peoples, and developments concerning indigenous peoples. It is not a complaint forum and still less is it a representative forum.

The wary manner in which states have approached the question of indigenous rights can be seen not only in the WGIP's limited and conservative charter and relatively low institutional status, but more particularly in the choice of its name. From the start states recognised the political motivation behind indigenous peoples' pursuit of their human rights, and linked this rather simplistically to the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights, both of which state unambiguously that all peoples have the right to self-determination. States representatives repeatedly put forward the view that indigenous people are not «peoples» in this sense but populations embedded within sovereign states, hence the title of the WGIP. The Sub-Commission later subverted this hard-line approach by allowing agenda items and reports involving the WGIP to replace the word «populations» with «peoples» without changing the Working Group's name (see Iorns 1992: 202, note 15). This admirably pragmatic decision has kept wrangles over terminology in abeyance while the issues that give rise to them are debated.

At this stage the debate is considerably advanced, although, as will be demonstrated, some states lag behind in understanding it. The WGIP has become the most open forum of the U.N. system, with the expert committee giving considerable freedom to all indigenous groups to attend and actively participate. Some member governments, including Australia, also regularly attend and contribute. This has given the WGIP something of the appearance of a complaint body which satisfies, to some extent, indigenous aspirations. Under the standing agenda item «review of developments», indigenous groups effectively criticise state governments on the international stage. This aspect of the WGIP has had one generally positive consequence for Australian indigenous groups and some consequences that are less so.

The positive consequence is that over the last fourteen years indigenous representatives have forged themselves into loose coalitions of global dimensions and developed skills in the complex world of international diplomacy and the United Nations system. However, this new mastery has come at a price. It can be argued that indigenous peoples have put the limited energy and resources available to them into this forum at the expense of potentially more fruitful genuine complaint forums such as the committees overseeing the various human rights conventions to which their states are parties. At the same time Australian indigenous representatives have generally failed to translate international criticism of member governments into domestic political pressure. One reason for this is a simple accident of history. In its fourth year, the WGIP inaugurated its standard-setting function by drafting principles for inclusion in an International Declaration on the Rights of Indigenous Peoples (Iorns 1992: 207). This was seen as such an important long-term project by many indigenous leaders that

attendance at the WGIP was guaranteed, thus cementing in place its simultaneous use as a quasi-complaint forum, to the neglect of other potentially more fruitful U.N. bodies. On the positive side, the intense and detailed debate over the draft Declaration – word by word and article by article – which took place over the subsequent eight annual sessions of the WGIP has allowed considerable elaboration of international law principles concerning indigenous peoples and given the indigenous peoples themselves primary expertise in their own human rights law and the methods of its implementation.

Not surprisingly, the *bête noire* of statists, the right to self-determination, reared its head early in the process and was (and remains) the single most contentious item of debate. (The entirety of Iorns' highly detailed 1992 study is devoted to this question.) The expert committee finished its deliberations on the draft Declaration with a considerable degree of consensus among states representatives and indigenous groups at its twelfth session and the draft passed to its parent body, the U.N. Commission on Human Rights which set up another working group to bring the draft to a form that can be passed by the General Assembly. This body, which met for the first time in November 1995, was to be called the Open-ended Inter-sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, but it hardly got beyond the election of a Chair before its name was challenged. On the one hand, some states felt the title pre-empted what the Declaration was to include. On the other hand, the draft Declaration had gone to the UNCHR under such a title, had appeared on all agendas and minutes as such, and had thus found its way into the name of the new working group. The Chair rapidly moved to cut short a premature debate over self-determination and «peoples» by suggesting that the group should be called «the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32». Another supremely pragmatic move, since this resolution includes the disputed word «peoples» while the new Working Group title is cleansed of it.

Those attending this first meeting were initially dismayed at the thought of retracing the debate in such a pedantic manner. It appeared that here at last mainstream governments were moving to take control of the process. No longer represented largely by «do-gooder» nations and the occasional recalcitrant, as at the WGIP, it was feared that the heavy-weights would fight the declaration word-by-word in a committee process structured in their favour. As it turned out the session went the other way. Many member governments displayed their ignorance of the meaning of the various articles, their tenuous grasp of human rights law (particularly on the question of collective human rights), and unawareness of the debates that had been elaborated under the guidance of the expert committee of the WGIP. The indigenous representatives, on other hand, honed by years of debating these very questions, reminded the states time and again of their very thin comprehension of the issues. This first session was devoted to a general familiarisation with the principle of the various articles and produced no concrete results, but it became very clear to observers that here for the first time indigenous peoples were clearly articulating their rights as peoples face to face with the equally clear intent on the part of states to deny, reduce or obfuscate such rights. Firmly, forcefully, and at times aggressively, the representatives of peoples directly challenged the representatives of states. Other states now find themselves in the sort of moral double bind that the Australian state has grappled with at least since the referendum of 1967 which granted power to the Federal government to legislate on behalf of Aborigines. Human rights must be recognised, reconciliation must be achieved, conflict and lack of consensus will be embarrassing, lack of progress almost equally so and yet political concessions must be minimised, so states appear to believe, or chaos looms.

Through all of this, the Australian government delegation's voice occasionally intervened – calm, moderate, and considerably more enlightened than its domestic counterpart. The Australian position in this international forum is complex because it must answer to a number of often contradictory elements and requirements, but it has within it the seeds of a much more useful approach to its own domestic problems than is currently being pursued. Firstly, the Australian government needs to harmonize its position with the understanding of self-determination current in international law and compare its applicability to indigenous groups that have a far more advanced level of autonomy than Australian Aborigines. If their statements did not address these questions they would be inconsequential. However, their suggestions also need to be in line with Australian practice and government policy. The tension between these two requirements produces an interesting ambivalence. Since at least 1992, the Australian government has been proposing some form of freely-determined political relationship between indigenous peoples and the state, but at the same time stepping back from the consequences of this for Australia itself. Its approach can be summarised as follows:

- Indigenous groups are clearly peoples in any ordinary meaning of the word.
- They are also peoples in international law, particularly as it relates to the right of self-determination.
- However, the meaning of self-determination is constantly evolving and it must not be understood to imply sovereign independence in all cases. Complementary law, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, provides adequate safeguards against any interpretation of human rights law as providing the legal foundation for secession.
- The term «peoples» and the concomitant right to self-determination can therefore be embraced without fear.

While the meaning of self-determination in the post-colonial era remains to be elaborated it has at least two elements in the Australian view. Indigenous self-determination is exercised firstly by free and equal access to all the rights, services and public instrumentalities that other citizens of a state enjoy, including full participation in democratic processes. Secondly, short of secession (unless it is mutually agreed), self-determination of indigenous peoples is established by the political relationship they enter into as separate and distinct peoples in the states within which they live (see Australia 1992: 2-4; Australia 1993: 1).

The Australian government's statements sometimes retreat from this emphasis on a political relationship between peoples and states by reiterating that self-determination is also exercised through democratic participation in mainstream politics, and they often address the second aspect in the Australian domestic context by suggesting that the ATSIC meets the requirement for political rights of Aborigines as a «separate and distinct» people. Nevertheless, Australia also supports Article Three of the Draft Declaration on the Rights of Indigenous Peoples which states that «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.» In November 1995, the Australian government delegation stated that it «considers that self-determination encompasses the continuing right of peoples to decide how they should be governed» (Australia 1995: 2). This statement also suggested that this doctrine has wider applicability, not just for indigenous peoples but for all peoples, with the implications not only that it is an appropriate method for resolving ethnic conflict (the current Balkan situation may be foremost in the mind of those elaborating this doctrine) but that if it is not implemented such conflict is encouraged (Australia 1995: 3).

The Australian government delegate stated in 1995, that «in the Australian

context, self-determination will be worked out within national boundaries and through the establishment of representative indigenous bodies, such as the Aboriginal and Torres Strait Islander Commission» but he went on to say: «Australia considers that self-determination encompasses the continuing right of peoples to decide how they should be governed, the right to participate fully in the political process and the right of distinct peoples within a state to participate in decisions on, and to administer, their own affairs. This approach is particularly relevant in the present world situation of frequent conflict within states. Clearly, sovereign independence is not feasible for every self-defined people. Attempts to pursue exclusive political arrangements lead too often to blood shed and fragmentation. A concept of self-determination within existing state boundaries, involving the full observance of individual and group rights, holds out a better hope of ensuring stability, human development and human security. It follows from this that Australia does not have difficulty with the use of the word "peoples" and a reference to "self-determination" in the draft [Declaration].» (Australia 1995: 2-3)

## Conclusion

Bearing in mind the earlier description of continuing Australian colonisation, it could be asked whether these enlightened intellectuals of the Department of Foreign Affairs and Trade are living in the same country as ordinary indigenous Australians. This paper will conclude by questioning how these Australian government policies, which have been founded on substantial debate in the wider world, can begin to be implemented in their country of origin.

There are two main areas of contemporary social change in Australia that will lead us by the end of the century to deal with Aboriginal questions in the way proposed by our international representatives. The first of these is the increasing need to find a new approach to relations between Aborigines and whites, since past approaches, whatever benefits they may have delivered, have all left a residue of seemingly intractable problems. The new approach may arise out of an increasing willingness of Australia to understand its relationship with Aborigines as founded on an act of particularly harsh and unjust colonialism. The High Court's decision on native title (see above p. 10), the questions raised about the legality of Australian sovereignty (McNeil 1996), and the beginnings of an understanding of the misery produced by the policy of mass removal of Aboriginal children from their families all indicate a shift in perspective: non-indigenous Australians are coming to recognise that current problems may well be the result of an unsuccessful political and constitutional accommodation between original peoples and their colonisers.

Secondly, this new consciousness is arising as Australia examines its own political institutions in preparation for the centenary of its federation. The debate over the need for a republic and for constitutional change, coupled with new ideas of federalism and regional responsibilities combine favourably with the recognition of the need for reconciliation with Australia's Aboriginal people. These are opportunities waiting to be seized. A lasting accommodation will probably be founded both on autonomous regional indigenous structures integrated with Australian government and administration in ways appropriate to each area, and on effective national representation. Nevertheless, the first step could be the creation in Australia of an independent indigenous forum that can consider the proper relationship between Australian indigenous peoples and the state, with the power to require constitutional reform, just compensation and recompense for past wrongs, and the creation of domestic mechanisms for monitoring and reporting on Australia's fulfilment of its indigenous human rights responsibilities.

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## Abstract

The Australian approach to containing its indigenous problem over the last twenty years has been gradually to recognise Aboriginal rights in land, thereby codifying and regulating these as a form of property. In the process the political element of Aboriginal territoriality, the prior exercise of self-determination by a sovereign people, has been neglected. This is firstly because the legitimacy of the Australian state depends on a view of Aborigines as one incorporated element of a multicultural pluralist society. Secondly, the state is hampered in its recognition of Aborigines as distinct peoples with whom it must come to terms by the highly diffuse nature of Aboriginal political authority deriving from a hunter-gatherer social system. The paper describes this, and then discusses the inappropriate nature of current Australian statutory means of dealing with Aborigines as corporate groups. This internal approach is contrasted to the Australian position internationally in response to Aboriginal assertion of political distinctiveness through activity at the United Nations. The discrepancies and contradictions in the Australian government position are examined. As it approaches the centenary of federation, Australia is currently in the grip of a debate over its Constitution and its relationship with Aborigines. This debate will eventually lead to a new form of political accommodation between original Australians and Autralian settlers.

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