No One Can Own the Land

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Introduction

I had a cousin who was beaten to death by the police. The police started the assault in the street and continued it in the police cell, where he was later found dead. He died from a blood clot in his brain. The police who killed him were easily identifiable. They were never charged with his murder. That is how we learn about the law. As Aboriginal people, we know what a powerful tool the law can be. We know that whatever 'rights' it may define, they will not be enforced for us, only against us.

The dominant style of legal analysis claims it defines rights and ensures their implementation. But the experience of distinct disadvantaged societal groups is that the dominant style of rational legal analysis is unable to define 'rights' without bias and retards the enforcement of those defined rights.

This dominant style of legal analysis has been implemented to define and implement rights in Australia. We inherited this legal system when invaded by the British in 1788. It's attempt to define rights of 'self-determination' and principles of property law illustrate how this form of legal analysis has been ineffective in realizing the rights that the system has defined for itself and the fact that these defined rights are not even adequate at defining what the Aboriginal community needs and values.

The consequence of this for Aboriginal people is that we can either accept the dominant legal culture and try to work within that system to achieve change. Or we can look to alternative forms of legal analysis and reject the existing legal institutions and methods of legal discourse. The latter is the only effective way for Aboriginal people to ensure that social and economic justice is achieved within Aboriginal communities. This means experimenting and establishing new legal institutions and legal processes that can define, enforce and protect the rights that the Aboriginal community decides are fundamental.

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The Process of Rational Legal Analysis

Methodology

Rational legal analysis is said to ensure that law can be viewed and analyzed in such a way as to prevent it from degenerating into a glossatorial and arbitrary practice. This dominant style of legal analysis is a pedantic case by case and piecemeal approach to the analysis of law. The rule of law and the study of cases and their rationalizing comparisons deduce principles which become the body of law.

Such law is believed to be predetermined.[1] It is the role of the judges and jurists, as those skilled in the craft of legal analysis to determine what those principles are. They have to articulate rights that are inherent in the system. Rights are supposedly found within the body of law, not created by legal institutions.

The judiciary claims to be without bias. It merely involves itself in the episodic process of rational legal analysis and is constrained by its mandate.

Rights are determined under the canonical style of legal analysis by shared values. It is claimed that these values are easily derived from the dominant values of society. It thus ignores the fact that there are many voices within a community, many of which are not heard.

And this assumption trivializes those voices when they are heard. The voice of a distinct disadvantaged societal group is almost always weak. The opinions of the group are usually treated as another perspective, and once considered get lost in the majority voice. Yet the majority is then in the position of being able to say that minority opinions and voices are incorporated within the dominant legal system.

The Nature of Legal Institutions

The legal institutions involved with rational legal analysis are confined by their mandates. They are believed to have a fixed role as agents within the legal system.

Rational legal analysis is the tool of the judge and jurist. It is generated by the jurist and expounded by the judiciary. It is the role of the judiciary to define rights and enforce them. Rational legal analysis allows them to delve, supposedly without bias, into the predetermined body of law and discover and articulate what rights exist there. They then enforce those rights.

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1 Law has been treated like a science. Hence legal principles were perceived as already existing.

This process occurs on an episodic basis as it is only undertaken when conflict is presented to the institution for resolution.

The status of legal institutions is never challenged by rational legal analysis. Such analysis is concerned with what happens within the framework, not with deconstructing the framework itself. The refusal to critique legal institutions means they are actually idealized. They are elevated to a height that makes their position more consolidated and their power more unfettered and unreviewable.

This confines the way in which rights can be sought within a community. Legal reform can only be achieved by working within the system that is controlled by the powerful upper classes of the dominant society. Reform is thought not to be achievable through changing the system itself. It is presumed that all other forms of legal institutions are inferior or have failed.

Achieving Legal Reform

Rational legal analysis is claimed to be a vehicle for political purposes. Bad redistribution law occurs when one social class gets political power and entrenches private privilege. This can be undermined by judicial review. The judiciary, by using rational legal analysis can redistribute rights more efficiently and fairly throughout the community.

Rational legal analysis holds forth a myth for groups that are seeking social, political and legal reform within the dominant legal culture. It claims that by agitating for change within the system of legal rules and institutions, distinct disadvantaged societal groups can obtain access to the rights that the rest of the citizenry enjoys.

Legal reform can only be achieved by clinging to rights that are supposedly already built into the law and discovered by legal science. To obtain the benefit of those rights certain conditions need to be met. These conditions are articulated by the judiciary, legislature or the jurist.

These agents have used their own language and created rights and the prerequisites to their enforcement from their own cultural and class bias. The result is a system of articulated rights. But the members of the community that need the enforcement of rights the most do not have access to them.

Attempts to change the legal institutions and their structures are equally unsuccessful because the nature of rational legal analysis is such that it denies that there are conflicts operating within the system. It idealizes the institutions, portraying them in the best possible light. It ensures that the institutions themselves are unquestioned.

Even when a legal institution fails in it's duty and the failure is revealed, such as when a legal fiction has created a gross denial of justice, it is not the institution

of the judiciary itself that is challenged and questioned. All that comes under scrutiny are the facts, evidence and interpretation.

The Inability of Rational Legal Analysis to Procure Rights For Distinct Disadvantaged Societal Groups

> *When I graduated from Law School in 1992 there were only thirty Aboriginal people in the whole of Australia who had a law degree. Together we are supposed to lead a legal revolution, a crusade for rights, on behalf of our community with the help of benevolent white lawyers and jurists. We are again meeting gunfire with sticks. And they continue to tell us that it is an even match, and the law is an even playing field.*

Rational legal analysis has failed to ensure that politically, economically and socially disadvantaged groups, such as Australian Aborigines, can benefit from or change the dominant legal culture. Specifically, it has failed to give a voice in the defining of what 'rights' are and how they are to be valued. And it has failed to enforce the rights that have been determined by the dominant legal culture through the existing legal institutions.

Aboriginal People as a Distinct Disadvantaged Societal Group

Aboriginal people constitute a distinct disadvantaged social group within Australia. We are the indigenous people of Australia and therefore we have a unique relationship with the land and the dominant, enforced culture.

We have a distinct culture. We have different values to the dominant culture. We are more concerned with the rights of community rather than the rights of the individual. Notions of reciprocity are more binding in determining obligations than concepts of contract law.

Aboriginal Australian are in a unique position.[2] We are the indigenous sovereign people. Our sovereignty is not recognized by the dominant legal culture but we reject their legal characterization of our status and maintain our belief that we are a nation.

The legal status of Aboriginal people within the dominant legal system is that of 'citizen'. We are given the legal status of all other people within the community. With the same bundle of 'rights' as any other person. This classification masks two things.

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2 I am certain that my assumption of sovereignty will be viewed as controversial and legally unfounded. I am unsing the term sovereignty to mean the legal recognition of Aboriginal nationhood. I am challenging the reader to view sovereignty from the perspective of an Aboriginal person. As an Aboriginal person, and a lawyer, I believe that my people are sovereign. The issue is not whether the Aboriginal peoples of Australia are sovereign but when the sovereignty of my Aboriginal nation will be recognised.

Firstly, it ignores the fact that Aboriginal people do not enjoy the same rights as the wider community. We have a lower standard of living.[3] Suffer from poorer health and diseases that the rest of the Australian population does not suffer from.[4] We are poorer.[5] We die younger. We are less educated by European standards.[6] Our communities often do not have water and electricity.[7] We are over-represented in all levels of the criminal justice system.[8] We die in police custody at a higher rate than non-Aboriginal people.[9]

Secondly, this legal classification is disempowering. It defines us as being a part of the dominant culture, as 'citizens' with the same status as the rest of the community. The classification implicitly denies our sovereignty. We are therefore forced to be a part of the dominant culture and exist within their institutional frameworks. We are forced to proceed to have rights recognized and enforced through their processes in their forums.

We are confined within a framework that defines us as equal but does not enforce that equality. It does not make equality a reality. Our cultural and socio-economic position within the community is ignored. We are limited by the tools in which we are given to make changes in our status and level of enjoyment of rights. Instead, we rely on the benevolence of the dominant culture for the enjoyment and enforcement of the rights that they have defined as fundamental.

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3 The 1986 census showed that Aboriginal people were in a poorer economic position than they were in 1971, as per the Royal Commission Into Aboriginal Deaths In Custody *National Report* Vol 2, 385.

4 Dr Roberta Sykes in *Black Majority* Hudson Publishing Melbourne 1989, 190 that in the first week that the Aboriginal Medical Service operated in Redfern, Sydney, doctors saw "...patients suffering from scurvy, desperately malnutritioned children with chronic osteomyelitis, punctured eardrums due to untreated infections, worm infestations, TB and impetiga. Said (Prof) Fred Hollows, 'In the first week we opened, I saw things that I thought had died out with the Depression' ".

5 The 1986 census showed that 6.2% of the non-Aboriginal population was unemployed. By comparison, 17.8% of the Aboriginal population was unemployed. Of the total non-Aboriginal population 62.6% are employed. Of the total Aboriginal population, only 32.6% are employed, as per the Royal Commission Into Aboriginal Deaths In Custody *National Report* Vol 2, 386.

6 Participation rates in secondary schools are increasing. In 1987, 19.4% of Aboriginal students stayed at school until Year 12. This figure is extremely low compared to 53.1% of non-Aboriginal students who complete Year 12. Studies also show that few Aboriginal students who complete their secondary education have the level of results needed to enter University. In 1986, 0.6% of the Aboriginal p opulation was studying at Universities or Technical Colleges compared to 2.5% of non-Aboriginal Australians, as per the Royal Commission Into Aboriginal Deaths In Custody *National Report* Vol 2, 341.

7 For a graphic example, the Human Rights Commission *Report on Toomelah* 1988.

8 At just on 2.5% of the overall Australian population we are 28.6% of the prison population. The over-proportion exists for Aboriginal men, Aboriginal women and Aboriginal juveniles. This over-representation is reflected in the fact that Aboriginal are 20 times more likely than a non-Aboriginal person to die in custody as per McRae, Nettheim and Beacroft *Aboriginal Legal Issues* Law Book Co Sydney 1991, 242.

9 The Royal Commission Into Aboriginal Deaths In Custody was established after this figure had been given publicity. However, Aboriginal people are dying in custody at the same rate as the period investigated by the Royal Commission as per J Behrendt and L Behrendt "Deaths In Custody Since The Royal Commission" *Aboriginal Law Bulletin* Vol 2 No 59 December 1992.

The 'Right' to Self-Determination

The right to self-determination is recognized as a right by international law. It is protected by Article 1 of the International Covenant on Civil and Political Rights (ICCPR)[10] and the International Covenant on Economic Social and Cultural Rights (ICESCR).[11] Australia has signed and ratified both Covenants. Aboriginal people, as with all other indigenous people, had no input into the process of articulating that these things were 'rights' and have had no input into their subsequent interpretation.[12]

The Australian Government has stated that it implements a policy of 'self-determination' for Aboriginal people. However, it has interpreted 'self-determination' to mean 'self-management'. This involves the inclusion of Aboriginal people within the Government structures that determine issues concerning the Aboriginal community. For example, when decisions have to be made about how to allocate Government funds, the principle of self-determination would mean that Aboriginal community representatives would have to have major input into the decision of how to divide up the money.

The Aboriginal community sees the concept of 'self-determination' as something completely different. To Aboriginal people it means total control over all aspects of our lives. In the area of provision of legal services, for example, it means more than consultation with Aboriginal people as to how money should be allocated throughout the existing system to assure that the special needs of the community are being met. It means that the community should be allowed to decide whether it continues to include itself within the existing legal frameworks or establishes an alternative form of dispute resolution process and alternative legal institutions. It means community empowerment to settle disputes that occur within the community in the manner that best suits the community.

In short, the Aboriginal community sees the notion of 'self-determination' as encompassing something more akin to the recognition of sovereignty.

Aboriginal people are powerless within the dominant culture to have effective input into the process by which the Government defines 'self-determination'. And the Government definition is not without extreme bias. It is designed to ensure that Aboriginal people are not empowered within the system but the system is still able to say that the right of 'self-determination' is being protected.

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10 Article 1 of the *ICCPR* states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

11 Article 1 of the *ICESCR* states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

12 The author notes that there was considerable input by Aboriginal Australians into the Draft Declaration on the Rights Indigenous People. The adoption and implementation of this remains to be seen.

Land

Self-interest by the dominant empowered section of society is even more evident in the legal articulation of property law in Australia.

The invasion of Australia was legally sanctioned by the British because they had declared the land to be *terra nullius*, vacant. Under their laws, if land was free from inhabitants, the Crown had the 'right' to take it. The classification was made despite the existence of an Aboriginal population estimated to be 750,000 that had lived on and protected the land since the beginning of time (or at least 40,000 years according to some white anthropologists).[13]

Aboriginal people did not have a concept of ownership that was comparable to the British legal concept. People saw themselves as guardians or custodians of land. They had to ensure that the ecosystem was balanced. They had to ensure that the cultural stories related to the land were passed down to the proper persons in the next generation.

The British based their claim of *terra nullius* on the fact that there were no houses or fences that divided the land up and could show ownership in a way that they could understand.

With one quick legal definition based on a notion of individual property right all Aboriginal land was stolen by the British.

The British legal system refused to acknowledge the relationship to the land that Aboriginal people had and continue to have. They did not see that guardianship and protection of traditional land was a 'right'. They did not see the practicing of spiritual ceremonies at sacred sites was a 'right'. The myth of *terra nullius* became entrenched in Australia's law despite numerous challenges by Aboriginal people within the Court system.

In 1992, the doctrine was finally overturned in *Mabo v Queensland*[14] *(the Mabo Case)*. The small group of Murray Islanders who brought the case had lived relatively uninterrupted on their traditional land and sought recognition of their native title. What the decision in the *Mabo case* highlighted was a moment when a trade-off was made between the Aboriginal community (with it's increased social agitation and increased political power) and the non-Aboriginal community.

Mabo is seen as a hollow victory for most Aboriginal groups and communities.[15] It offers a narrow definition of what native title is. It only applies where the Aboriginal group can show a continuous association with the land for which they are seeking recognition of title. This effectively excludes most

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13 As per R Broome *Aboriginal Australians* Allen & Unwin Sydney 1982, 10.
14 (1992) 175 CLR 1.
15 The victory for Aboriginal people was that the dominant culture finally recognized that we were in Australia first. This was not news to us.

Aboriginal groups from falling within it's parameters. It is a minor concession by the powerful mining and pastoral industries. Most land that is capable of being farmed or mined has already been taken by those interests. Aboriginal people that have been able to remain on their land have done so only because the land on which they live has been deemed as economically worthless by the non-Aboriginal community. It is only this small number of Aboriginal groups who will have their native title recognized under the decision in *Mabo*. Most will be outside the judicial definition.

The vast amount of resources and effort spent by the Aboriginal community in challenging the illegal and immoral occupation of Australia's land by the dominant culture has resulted in a minute change in the law. This change will not affect most Aboriginal groups.

It has taken a long time for the Aboriginal community to reach the stage where it is politically organized to the extent that it is able to affect such changes. We have had to learn the way the system works in order to put into play all the necessary elements to provide for a small change in the property laws in Australia — a change that benefits the Aboriginal community as a whole very little but deprives the economic and politically powerful of the dominant culture of nothing.

One of the things that allows the powerful classes of the dominant culture to maintain control over the evolution of the area of property law is that the judiciary are the part of the process that defines what the law is. Judges for the most part come from the wealthy sectors of the community that has made it's money from exploiting the land that was stolen from the Aboriginal people. As part of the richest class in Australia they have an interest in preserving the status quo of society through the law. They do not want the land that makes them money to be under threat of a possible claim for native title by the Aboriginal people that have been dispossessed of it.

This bias is masked by the language of dominant legal discourse. By referring to established principles of law and relying on the strict principle of *stare decisis,* the Court gives the appearance of merely interpreting the law, not of making political decisions. Courts are idealized as being independent. The doctrine of 'separation of powers' is used to create the appearance that the Courts act independently of other political processes. It claims that the judicial officer and jurist are the experts of what the law is. That they have a knowledge that is greater than other participants in the legal and political process. The language of the judicial officer and the power of their voice is kept from the reach of the non-jurist and non-judicial officer.

And this bias is allowed to stand unchallenged because dominant style of rational legal analysis portrays the institution of the courts and judiciary in an idealized way. Aboriginal people know this all too well from their experience with the dominant legal culture, especially in the area of property law as the

experience with the *Mabo case* highlights, that legal institutions fail to give a truthful explanation of what is actually occurring in the system.

Property law as explained by rational legal analysis is neutral. But law is indeterminate. It strives to appear neutral but the real reasons behind any judicial decisions are political.

It also creates an ideological conflict for the Aboriginal community. An effort like the litigation in *Mabo* is an effort to agitate for political change within the existing system. It is the method of recognizing rights that is followed by those who think we should become a part of the system and work within it for change. These decisions have shown to other elements of the Aboriginal community, especially urban and dispossessed Aboriginal peoples, the futility of this piecemeal effort to use the system for our own purposes and political aims.[16]

Aboriginal people working within the system are sometimes seen as tokens because they are not allowed to effect real change but the system can say that the Aboriginal voice is being recognized and included. Often people take on the values of the dominant culture to be able to get ahead so those that do get into the system after going through the legal training are too far removed from the realities and values of the community to be interested or able to make decisions that challenge the existing status quo.

This has caused a rising political push for the recognition of sovereignty. Sectors of the Aboriginal community are beginning to seek recognition of rights through our own mechanisms that we have a right to establish as a nation.

The problem highlighted by the *Mabo case* is a conflict between two cultural values and two histories. Aboriginal people view the land as ours because we are the custodians of it. This is opposed to the way in which the dominant legal culture sees ownership and rights to property. Aboriginal people have a spiritual connection to the land. It is ours to look after. That is the role we were given since the beginning of time. Non-Aboriginal people see the land as a resource that has a bundle of 'rights' attached to it. Aboriginal people believe that our traditional lands still belong to us. That Europeans invaded our country and stole our land. Non-Aboriginal people believe that if they purchase land they own it and are entitled to a bundle of rights that are created by the legal system and should be protected by that system.

There is an inherent conflict in the way Aboriginal people and non-Aboriginal people see the rights attached to land. There is a cultural conflict in the way the land itself is valued. This highlights one of the greatest assumptions made by rational legal analysis: the failure to recognize diversity of values and concepts of rights.

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16 The promised land acquisition fund and the social justice package offer more to urban and dispossessed Aboriginal peoples than the conservative *Mabo* decision did.

Implications For Rational Legal Analysis

> *Our determination to seek alternative forms of legal institutions are met with outrage from the non-Aboriginal community. Our strong belief that we are sovereign peoples meets with the same scorn. They demand that there be one law for one people. They want what they call 'uniformity'. They want what they call 'equality'. We have never felt their uniformity and equality. There has been two laws operating in Australia since the British invaded. Their law that protects them and their law that keeps us oppression. We are asking no more than for honesty about the ways laws are applied.*

The inability for the process of rational legal analysis to ensure a framework that meets with all members of a society means that it needs to be challenged. It's ineffectiveness makes it an impotent tool with which to ensure that equality and resources are evenly distributed within society, especially in ensuring it's defined rights are relevant to and enjoyed by all societal groups. History has shown us that distinct disadvantaged societal groups such as Aboriginal Australians cannot rely upon the existing legal institutions and rules for the protection of what those groups may themselves perceive to be their fundamental rights (as opposed to what the dominant legal culture has defined as 'rights').

Rethink Institutions

Educating Aboriginal people so that they are equipped to enter the dominant legal culture and engage in dominant legal discourse is an ineffective way of trying to establish real changes for the Aboriginal community. The number of Aboriginal people in law is still so small that it is wrong to assert that the Aboriginal community has any political power within the legal system.[17]

It is a slow, time consuming process to undertake case-by-case litigation in a vain attempt to try and get definitions of rights changed and new rights developed.

We are a long way off from having a judiciary or academy within the dominant legal system that has numbers of Aboriginal people in them to enable the necessary support to adopt any of the changes proposed by the community. That means that the judiciary and jurist will continue to have the values of the dominant culture.

The Aboriginal community has few resources. We are the poorest and least educated community in Australia. Our resources are needed for food, shelter, clothing and medical assistance. The episodic approach of rational legal analysis is a luxury that we can rarely afford.

The most effective way of agitating for legal change is to be innovative in rethinking the types of legal institutions that will define and enforce the rights of Aboriginal people.

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17 In 1992 there were approximately 30 Aboriginal people in the whole of Australia who were qualified in law.

We are well aware that the principles of law are not just. We need to look at legal institutions with the same suspicion. Just as the law does not work for us, neither do the structures.

Although they appear neutral, they are responsible for the law and its enforcement. They do not pick principles out of thin air. Their decisions are political and filled with self-interest.

The existing structures have failed to achieve social, economic and political justice.

Aboriginal people are faced with the choice of changing their political aims, compromising those goals because as they stand they cannot be realized within the existing framework, or changing the framework.

Democracy is not achieved by denying access to the process of changing institutions and the principles that are valued. The people that do not have that access are the people that usually need protection.

There needs to be imaginative thinking about new institutions to define and adjudicate. There needs to be a more effective voice from the distinct disadvantaged societal groups in the formulation of rights and ideas and the institutions that carry them out.

One way of changing the structure would be adopt a replica of the existing legal institutions and processes that exist in the dominant culture. For example, an Aboriginal Court could be established, administered by Aboriginal people and presided over by Aboriginal judges. Although this is an adoption of an institution from the dominant legal culture, the difference is that it would focus on different cultural values if it were to be administered and operated by the Aboriginal community.

The difficulty of this approach, based as it is on the imposed legal system and reflective of European cultural values, is that it is founded on the concept of the rights of the individual. Traditional Aboriginal communities were however more concerned with what would be translated by western scholars as 'communal rights'.

Aboriginal society was concerned with the realization of goals that are not acknowledged under the current legal system but are essential to the culture of Aboriginal people. There was a concern that everyone be fed, that everyone be looked after, that kinship relationships were observed and the principle of reciprocity was not breached. The preferable way to change structures is to imaginatively create new institutions that embody the values of Aboriginal culture.

The criteria for the choice of the jurist was different. It was the wisest elders of a group. There was no political process by which these leaders were elected.

Their position was granted by their status within the community. By the respect they had generated and their wisdom on matters related to the group, especially in matters of a spiritual kind.

Current legal structures claim that there are no alternative legal institutions, and that known alternatives have failed. This is not true.

Traditional Aboriginal communities have had laws and legal procedures since the beginning of time. These structures were flexible and operated at a community based level, thereby ensuring compliance. Many people were involved with the hearing of the dispute. Anyone with an interest could contribute to the discussion. These structures recognized community values and community rights. It was a more effective way of generating and enforcing rights because it was concerned with a group of people who had to live closely together. It was reflective of the realities of life.

The traditional legal system did not fail. It worked well. It was only given up under force after Australia was invaded. Because the dominant culture and it's structures were imposed on the Aboriginal community. Not because the Aboriginal legal system was ineffective.

In each branch of law, structure is surrounded by deviations, each of which has the possibility of being an alternative. Institutions should be seen as a sub-set of possibilities. Each community may be interested in a different type of structure to decide what rights are within the group and how they are to be effected.

The need for flexibility within communities of legal institutions is reflected in the diversity of Aboriginal culture itself. As a generalisation, most Aboriginal communities throughout Australia can be described as traditional, rural or urban.

There are traditional Aboriginal groups who live on their traditional lands and lead a traditional existence. They do not have recognized statehood and sovereignty but are able to effectively enforce traditional values through traditional methods of dispute resolution and the recognition of 'rights' as they are perceived to be in traditional society. The smallest percentage of Aboriginal people would occupy this group.

Many Aboriginal people live on the fringes of small country towns, not far from their traditional country. They have moved to these enclaves because they have been removed from their traditional lands which are now used mostly for agricultural purposes.

There are large numbers of Aboriginal people who live in cities, in ghetto-like suburbs. They are an easily identified community. Even though they are scattered and a city or country community will be made up of people from different tribal groups, they are an identifiable community, joined by the strong links of kinship within the community that remain important.

Communities need complete control over the decisions of what rights are. Each community would come up with different answers to what fundamental rights were. And these would be different to those valued by the non-Aboriginal community. As a sovereign people, Aboriginal people should be allowed to protect those rights.

The most appropriate structures should be decided by the Aboriginal community itself. A community should be able to experiment with traditional legal systems and modern legal systems with the aim of maintaining the flexibility to adjust the system as inequalities arise.

Changing the Language of Legal Discourse

Aboriginal people make up less than 2% of the Australian population. We are not a strong political voice even when we are highly organized. We are uneducated by European standards so denied access to many of the forums that rational legal analysis allows for discussion. When voices are heard, they are only consulted. They are not persuasive. They are merely used in an attempt to give credit to the dominant voice as being legitimately representative of diverse groups. The language of law is a language that is inaccessible to the non-jurist or non-judge. This is so even though the experience of law is not alien to the non-judge and non-jurist. A special legal language that is devised by the legal elite excludes the voice of those that can offer insight from experience. There is a monopoly on the defining and adjudication of rights created by this legal language. Whilst thinking about changing legal structures, we need to think about the expression of laws.

In Aboriginal culture, value is placed in the opinions of elders who have had experience with life, who are respected because of their knowledge of culture (stories, songs, religion) and who have observed the cultural values (kinship obligations, totem taboos). It is not every voice that is looked upon. And not every old persons voice. Only the wisest and most respected members of the community. These people are not voted in to position of elder. It flows from respect of their opinions and knowledge. They are legal agents that can combine experience with knowledge of law. They understand the values of the community. They are not bound by legal rules and legal tools such as *stare decisis*.

Conclusion

Only those who the legal system advantages have faith in it's ability to provide and protect.

Aboriginal people since the invasion of Australia have felt nothing but the brute force of the imported English legal system. It's rules and institutions provided the 'legal' basis which justified the theft of Aboriginal land. It protected those who participated in frontier warfare. It has continued to provide the basis for the denial of Aboriginal sovereignty and Aboriginal self-determination. We

continue to feel it's bias in the criminal justice system where we are over-represented in all levels. We are arrested for crimes that non-Aboriginal people are not arrested for such as swearing and drunken behavior. The State has created laws that have denied Aboriginal people citizenship in Australia until the late 1960's. It enacted laws that allowed for the removal of Aboriginal children from their families as part of an integration policy.

Aboriginal people are generally disillusioned about the ability of the dominant legal system to effect social and economic change or protect what it has defined as basic human rights. The distrust in which we view the dominant system provides the incentive and creativity to look towards new ways of thinking about rights and their enforcement.

Such changes should not be made through the existing legal system nor by duplicating it's structures within our own communities. Rather, it needs to be achieved by the imaginative reformulation of legal institutions that incorporate our traditional values of community and kinship and traditional decision-making processes. This includes allowing elders to be agents of the law. It also involves rethinking legal discourse. It means valuing experience as much as legal thought. There needs to be a real link between theory and practice. And a recognition of all voices.

It is essential that such system have the flexibility and imagination embodied in it that created it. Otherwise, any new system will be as ineffective as preventing injustice from occurring within a system as the dominant system is.

We were created to protect the land. We came from the land. We return to the land when we die. We do not own the land. What is a 'property right'? No one can own the land.