The Indigenous Sovereignty Question and the Australian Response

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Sovereignty: Concepts and Dilemmas

In the political-legal lexicon there is perhaps no more troubling term than that of sovereignty. The penumbrae of the term are legion.[2] Definitions while serving their purposes do not, however, create truths themselves. To define may be to clarify but it is also at the cost of limiting meaning. Amplification comes through placing the concept in context, and exegesis through the exploration of relationships between that and others. In the European context sovereignty came to carry some of its generally recognised trappings through the efforts of political philosophers such as Jean Bodin[3] and Thomas Hobbes.[4] Bodin's major contribution for the purposes of this article was his identification of the absolute powers of government residing in a single entity, the sovereign ruler; Hobbes' contribution was the provision of the quantum leap from natural law, binding the sovereign ruler, to positive law which was what the sovereign ruler said it was.[5]

One of Australia's leading contemporary literary authors made the observation that "[t]he law is for one part of mankind to explain how its oppression of the other is for the good of all."[6] Contemporary definitions of sovereignty stress the necessary statist structure for the operation of free will. Without this attribute independence will not be recognised by other states.[7] The view which I prefer to endorse is that put forward by Hinsley[8] who reminds us that sovereignty is not a given; there is despite

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2 See eg legal scholars cited in Iorns C "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) *Case Western Reserve Journal of International Law* 24: 2, 199 at 236-239; LFE Oppenheim 1 *International Law* (2 vols 1905, 1906) at 103, quoted in Hannum H *Autonomy, Sovereignty & Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990) p 14; Crawford J *The Creation of States in International Law* (1979) at 26.

3 Bodin J *On Sovereignty: Four chapters from The Six Books of the Commonwealth* Franklin JH (ed and trans.) (Cambridge University Press, Cambridge, 1992); Scott C "Dialogical Sovereignty: Preliminary Metaphorical Musings" 21 *Proc Canadian Council of International Law* 267.

4 *Leviathan* 1651 Oakeshott M (ed) (Collier Books, New York, 1962).

5 See generally, Steinberger H "Sovereignty" in Bernhardt R (ed), 10 *Encyclopedia of Public International Law* (Elsevier Science, Amsterdam) p 397; Camilleri J "Rethinking Sovereignty in a Shrinking, Fragmented World" in Walker R, Mendolovitz S (eds), *Contending Sovereignties: Redefining Political Community* (Lynne Rienner Publishers, Boulder, 1990) p 13.

6 Hall R *The Second Bridegroom* (Farrar Straus Giroux, New York, 1991) p 6.

7 See eg Mugerwa N "Subjects of International Law" in Sorenson M (ed) *Manual of Public International Law*, 1978, pp 247, 253.

8 Hinsley F *Sovereignty* (CA Watts, London, 1966) p 1.

enunciation to the contrary no fixed immutable meaning. Camilleri and Falk in support of Hinsley's view state that: "Sovereignty is not a fact. Rather it is a concept or claim about the way political power is or should be exercised . . . Yet sovereignty is not just an idea . . . It is part of the more general discourse of power whose function is not only to describe political and economic arrangements but to explain and justify them as if they belonged to the natural order of things."[9] The irony that indigenous peoples have been forced to stake claims for the recognition of their cultural and territorial rights in terms of sovereignty is symptomatic of the necessity to frame the discourse in the language and concepts of the dominant power. When there is an appreciation of the indigenous social structures, and of the heterogeneity of these cultures in Australia, then and for many, the retention of the centrality of indigenous traditional relationships to land, then this may make sovereignty seem an entirely inappropriate rallying call.[10] Prominent legal scholars on this particular issue have argued against the use of the term. Professor Garth Nettheim has stated " . . . for the majority, if not all, of Australia's indigenous people, the best advice might be to stop talking in terms of sovereignty and to argue instead for self-determination." [11]

There is a difficulty however in using appropriate terminology because of the total dominance of the colonial culture. To speak for example of Aborigines we need bear in mind that this is a European expression.[12] Bruce Chatwin in *The Songlines* through one of his characters makes the statement that "there is no such person as an Aboriginal or an Aborigine. There are Tjakamarras and Jaburallas and Duburungas . . ."[13] It would appear that only through the bi-cultural (or multi-cultural) competence of indigenous peoples is it possible for their claims to be heard, and then for the even slighter chance of being understood.[14] The glaring obstacles in this process include the very real possibility of the dominant culture's failure to recognise what may constitute other than mainstream patterns of human organisation.[15] While there may be some liberalisation as to the recognition of the

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9 Camelleri J, Falk J *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Edward Elgar, Aldershot, England, 1992) p 11. See also Camilleri *op cit*, and Cassese A *International Law in a Divided World* (Clarendon Press, Oxford, 1986).

10 For an entirely different setting but for analogous insights into the inappropriateness of colonial attempts to fit indigenous social and land relationships into colonial and post-colonial paradigms see Fisiy C *Power and Privilege in the Administration of Law* (African Studies Centre, Leiden, 1992).

11 Nettheim G " 'Peoples' and 'Populations' - Indigenous Peoples and the Rights of Peoples" in Crawford J (ed), *The Rights of Peoples* (Clarendon Press, Oxford, 1988) p 118; see also Hannum H "International Protection" (1988) in Macartney W (ed), *Self-Determination in the Commonwealth* (Aberdeen University Press, Aberdeen) p 36.

12 See eg Attwood B *The Making of the Aborigines* (Allen & Unwin, Sydney, 1989); Reece B "Inventing Aborigines" (1987) *Aboriginal History* 11 at 14.

13 Chatwin B *The Songlines*, (Jonathan Cape, London, 1987) p 288.

14 For an exploration of cultural reality bridging see Watson and Chambers *Singing the Land, Signing the Land* (Deakin University, Geelong, 1989).

15 A recent epiphanic treatise directed at correction of this is: Swain T *A Place For Strangers: Towards a History of Australian Aboriginal Being* (Cambridge University Press, Cambridge, 1993); for an

legitimacy of the possibility of other structures this is not as yet common thinking. The entrenched belief is that what has been established in the last couple of centuries is *the* Australian system. As of this time there has been little general support for the acknowledgment that the imported, essentially British political and legal patterns may not correspond with indigenous ontologies.[16]

In an overseas claim for the recognition of indigenous jurisdiction and self-government, Gitskan and Wet'suwet'en First Nations asked McEachern CJ to set aside his task "of determining appropriate remedies and concentrate on the evidence and complexities of Gitskan and Wet'suwet'en societies . . . It will be from this evidence that a legal pathway to a just resolution can be found."[17] In Australia until the High Court is prepared to "concentrate on the evidence and complexities of Aboriginal societies" there is little hope of curial recognition of Aboriginal sovereignty whatever that may entail. For Aboriginal legal activist, Paul Coe, sovereignty means: " . . . having the power to govern your own affairs in regard to political, social and cultural aspects. It is the power from which all specific political powers are derived. Sovereignty is inherent; it is a distinct right which comes from within a people and their culture."[18]

One of the many difficulties non-Aboriginal Australia has to face is that convenient as it would be to deal with one united Aboriginal voice no such voice exists.[19] In non-Aboriginal Australia on the other hand there is both expectation and accommodation of its plurality of views. Logically then it should not be so difficult to accept the voicing of a plurality of indigenous views. On the issue of sovereignty these range from those of the Aboriginal Provisional Government calling for a separate Aboriginal nation[20] to non-secessionist arrangements of self-governments[21] such as

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15—*Continued*
incipient recognition see eg *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) National Report (Commissioner Elliott Johnston, QC, AGPS, Canberrra, 1991). Recommendation 199, applying primarily as to the benefits perceived as to delivery of services.

16 *Ibid*; Fortune JR "Construing *Delgamuukw*: Legal Argument, Historical Argumentation, and the Philosophy of History" (1993) *University of Toronto Faculty of Law Review* 51 at 80; Amselek P, MacCormick N, (eds) *Controversies about Law's Ontology* (Edinburgh University Press, Edinburgh, 1991); Bell HR "Pattern Thinking: Triangle Thinking", *Gathering Women* 1:3 at 19.

17 *Delgamuukw* v *British Columbia*, Plaintiffs opening address May 11, 1987 [1988] 1 CNLR 14 at 22; see also Monet D, Skanu'u (Ardythe Wilson) *Colonialism on Trial: Indigenous Land Rights and the Gitskan and Wet'suwet'en Sovereignty Case* (New Society Publishers, Philadelphia, 1992).

18 Coe P "The Struggle for Aboriginal Sovereignty" (1994) 13 *Social Alternatives* 10. (The whole of this issue of *Social Alternatives* is devoted to indigenous sovereignty and questions of justice).

19 For an early assessment of the future efficiency of the Aboriginal and Torres Strait Islander Commission (ATSIC) in this role see Brennan F "ATSIC: Seeking a National Mouthpiece for Local Voices" (1990) *Aboriginal Law Bulletin* 2:43 (April) at 4.

20 Aboriginal Provisional Government July 1992-1993 *APG Papers* vols 1-4 (Another Deep South Publication, Hobart); for comments on secession generally see Lam MC "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) *Cornell International Law Journal* 25 No.3: 603 at 609.

21 Eg the statement of the National Coalition of Aboriginal Organisations of Australia to the International Labor Organisation Conference 1988: " . . . we define our rights in terms of self-

that of the Torres Strait Regional Authority (TRSA)[22] or of those in the Kimberley.[23] The collated responses from the Resource Assessment Commission's Coastal Zone Inquiry during 1992-1993 did return one unanimous response from the Aboriginal and Torres Strait Islander interests and that was for "a voice in all places" for control over their own destinies.[24] I would contend that it is not unnatural to view matters initially (and often medially and even ultimately) from one's own particular cultural centricity. Swain[25] sees the "cardinal human endeavour" as that of attempting "to maintain the shape of the world". But the perception of the shape of the world is in the mind of the cultural eye. The current constitutional division of powers in Australia is *one* way for governance. On the eve of the possible creation of a republic we need remind ourselves that the statist structure emerged only three or four centuries ago in Europe and that sovereignty even within the western tradition, despite the influence of claims by political philosophers such as Bodin and Hobbes, is not absolute.[26]

Current Australian Common Law and Indigenous Sovereignty

Genius of the Common Law

In one sentence the summary of the issue of indigenous sovereignty in Australian municipal courts is that it is a non-justiciable issue. While this represents the present pronouncement of the High Court of Australia the very nature of the common law is

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21—*Continued*
determination. We are not looking to dismember your States and you know it." Cited in Lam *ibid* at 608.

22 Torres Strait Regional Authority 1995. *Annual Report 1994-1995*; Lui G "Self-Government in the Torres Strait Islands"(1994) in Fletcher C (ed) *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, Canberra) pp 125-129; Lui Jnr G "Torres Strait: towards 2001" (1994) *Race and Class* 35 No.4 (April-June) 10 at 16.

23 Yu P "Kimberley: The Need for Self-Government and a Call for Radical Change" (1994) in Fletcher *ibid* at 115-124; Yu, P "*Interview Peter Yu Terry and Heidi Libesman* spoke with Peter Yu, Executive Director of the Kimberley Land Council, at the Native Title in the North Conference held in Townsville in June 1995" (1995) *Aboriginal Law Bulletin* 3: 75, 12-14.

24 Smyth D *A Voice in All Places: Aboriginal And Torres Strait Islander Interests in Australia's Coastal Zone* (rev ed) (Commonwealth of Australia, Canberrra, 1993).

25 Swain *op cit* at 50.

26 See eg Walker D *Oxford Companion to Law* (Clarendon Press, Oxford, 1980) p 1165; Steinberger *op cit*, p 414; Reimann M "A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz* v *Federal Republic of Germany*" (1995) 16 *Michigan Journal of International Law* 403; Dyck N "Representation and the 'Fourth World': A Concluding Statement" in Dyck N (ed), *Indigenous Peoples and the Nation-State: 'Fourth World' Politics in Canada, Australia and Norway* Social and Economic Papers No.14 St John's, (Institute of Social and Economic Research Memorial University of Newfoundland, Newfoundland) p 236; Crough G "Aboriginal Sovereignty and Self-Government" *Social Alternatives op cit* at 22-24; Hall G "The Quest for Native Self-Government: the Challenge of Territorial Sovereignty" (1992) 50 *Toronto Faculty of Law Review* 1 at 39; Gross L "The Peace of Westphalia 1648-1948" (1948) 42 AJIL 20 at 39.

that it is not immutable.[27] Whyte, for example, sees in the common law the genius of deliberate ambivalence giving rise to "the recognition that the prevailing view — the normative conclusion of a particular case — has only limited validity. In common law there is scrupulous care not to declare results that cannot later be hedged, limited, trumped by other values and ultimately, overridden."[28]

One of the leading advocates of this dynamic view of both law and judicial functions is Edward McWhinney, Professor of International Law, Simon Fraser University. His recognition of societal flux and the function of law to best serve that kaleidoscope led him to the following conclusion: " . . . positive law, so far from being rigid and immutable, existed in a continuing, dynamic relation with the society for which it had first been developed, and that it should continue to evolve in true dialectical fashion, in response to rapidly changing societal conditions and demands."[29] His views on the direction of western legal thinking and the role of judges place him in the band of bold spirits. Judicial responsibility calls for a " . . . critical re-examination of (national) courts' own past *jurisprudence* when it seems to fly in the face of contemporary societal needs and community expectations of what is right and reasonable."[30] McWhinney identifies, with admiration, Lachs J of the International Court of Justice "as personifying the new judicial thinking, with its renouncing of the "dead-hand control" of old *doctrines* and old *jurisprudence* developed in other, earlier times, in favour of rational contemporary solutions to contemporary problems of the World Community."[31]

One of Australia's judicial "bold spirits", Murphy J, made similarly clear his views on the role of law in *Dugan* v *Mirror Newspapers*:[32] "Australian Courts (especially this Court) [ie the High Court of Australia] should, while taking into account the advantages of predicability, evolve the common law so that it will be as rational, humane and just as judges can make it. The present condition of the common law is the responsibility of the present judges. If this were not so, we would still be deciding cases by following the decisions of medieval judges. As Justice Holmes said: 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind

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27 See eg Shiner R *Norm and Nature: The Movements of Legal Thought* (Clarendon Press, Oxford, 1992) p 326.

28 Whyte JD "Nations, Minorities and Authority" (1991) 40 *University of New Brunswick Law Journal* 45 at 59; and at 60-61, the suggestion similar characteristics are grounded in good constitutions.

29 McWhinney E *Judicial Settlement of International Disputes - Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Martinus Nijhoff Publishers, Dordrecht, 1991) p 9.

30 *Ibid* at xiv (Italics in original).

31 *Ibid* at xix; see also Sturgess G, Chubb P *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths Australia: William Heinemann Australia, Richmond, Vic, 1988) 465-467.

32 (1978) 53 ALJR 166 at 176.

imitation of the past'.[33] Mr Justice Cardozo said: 'When a rule, after it has been tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment'.''[34]

Kirby J, the most recent appointment to the High Court of Australia, in like fashion has emphasised throughout his judicial career that the core of law is about justice. With the passage of the *Australia Act* 1986 (Cth) and the severing of constitutional ties with the United Kingdom[35] and the gradual emergence of *Australian* precedent[36] there are enough indicia that it is now *possible* for Australian case law to allow historical truths to intervene[37] and for the guiding principle of the law to be the pursuit of justice with general rather than selective application.[38]

The Persistence of Jack Congo Murrell Jurisprudence

Unlike American jurisprudence[39] Australian jurisprudence has indicated virtually no proclivity for recognition of indigenous sovereignty. Early colonial case law reveals the New South Wales Court of Appeal settling the question of jurisdiction over the ''natives'' by 1836. Burton J, in the *Jack Congo Murrell* case[40] said:

> That although it might be granted that on the first taking of possession of the Colony, the Aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.

Burton J affirmed that proclamation of British sovereignty included the area in which the offence of this case occurred, that Britain had exercised rights over this

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33 ''The Path of the Law'' (1897) 10 *Harvard Law Review* 469.

34 *Selected Writings of Seymour Nathan Cardozo* (1947) at 152.

35 See Note ''Abolition of Residual Constitutional Links between Australia and the United Kingdom'' (1986) 60 ALJ 253.

36 See eg Ellinghams M et al (eds) *The Emergence of Australian Law* (Butterworths, Sydney, 1989); Gaudron M ''The Realisation of an Australian Legal System'' (1987) *Law Institute Journal* at 686-689.

37 For views on tensions between legal theory and historical fact and the paramountcy of the former see eg *Millirpum* v *Nabalco* (1971) 17 FLR 141 at 202-203; for a more recent and liberal application, see *Mabo* v *Queensland (No.2)* (1992) 175 CLR 1 (Hereafter *Mabo 2*) at 29-30 per Brennan J.

38 For a startling recent US decision exemplifying selective reading of history see *State* v *Elliott* 616 A 2d 210 (Vt.1992) and discussion in Lowndes J ''When History Outweighs Law'' (1994) 42 *Buffalo Law Review* 77.

39 See Cohen FS *Felix S. Cohen's Handbook of Federal Indian Law* (*Cohen's Handbook*) (The Michie Company Law Publishers, Charlottesville, Virginia, 1982); Wilkinson CF *American Indians, Time, and the Law Native. Societies in a Modern Constitutional Democracy* (Yale University Press, New Haven, 1987); Wilkinson C et al *Indian Tribes As Sovereign Governments* (AIRI Press, Oakland, Canada, 1988); Getches D, Wilkinson CF, Williams RA *Cases and Materials on Federal Indian Law* (3rd ed, West Publishing Co, St Paul, Minn, 1993).

40 *R* v *Murrell* (1836) Legge 72 at 73.

country for a long period,[41] and that the Court was in effect colour blind and that the fact that the offence had occurred between Aborigines was immaterial and that they were subject to the same law as white people.[42] By contrast, in the United States one of the still most cited federal Indian law cases is *Worcester* v *Georgia*[43] which laid the foundation for contemporary recognition of inherent Indian sovereignty as to tribal governmental status. The US federal legal fetter over Indian tribes was at that time restricted to the regulation of commerce;[44] it did not as in Australia run to total jurisdiction.[45]

The legal dilemmas in Australia as to Aborigines arose through the doctrine of *terra nullius* which applied to uninhabited territories or territories inhabited by those so low in social structure that there was no discernible governmental structures.[46] The British acquisition of sovereignty over Australia proceeded on the basis of occupation. The rationale for this approach was based on the alleged primitive or barbaric state of Aboriginal society. The Report of the Select Committee of the House of Commons on Aborigines in 1837 gave authority to the view that Aboriginal tribes represented:

> . . . probably the least-instructed portion of the human race in all the arts of social life. Such indeed, is the barbarous state of these people and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or as proprietors of the soil, have been utterly disregarded.[47]

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41 9 Geo IV C.83 (*Australian Courts Act* 1828) was cited as authority for this claim; (prior habitation for millenia by indigenous people was not a matter for consideration.)

42 See also Bridges B "The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842" (1973) *Journal of the Royal Australian Historical Society* 59 Pt 4 at 264-269; Castles A *An Australian Legal History* (Law Book Company, Sydney, 1982) pp 526-529; McCorquodale J *Aborigines and the Law: A Digest* (Aboriginal Studies Press, Canberra, 1987) p 419; for recent case law affirmation see *Walker* v *The State of New South Wales* (1994) 126 ALR 32; cf recent Canadian case law holding no Aboriginal sovereignty survived to displace BC provincial court jurisdiction: *R* v *Williams* [1994] 3 CNLR 173 (BCSC).

43 *Worcester* v *State of Georgia* (1832) 6 Peters 515 per Marshall CJ.

44 See Prucha FP *American Indian Policy in The Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (University of Nebraska Press, Lincoln, 1962); Walters W "Review Essay: Preemption, Tribal Sovereignty, and *Worcester* v *Georgia*" (1983) 62 *Oregon Law Review* 127; for an expansion of US criminal law over Indian country see: Clinton R "Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective" (1975) 17 *Arizona Law Review* at 951-959; *Cohen's Handbook op cit*, Ch 1.

45 Contrast for example, *Ex parte Crow Dog* 109 US 556 (1883) upholding exclusive criminal jurisdiction as an attribute of tribal sovereignty; note however ensuing 1885 US legislation *Major Crimes Act* 18 USC para 1153 (1982).

46 For an ethnocentric Privy Council view of the inherent difficulty of assigning hierarchical positioning of indigenous tribes as to their state of juristic development measured against "civilised society" see, *Re Southern Rhodesia* [1919] 1 AC 211 at 233-234; for an overview of publistic writings on acquisition of "backward" territory see Lindley M *The Acquisition and Government of Backward Territory in International Law* (Longmans Green, London, 1926).

47 British House of Commons Parliamentary Paper 1837 VII, No 425, p 82.

Associated with this idea of barbarism, the concept of *terra nullius* in the context of colonialism has functioned to deprive indigenous peoples of their original independent and separate existence. So despite the *Mabo* finding that Australia was not *terra nullius*, the sovereignty of Australian Aborigines remains "utterly disregarded", the same status as in 1837 as noted by the House of Commons Select Committee on Aborigines. The anomaly in Australia was therefore how, in some way, to accommodate people who by any standard demanded recognition above that of fauna but, who until 1992, within the framework of a legal fiction were denied recognition of even title. Australian case law following *Mabo 2* has not admitted to the recognition of indigenous worth as amounting to any warranty to inherent rights.[48] Both indigenous jurisdiction and indigenous sovereignty continue to be denied. The British House of Commons Select Committee on Aborigines response in 1837 to the injustice of the policy which demanded Aboriginal obedience to English common law recorded in its view the absurdity of such a policy "and to punish their non-observance of them by severe penalties would be palpably unjust."[49]

Note however that these observations did not find expression in the Committee's recommendations or indeed in any further recommendations. Aborigines were subject to the received law on the basis of Australia's colonisation being categorised as a "settled" colony.[50] With an essentially European history dominating Australian thought for the past two centuries there will be needed a massive educational effort to overcome both the cultural and institutionalised superiority complexes that confuse or equate difference with inferiority.

The Loneliness of Bonjon Jurisprudence

The much lauded *Mabo 2* is Australia's foundational case for the recognition of some pre-existing colonial Aboriginal rights but it is a meagre step in that direction. A lonely judicial colonial voice back in 1841 ignored the *Jack Congo Murrel* case[51] when Bonjon, an Aborigine was charged with the murder of another Aborigine.[52] It

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48 Eg *Walker's* case, *op cit*; *Isabel Coe on behalf of the Wiradjuri Tribe* v *The Commonwealth of Australia and State of New South Wales* (1993) 68 ALJR 110; contrast Canadian case law recognition of inherent as opposed to contingent indigenous rights: *Guerin* v *The Queen* [1984] 2 SCR 335 at 378 per Dickson J.

49 British House of Commons Parliamentary Paper 1837 VII, No 425, p 84 cited in Crawford J "Legal Pluralism and the Indigenous Peoples of Australia" (1994) in Mendelsohn O, Upendra B (ed), *The Rights of Subordinated Peoples* (Oxford University Press, Delhi) p 182.

50 See *Mabo 2* at 34-35 per Brennan J, citing Blackstone's *Commentaries on the Laws of England* 17th ed (1830) Bk 1 Ch 4 pp 106-108; Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (AGPS, Canberra, 1986) Report No 31 vol 1, para 39-40.

51 *Op cit* 72; Hookey J "Settlement and sovereignty" in Hanks P, Keon-Cohen B (eds) *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* (George Allen & Unwin, Sydney, 1984) p 16, notes Legge's reports were not published until 1896 but Bridges, *op cit* at 267 records the *Murrel* case was put before Willis J who nevertheless declined to follow these opinions.

52 *R* v *Bon Jon* (Supreme Court of New South Wales, Willis J, Port Phillip Gazette 18 September 1841), in McCorquodale *op cit* at pp 376-377; additional sources are cited in Bridges, *op cit* at 269, n 14; the case is also cited as *Bonjon* in Hookey, *ibid* and as *Borijon* in Castles *op cit* at 530-531; see

is the strongest statement from any colonial (Australian) court or from any Australian court on the recognition of indigenous sovereignty albeit in a subordinate form such as had been the foundation of US federal Indian law based on the "domestic dependent nation" category[53] which nevertheless maintains indigenous rights to tribal sovereignty, self-government and control of jurisdiction. Willis J in *Bonjon* cited the publicist Emerich de Vattel:[54]

> whoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour's property, will acknowledge, without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.

St Augustine had written on the matter in terms of brigands some thirteen hundred years before:[55] "[w]ithout justice what are kingdoms but great bands of robbers? And what is a band of robbers but such a kingdom in miniature? . . ." He continued by recording an exchange between a captured pirate and Alexander the Great:

> The king asked him what he meant by infesting the sea. He replied with the boldest freedom, 'precisely what you mean by infesting the whole world. Because I do it in a little ship I am called a robber. Because you do it in a great fleet you are called emperor.'

The author of *Mein Kampf* could also perceive profit in disguising enterprises in the cloth of magnitude: "[t]he great masses of the people . . . more easily fall a victim to a big lie than to a little one."[56]

Historical and judicial amnesia are not uncommon.[57] Elizabeth Evatt in a contribution to Grotian Society Papers in 1968 made a comparative study of the acquisition of territory in Australia and New Zealand.[58] Having examined the Law

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52— *Continued*
also expressions of Cooper CJ of Supreme Court of South Australia cited in *Milirrpum* v *Nabalco* (1971) 17 FLR 141 at 261.

53 *Worcester op cit*. This "domestic dependent nation" category has been expressly rejected in *Isabel Coe's* case *op cit* at 115 and the rejection was reiterated in *Walker's* case *op cit*.

54 "Papers Relative to the Aborigines, Australian Colonies" (1844) *British Parliamentary Papers* vol 8 Irish University Press 152: cited in Hookey J *op cit* at p 6. Vattel, however, restricted his interpretation of Exodus 20:15; "Thou shalt not steal", to exclude territorial acquisition from nomadic peoples who did not practice cultivation; Vattel E *The Law of Nations* (T & JW Johnson & Co, Philadelphia, 1863) particularly, chapters 8 and 18. For insights into alternative indigenous forms of cultivation, however, see eg Jones R "Fire-stick Farming" (1969) *Australian Natural History* at 224-228.

55 Wand J (trans.) *St. Augustine's City of God* (Oxford University Press, London, 1963) pp 71-72.

56 Hitler A *Mein Kampf* (German original 1925 vol 1; 1927 vol 2) (Boston Houghton Mifflin, 1943) vol 1 chapter 10, p 231.

57 For an example of exegesis on the approved displacement of historical fact by legal theory see *Milirrpum* v *Nabalco, op cit* at 202-203.

58 Evatt E "The Acquisition of Territory in Australia & New Zealand" 1970 in Alexandrowicz CH

of Nations in practice and theory as it so pertained she concluded her paper with an appeal for support of the views of Fauchille:

> "Les puissances civilisées n'ont pas plus de droit de s'emparer des teritores des sauvages, que ceux-ci n'ont le droit d'occuper les continents européens."[59]

Her summation as to why the Maori of New Zealand should be recognised prior sovereignty while the situation in Australia never commanded equal treatment since "agreement by the natives, either formally or informally expressed, was never thought necessary"[60] seems to be bedded in the following explanation:

> Australia is in fact one of the rare examples of a large tract of inhabited territory acquired *peaceably* by occupation without any consent being sought from the native population. There is a practical explanation for this, for although a State might prefer to obtain some form of consent where there is an organised community with a recognised chief, this was impossible in the case of Australia inhabited by scattered unorganised tribes.[61]

This warrants some reply. Although atrocities were known of at the time of Evatt's publication it was certainly not judicially fashionable to acknowledge the "darkest aspect of the history of this nation."[62] Neither did Evatt have at the time of her writing Murphy's J High Court of Australia pronouncement of a non-peaceful acquisition by Europeans:

> The history of the Aboriginal people since European settlement is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture.[63]

The space between the reality of the indigenous physical and cultural genocide and the European terminology of "settlement" is preserved by the legal fiction that

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58—*Continued*
(ed), *Grotian Society Papers 1968 Studies in the History of the Law of Nations* (Martinus Nijhoff, The Hague) 16-45.

59 *Traité de Droit International* Tome 1,2 (1925) s 547 p 699 cited *ibid* at 45. "The civilised powers do not have the right to seize dominion over the territory of the savages any more than the savages would have the right to occupy the European continent. (trans. Mark Mourell); cf the symbolic actions of Burnum Burnum, 26th January 1988, (Australia Day of the Bicentennial) when he planted the Aboriginal flag on the White Cliffs of Dover.

60 *Ibid* at 44.

61 *Ibid* at 18 (Italics added), citing Lindley *op cit* at pp 40-41 and *Cooper* v *Stuart* (1889) 14 AC 286.

62 *Mabo* 2 at 109 per Deane and Gaudron JJ; cf: "a legacy of unutterable shame" at 104 per Deane and Gaudron JJ.

63 *The Commonwealth of Australia* v *Tasmania* (1983) 158 CLR 1 at 180.

indigenous peoples had no inherent rights which equated to sovereignty and that in any case such a claim was barred *inter alia* on the grounds that:

> It was fundamental to the Australian legal system that the Australian colonies became British possessions by settlement, and not by conquest, thereby introducing the common law into the continent.[64]

Elizabeth Evatt seems partially close to the truth when in her summation of her paper "Acquisition of Territory in Australia and New Zealand" having canvassed the rules as set out by the colonising potentates, she comes to the conclusion that : "In reality each State acted according to the needs of the case."[65] Not however according to the needs of the case other than from a Eurocentric view. The "needs" were assessed from the views of the state's policies of colonialism backed by philosophies of history that vindicated the destruction of indigenous cultures. The phrase "acquisition of territory" remains a euphemism.

Other commentators have characterised the practices more forcefully. Writing on the practice in Australia, New Zealand and Canada of initial forms of "institutionalised contact" with the indigenous inhabitants, Associate Professor Armitage in description of the European invasions uses the terms, "powerful, acquisitive, exploitative, and proselytising."[66] North American Indian legal scholar, Robert Williams, writing of the incorporation of the Law of Nations' [European] foundational doctrine of discovery into the domestic law and of its continuing impact in the United States,[67] (but just as relevant to Canada,[68] New Zealand[69] and Australia[70]) traces the legacy of racial discrimination from the time of

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64 *Coe* v *Commonwealth* (1979) 53 ALRJ 403, per Gibbs and Aickin JJ.

65 Evatt E *op cit.*

66 Armitage A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (UBC Press, Vancouver, 1995) p 186.

67 Williams RA "Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination" (1991) *Arizona Journal of International and Comparative Law* 8:2, 51-75; for expanded coverage see Williams RA *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, New York, 1990).

68 *St Catherine's Milling and Lumber Co* v *The Queen* (1889) 14 AC 46. (The reliance by the Privy Council on Marshall CJ decisions, especially *Johnson* v *McIntosh*, gives a high degree of congruence between US and Canadian jurisprudence subordinating indigenous peoples); *Calder* v *Attorney-General of British Columbia* [1973] SCR 313. (The situation of the BC Nishga seeking a decaration that their title to traditional land remained unextinguished bears close parallels to situations in Australia.)

69 *R* v *Symonds* [1847] NZPCC 387 at 388 per Chapman J (NZSC) affirming the feudal base of all title as arising from the Crown: "It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title . . . This principle . . . pervades and animates the whole of our jurisprudence in relation to the tenure of land"; *Wi Parata* v *Bishop of Wellington* (1877) 3 NZJUR (NS) 72 denying the validity of the Treaty of Waitangi as a binding document, classifying Maori as savages and therefore incapable of "making cession of sovereignty" and justifying the acquisition of title by discovery and occupation. (at 78); cf *Hunt* v *Gordon*

the medieval crusades. We note that in the United States context, however, indigenous sovereignty survived at least in some diminished form.

Wedge and the Continuation of Murrell

In Australia, the issue of indigenous sovereignty arose again in the New South Wales Supreme Court in *R* v *Wedge*[71] specifically in regard to the claim that New South Wales had no right of jurisdiction over an Aboriginal person. That claim was rejected following precedent of *Cooper* v *Stuart*[72] and *R* v *Jack Congo Murrell.*[73] *Wedge*[74] continued to hold to the legal fiction that "the colony of New South Wales was founded by settlement, not conquest . . . " Lord Watson in *Cooper* v *Stuart* referred to the territory of New South Wales as "practically unoccupied without settled inhabitants or settled law"[75] and it was this criteria which for him was critical for the application of Blackstone's categorisation of New South Wales as "an uninhabited country . . . discovered and planted by English subjects."[76] Under such categorisation as far as the contemporary Australian municipal legal system is concerned, Aboriginal sovereignty is a non-issue. Rath J cited with approval the High Court of Australia (1913):

> . . . the unquestionable position that, when Governor Phillip received his first commission from King George III on 12th October, 1786, the whole of the lands of Australia were already in law the property of the King of England."[77]

And the High Court of Australia (1959):

> "On the first settlement of New South Wales (then comprising the whole of Eastern Australia), all the land in the colony became in law vested in the Crown."[78]

It is worth noting that the brackets in the preceding quote are those of Windeyer J. This is of importance from the point of view of international law at the time of "first settlement" for the requirements of acquisition of territorial sovereignty. These included not only discovery but also occupation *and* use, conditions of course which could not have been complied with.

69— *Continued*
(1884) 2 NZLR 160 at 185-186 (SC & CA).

70 As per Australian cases cited throughout this paper.

71 [1976] 1 NSWLR 581.

72 *Op cit.*

73 *Op cit.*

74 *Op cit.*

75 *Op cit* at 291.

76 Cited in *Wedge, op cit* at 584.

77 *Williams* v *Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 per Isaacs J, cited in *Wedge, ibid* at 585.

78 *Randwick Corporation* v *Rutledge* (1959) 102 CLR 54 at 71 per Windeyer J, cited in *Wedge, ibid.*

Further factual discrepancies are noted between Lord Watson's assessment of Aboriginal people being without settled law and the later unambiguous statement by Blackburn J in *Milirrpum* v *Nabalco*:[79]

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is shown in the evidence before me.[80]

Despite this finding, *Milirrpum* in no way approved the concept of continuing indigenous sovereignty; it did not even acknowledge the existence of the doctrine of common law native title.[81] A reading of *Milirrpum* provided a reaffirmation that indigenous peoples had no rights except as bestowed by the contemporary Australian legal system. The acknowledged indigenous government of laws which existed for millennia is erased by royal prerogative, proclamation or legislative act. Only by those same forces can that which pre-existed colonial invasion be re-created. The same alien regime which committed the theft may reinstate rights or recognition. In other words under such a regime the subordinate position of indigenous peoples depends upon the precariousness of benevolence not on the justice of the recognition of inherent rights.[82]

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79 *Milirrpum* v *Nabalco* (1971) 17 FLR 141.

80 *Ibid* at 267.

81 For criticism of the decision, see works cited in McCorquodale, *op cit*, p 326.

82 New Zealand jurisprudence even with the complicating factors of a treaty has been able to support this "benevolent" view; see, for example, *Wi Parata* v *Bishop of Wellington* (1877) 3 NZ JUR (NS) 72 at 77-78 per Prendergast CJ; *In re Ninety-Mile Beach* 1963 NZLR 461 at 468 per North J; in Australia, identified also in *Milirrpum*, *op cit* at 255-256; contrast Canadian developments, eg Royal Commission on Aboriginal Peoples *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Canada Communication Group, Ottawa, 1993); Royal Commission on Aboriginal Peoples *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa, 1992); Royal Commission on Aboriginal Peoples *Bridging the Cross-Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, 1996). Recommendation 1, p 224: "Federal, provincial and territorial governments recognise the right of Aboriginal nations to establish and administer their own systems of justice *pursuant to their inherent right of self-government*, including the power to make laws, within the Aboriginal nation's territory." (Italics added); Bell C "Comment on Partners in Confederation, A Report on Self-Government by the Royal Commission on Aboriginal Peoples" (1993) *University of British Columbia Law Review* 27:2, 361; Liberal Party of Canada *Creating Opportunity* Canadian Liberal Party (popularly known as "*The Liberal Red Book*"), Ottawa, 1994, Ch 7: Aboriginal Peoples. This policy document of the current government of Canada pledges: "A Liberal Governnent will act on the premise that the *inherent right of self-government* is an existing Aboriginal and treaty right." (Italics added); *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. Federal Policy Guide* (Department of Indian Affairs and Northern Development, Quebec, Canada, 1995); "Aboriginal Self-Government" (1995) *Backgrounder* (Department of Indian and Northern Affairs, Quebec, Canada); Isaac T *Aboriginal Law: Cases, Materials, and Commentary* (Purich's Aboriginal Issues Series) (Purich Publishing, Saskatoon, Saskatchewan, 1995) Ch 8.

Racial Discrimination or Cultural Acknowledgments?

In *Koowarta* v *Bjelke-Petersen*,[83] the High Court examined the term "racial discrimination" in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICEAFRD).[84] Art 1(1) of the Convention provides:

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

While no doubt such principles are worthy of enshrinement, they may not afford protection for the recognition of the preservation of cultural diversity and the necessary heterogeneous accoutrements of political, social, economic, legal, administrative and other structures and systems. The premise of ICEAFRD is essentially one of beneficence fostering assimilation, bestowing "equality before the law" (Art 5), the issue of whose law attracting no discussion for the very ideals upon which the Charter of the United Nations are based are statist, conveniently ignoring the colonial histories of its member (incongruously called) nations, and similarly ignoring provision to date for indigenous collective rights which have been subsumed by the paramountcy of sovereign integrity of states.

The recitals to ICEAFRD affirm the view that racial discrimination is anathema and in Mason's J discernment "the community of nations or at least a very large number of them, are vigorously opposed to racial discrimination, not only on idealistic and humanitarian grounds, but also because racial discrimination is generally considered to be inimical to friendly and peaceful relations among nations and is a threat to peace and security among peoples."[85]

Opposition to these views may be based initially on the connotations given to "discrimination". Many liberal-minded people would applaud the measures suggested for the elimination of that racial discrimination which has its basis in hatred, or superiority complexes. But "discrimination" also carries the denotation of having the ability to discern differences without the attachment of pejorative connotations. The United Nations having advanced the message and to some extent convinced at least some of the world that racial discrimination in its negative aspects is to be deplored, may move on to see the next worthwhile focus as the educative aim of advancing the acceptance of difference rather than the celebration of its demise through the homogenisation of assimilation.

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83 *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168.

84 The Convention (ICEAFRD) was given domestic force in Australia by the *Racial Discrimination Act* 1975 (Cth).

85 *Koowarta* v *Bjelke-Petersen*, *op cit* at 235.

Changing terminology and the clusters of associated assumptions are propaedeutic to reform. Having sown the seeds that racial discrimination is not to be tolerated in its negative forms, the more daring of leaders will push to the next lesson that racial discrimination has positive aspects when *peoples* are striving for cultural survival, and that it is quite possible (deliberately or otherwise) for the goal of the elimination of racial discrimination to advance cultural genocide. In certain circumstances distinct cultural groups are calling for discrimination in the sense of the necessity for them to be recognised as different which is not to be equated with or confused with inferior.

Sadurski, in criticising the High Court of Australia's reasoning in *Gerhardy* v *Brown*[86] rather than the decision itself (which Sadurski believed the Court got right) makes the same basic point which has just been made: "The Court has assumed that racial distinctions are *per se* discriminatory."[87] Such an assumption may lead to a worsening of the plight of indigenous peoples striving for the greatest degree of control over their distinct cultural destinies.

Mason J in *Gerhardy* v *Brown* acknowledged the inherent difficulties of defining or describing the concept of human rights:

> The concept of human rights as it is expressed in the Convention [ICEAFRD] and in the United Nations Universal Declaration of Human Rights evokes universal values, ie values common to all societies. This involves a paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society, or in the case of *homogenous* societies which are grouped together, eg the European Economic Community, to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.[88]

Sir Paul Hasluck, advocate of the policy of assimilation, stated that, "Those who apply the term 'racist' most frequently to other persons are themselves the active proponents and perpetuators of racial division."[89] Racial division, however, is not necessarily to be equated with racism. The desire of distinct identity, racial, cultural or both, has evidenced itself in every age. Indigenous peoples in this respect are no different.[90] Australian case law has yet to acknowledge this fundamental human trait.

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86 *Gerhardy* v *Brown* (1985) 159 CLR 70

87 Sadurski W "*Gerhardy* v *Brown*. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't" (1986) 11 *The Sydney Law Review* 1 at 7.

88 *Op cit* at 102 (Italics added).

89 Hasluck P "The Situation Today: An Historical View" (1980) in Berndt R, Berndt C (ed) *Aborigines of the West: Their Past and their Present* (University of Western Australia Press, Perth) p xxvii.

90 See eg Moody R (ed) *The Indigenous Voice: Visions and Realities* (2nd ed) (International Books,

Mabo

The much celebrated *Mabo 2* decision while dispelling over 200 years of legal fiction in putting to rest the doctrine of *terra nullius* as applying to the continent of Australia on European colonisation, has left major conundrums. Within the framework of the dispossessing law, Murray Islanders argued their case for recognition of common law native title. They did not argue a case for the recognition of indigenous sovereignty. The High Court of Australia nevertheless felt compelled to state that: "The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court." [91] This stance has no shortage of precedent.[92] Typical of High Court of Australia enunciation on this issue is that of Gibbs J in *New South Wales* v *Commonwealth*:[93]

> The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state. For statements and illustrations of this principle it is enough to refer to *Salaman* v *Secretary of State in Council of India*; *Sobhuza 11* v *Miller* and *Secretary of State for India* v *Sardar Rustam Khan*.

Salaman,[94] *Sobhuza 11*[95] and *Secretary of State for India*,[96] all English decisions, are now between 55 and 90 year old precedents. While under common law age per se is insufficient to negative precedent, Brennan J (as he then was) in *Mabo 2* clearly indicated Australian law is no longer bound by English law,[97] a point which Kirby J took the opportunity to reiterate in his inaugural address at the High Court of Australia: "The termination of Privy Council appeals has finally released Australian law from accountability to the judicial values of England that lasted so long. The slow realisation of this fact, and its implications, in a profession often so resistant to change, presents to this, as to other Australian courts and courts of the region, challenges which are exciting and sometimes difficult."[98]

It has been argued on a number of grounds that there is justification for viewing sovereignty as a municipally justiciable issue. Stephen Gray argues among other grounds for the consideration of the application of the so-called revolution cases.[99]

90— *Continued*
Utrecht, The Netherlands, 1993).

91 *Mabo 2* at 4.

92 See eg *Mabo 2* at 31-32, notes 61-64.

93 (1975) 135 CLR 337 at 388 (notes omitted); cited also in *Coe* v *Commonwealth*, *op cit* at 408 per Gibbs J.

94 [1906] 1 KB 613.

95 [1926] AC 518.

96 [1941] AC 35.

97 *Mabo 2* at 29.

98 "Speech on the Occasion of His Swearing in and Welcome as a Justice of the High Court of Australia" Tuesday 6 February 1996, High Court of Australia.

99 Gray S "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo* v *Queensland*" (1993) 2 *Griffith Law Review* 39-63 at 56-61; see *Madzimbamuto* v *Lardner-Burke*,

His arguments centre on the independence of the judiciary from the other arms of government; the independence of the Australian legal system from that of Britain; and on the grounds that judges make policy outside of legal doctrine. It would therefore follow that if Australia is constitutionally and legally independent of Britain, (and this status has been achieved by a series of steps commencing with the creation of the Commonwealth of Australia and finding completion through the *Australia Act* 1986 (Cth)) then the last vestige of imperial constitutional control exists no longer. And, in that the High Court of Australia, the highest court in the contemporary Australian legal system is not bound to follow its own decisions it is within its jurisdiction to pronounce upon that which have been termed "acts of state"[100] or the exercise of "prerogative powers."[101] *Mabo 2* does not draw any clear distinction between "acts of state" or the exercise of "prerogative powers."[102] The authorities and literature cited make clear however that both terms are rooted in an imperial past and are, on those grounds, it is suggested, due for re-examination, re-assessment, and reform.[103]

Fonteyne writing of British and Commonwealth use of the term "act of state" records the usual restriction "to denote the quite distinct immunity which the Crown enjoys at common law in its own courts for injury inflicted on aliens outside the

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99— *Continued*
Court of first instance, Judgment No GD/CIV/23/66 of 9 September 1966; *Mitchell* v *Director of Public Prosecutions*, Court of Appeal Grenada reported in (1986) LRC (Const) 40; see also Joseph P "Constitutional Law" (1996) *New Zealand Law Review* at 11 discussing Commonwealth independence.

100 Fonteyne JP "Acts of State" (1987) *Encyclopedia of Public International Law* pp 1-3; Gray *ibid* at 44; McNeil K *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) pp 108-133; "Royal Prerogative & The Crown in Foreign Relations" (1975) *English and Empire Digest with Complete and Exhaustive Annotations* pp 718-727; Singer M "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice" (1981) 75 *American Journal of International Law* at 283-323.

101 Evatt HV *The Royal Prerogative* (The Law Book Company, Sydney, 1987); Williams DGT "Case and Comment: The Prerogative and Preventive Justice" (1977) *The Cambridge Law Journal* 36:2 at 201-205; "Royal Prerogative & The Crown in Foreign Relations" (1975) *English and Empire Digest with Complete and Exhaustive Annotations* 662-665; Wesley-Smith P "Judicial Review of Prerogative Action" (1985) *New Zealand University Law Review* 1984-1985 at 323-333; Markesinis BS "The Royal Prerogative Re-Visited" (1973) *The Cambridge Law Journal* 32:2 (November) 287-309; for etymological significance see Blackstone *Commentaries* (1765) I, 239: "It signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical, that is can only be applied to those rights and capacities which the King enjoys alone . . . "

102 Gray *op cit* at 44, n 19 citing *Mabo 2* at 78 per Deane and Gaudron JJ.

103 For case law upholding the prerogative constituent power beyond the realm see eg *Campbell* v *Hall* (1774) 1 Cowp 204; *Lyons* v *East India Co* (1836) 1 Moo PC 175; *Phillips* v *Eyre* (1870) LR 6 QB 1 at 17-19; *Sammut* v *Stickland* [1938] AC 678 (PC); *Sabally* v *Attorney-General* [1964] 3 WLR 732 at 744; Jennings RY *The Acquisition of Territory in International Law* (Manchester University Press, Manchester, 1963); Roberts-Wray K *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) pp 116, 143-166.

realm (see eg *Buron* v *Denman* (1848) 154 ER 450.'')[104] This again for Australia poses conundrums. Were the ''natives'' who had no existence under the *terra nullius* doctrine capable of categorisation as ''subjects'' or ''aliens''? The sophistry of colonialism makes pursuit of such questions a descent into illogicalities. How do you deal with a situation where human beings are not afforded the recognition of human beings? How do you equate historical fact with ''required'' legal theory? How do you justify continued non-recognition of indigenous sovereignty?

Brennan's J restraint so to proceed is couched in what he perceived as fracturing the ''skeleton of principle [that] which gives the body of our law its shape and internal consistency.''[105] In just the preceding paragraph however he catalogues some of the injustices visited upon the ''indigenous inhabitants'' by the application of the common law and continues:

> [it] made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.[106]

The requirements for the acquisition of territory at the time of colonisation of New South Wales under the Law of Nations (later renamed international law) as already noted were not met but to pursue that avenue of redress the obstacles of having a case heard before an international forum are immense.[107] Current indigenous demands on the Australian government for international representation have so far elicited no positive response.[108]

But to return to municipal law and the perplexities which Brennan J impliedly raises, there is on the one hand the call to right wrongs the legacies of which are only too glaringly present; on the other hand is the fear that the attempted remedying of foundational injustices would ''fracture the skeleton of principle which gives the body of our law its shape and internal consistency.''[109] The tensions he identifies are those which a free and independent judiciary are equipped to determine. The tensions may be those of certainty, uniformity and restraint against those of substantial change in pursuit of justice, a division of pursuits classed by Denning as between timorous souls and brave spirits.[110] While the tenor of the common law

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104 Fonteyne *op cit* at p 2.

105 *Mabo* 2, *op cit* at 29; see also at 30 & 45; cf *Johnson* v *McIntosh* 21 (8 Wheat) 543 (1823) where Marshall CJ speaking on the effects of the Doctrine of Discovery on the limitations it imposed on American Indians stated: ''However this restriction may be opposed to natural right, and to the usages of civilised nations, yet, if it be indispensable to that system under which the country has been settled, and it be adopted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.'' (at 592).

106 *Mabo* 2, *ibid* at 29.

107 See eg Nettheim G ''International Law & Sovereignty'' (1994) in Fletcher *op cit* at 73.

108 See eg Draft Recommendations on Aboriginal Justice Issues cited in Gray *op cit* at 39-40.

109 *Mabo* 2, *op cit* at 29-30.

110 *Candler* v *Crane, Christmas & Co* [1951] 2 KB 164 at 178; see generally, Sturgess G, Chubb P

legal fraternity is predominantly (if not overwhelmingly) conservative, individual judges at the highest levels have championed[111] and are championing judicial activism.[112] At the recent Law-Asia Conference, former Justice of the Supreme Court of India, Krishna Iya made clear his views on the role of judges in administering and delivering justice. The Chair of the Law-Asia Human Rights Standing Committee, Dato Param Cumaraswamy recorded the judge's strong advocacy on this role:

> That is to be more public orientated, to take justice to the people rather than people coming for justice, and this is the court's activism, instead of folding their arms for example and saying, "Look, we don't have the powers to do this and powers to do that", but to be more creative and be proactive in the development of the law. This is what the Indian Supreme Court has done, and today what we heard from him: in a jurisdiction like India, the largest democracy in the world, how they developed and brought justice to the people, and this is the message he was trying to give to the judges because generally judges are known to be conservative, they're known to be always hiding behind the law books and saying "Look, we don't have this power because parliament hasn't given us such powers" but he says, "Look, you have the power, use it, because you have the power to do justice, and justice is a very, very wide term."[113]

Yet even by doing nothing more, it is suggested, than "identifying" the common law already in existence, it is possible through its application to rise to the challenge laid down by Brennan J when he stated:

> No case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[114]

In a democracy based on majoritarian values the role of the judicial system includes, if justice is part of that system, protection of minority rights.[115] That recognition is not based on charity and especially so when it applies to indigenous peoples. A critical question is whether indigenous peoples are to continue to be seen as just

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110—*Continued*
Judging the World: Law and Politics in the World's Leading Courts (Butterworths Australia: William Heinemann Australia, Richmond, Vic, 1988), especially p 261.

111 See eg *Dugan* v *Mirror Newspapers* per Murphy J, *op cit* and accompanying text to *supra* n 31.

112 See eg Kirby J, *supra* n 98.

113 Australian Broadcasting Corporation. Radio National Transcript: "Law-Asia Celebrates 30 Years" *The Law Report*, Tuesday 3 September 1996.

114 *Mabo* 2 at 30.

115 See Rawls J *A Theory of Justice* (Cambridge, Mass, 1971); Kirby M "Occasional Lecture for the Senate Department of the Australian Parliament" cited in Shearer IA "The Growing Impact of International Law on Australian Domestic Law - Implications for the Procedures of Ratification and Parliamentary Scrutiny" (1995) 69 ALJ 404 at 405.

another one of the many user groups whose aspirations are to be taken into account or whether there is an overdue recognition of status with serious attempts at appropriate accommodations.

Walker

As noted, as black letter law now stands it seems that recognition of indigenous sovereignty is not imminent. In the *Walker* case[116] in addition to reaffirming the one law principle for black and white as established in 1836,[117] Mason CJ (as he was then) quoted from his own 1993 judgment in *Coe* v *Commonwealth*:

> *Mabo 2* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a "domestic dependent nation" entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.[118]

This pronouncement raises issues as to where the current policy of self-determination fits. The fact that the process for recognition of indigenous rights according to this authority must take place *within* the legal system of the (post) colonisers means of course that every legality of that imposed alien system must be observed.[119] This highlights the extreme odds of indigenous peoples ever receiving justice by this route while the Australian judiciary continues to feel itself restrained by notions of antiquated English jurisprudence. This type of cultural legal baggage is not unique to any particular people. The driving force of colonialism in the New World from the 15th century while different in detail from colonialism as manifested in Australia has had remarkably similar devastating effects on indigenous culture and peoples.[120] The High Court to date continues to give no indication of

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116 *Walker* v *The State of New South Wales* (1994) 126 ALR 321.

117 *R* v *Murrell* (1836) Legge 72.

118 *Isabel Coe on behalf of the Wiradjuri Tribe* v *The Commonwealth of Australia and State of New South Wales* (1993) 68 ALJR 110.

119 For issues on *internal* autonomy and self-government, see United Nations: Economic and Social Council "Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination: Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples: Commission on Human Rights: Forty-eighth session: Item 14 of the provisional agenda" (Nuuk, Greenland, 24-28 September 1991) Economic and Social Council 25 November 1991; see also Addendum to this document.

120 For New World legacies see Williams RA "Columbus's Legacy *op cit*; and Williams RA *The American Indian in Western Legal Thought op cit*; for global historical insights see Tatz C "Racism & Inequality" (1987) in Jennett C, Stewart R (eds), *Three Worlds of Inequality: Race, Class & Gender* (Macmillan, South Melbourne) pp 38-40; for modern philosophical insights see Popkin R

acknowledging the continuance of indigenous sovereignty, nor even the concession that it is a justiciable issue.[121]

It is interesting to juxtapose the perceptions of Mason CJ in *Walker* v *The State of New South Wales*,[122] and similarly in *Isabel Coe on behalf of the Wiradjuri Tribe* v *The Commonwealth of Australia and State of New South Wales*[123] with his remarks in the earlier *Gerhardy* case.[124] In the *Walker* and *Isabel Coe* cases where as quoted above,[125] the Chief Justice indicated that any rights the indigenous peoples of Australia had were entirely contingent on the Crown's bestowal.

In *Gerhardy* v *Brown*[126] Mason J had previously stated that the expression "human rights" includes claims ". . . to the protection and preservation of the cultural and spiritual heritage of that group." We may ponder what effective measure of protection and preservation may be afforded to indigenous peoples who have had thrust upon them as survivors of physical genocide, alien political, social, economic, religious, legal, administrative, educational and philosophical systems and streams. In short, what measures are afforded looking to either the municipal law of the coloniser or the international law of the colonisers for legal space which cannot realistically perform the miracle of *restitutio in integrum* but which could accommodate new relationships based on genuine consent?

In *Gerhardy*, Brennan J stated:

> The recognition and observance of human rights and fundamental freedoms by a state involves a restraint on the untrammelled exercise of its sovereign powers in order to ensure that the dignity of human beings within each state is respected and that equality among human beings prevail . . . human rights . . . are rights and freedoms which every legal system ought to recognise and observe. They are inalienable rights and freedoms that a human being possesses simply in virtue of his humanity . . . The state and other persons are bound morally, though not legally, to recognise and observe those rights and freedoms.

He continued:

120—*Continued*
"The Philosophical Bases of Modern Racism" (1980) in Watson R, Force J (eds) *The High Road to Pyrrhonism* (Austin Hill Press, San Diego) p 79.

121 Eg McRae H, Nettheim G, Beacroft L "Colonisation, Sovereignty & Law" *Aboriginal Legal Issues* (Law Book Co, Sydney, 1991), pp 57-100; Hodgson DC "Aboriginal Australians and the World Court I - Sovereignty by Conquest" (1985) *New Zealand Law Journal* (January) 33-35; Hodgson DC "Aboriginal Australians and the World Court II - The Advisory Jurisdiction of the World Court" (1985) *New Zealand Law Journal* (February) 64-68; Tatz C "Aborigines and the Age of Atonement" (1983) *The Australian Quarterly* 55:3 (Spring) 291-306; Hookey, *op cit* at 1-18; McCorquodale *op cit* at 104-113; and case law cited throughout this paper.

122 *Walker's* case (1994).

123 *Op cit.*

124 *Op cit.*

125 *Supra* notes 116 and 118.

126 *Op cit* at 101-102.

> . . . an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some differences in the rights and freedoms that are conducive to their attainment.''[127]

Brennan J speaks of ''inalienable rights and freedoms'' and he acknowledges the heterogeneity of human organisation and culture. The recognition and observation of these rights and freedoms, in his judgment, attract moral but not legal protection. Australia as a charter member of the United Nations is signatory to the UN Charter.[128] It is also signatory to the Human Rights Covenants.[129] The central issue of indigenous self-determination which is at the slow ''crystallising'' stage in international law may eventually formalise protection against cultural genocide from moral to legal status.

Justice Brennan's delivery is by a judge (like judges all over Australia) who has sworn his allegiance to the State. And as such his judicial objectivity permits no view which would ''fracture the skeleton of principle''[130] which has in historical truth arisen through, to use the political-legal terminology, an act of state. Two points are of significance: (1) The State which declared its sovereignty to extend over what is now called Australia, by act of state, is not the current State of Australia. (2) That particular act of state had no legitimate basis in international law as it was in the 18th century for the claim of sovereignty on the facts as to cession, and fails equally today on the claim of occupation by settlement in light of belated recognition of the fiction of the doctrine of *terra nullius*.

When Lieutenant James Cook received his secret instructions from the British Admiralty in 1768 for his forthcoming exploration of the Southern Pacific, there was a clear distinction acknowledged between a situation where territory was occupied and where it was unoccupied. The relevant instructions read:

> You are also with the consent of the natives to take possession of convenient situations in the country in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.[131]

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127 *Op cit* at 125-126.

128 See Art 1(2) and Art 55.

129 See *International Covenant on Civil and Political Rights*, Art 1(1); *International Covenant on Economic, Social and Cultural Rights*, Art 1(1).

130 *Mabo 2*, *op cit* at 29; see also at 30 & 45.

131 Additional Instructions for Lieutenant James Cook [Executed by the Admiralty Commissioners, 30 July 1768]. Source: British Admiralty, Secret Instruction Book, Public Record Office, London, Admn 2/1332, cited in Bennett JM, Castles AC *A Source Book of Australian Legal History* (The Law Book Co, Sydney, 1979) pp 253-254.

It is history that "the consent of the natives" in Australia to this day has not been sought nor given.

The High Court of Australia has pronounced upon the benefits of international law with its post-war emphasis on human rights in such cases as *Koowarta* v *Bjelke-Petersen*[132] and *Gerhardy* v *Brown*.[133] It has shown a willingness to interpret law favouring the upholding of human rights in a number of recent cases even where there was no direct necessity to implement international legal instruments.[134] These perceived benefits include a more peaceful world — we may remind ourselves that in the realisation of the internet global village, 300 million people claim indigenity.[135] Henry Lawson's mighty bush, with more than just iron rails, is now tethered to the world.[136]

In regard to indigenous sovereignty we proceed struthiously, nevertheless, to maintain legal fictions which are without moral reason or honour and at the same time speak of the recognition and observance of human rights and fundamental freedoms without addressing the grundnorm of the State's power[137] and the mysteries of the overlooking of the necessary element of consent of the people which in recent historical time has been taken as the hallmark of a democratic system.

Indigenous Sovereignty: Law or Justice?

The growing literature around the recognition of indigenous rights suggests that there is a plethora of possibilities for the accommodation of some form of indigenous sovereignty.[138] The most likely route seems to be through political

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132 *Op cit.*

133 *Op cit.*

134 Eg *Re Marion* [1991] FLC 92-193 at 78,301 per Nicolson CJ; *Gradidge* v *Grace Bros Pty Ltd* (1988) 93 FLR 414 per Kirby P; *Mabo 2, op cit* at 42 per Brennan J (Mason CJ and McHugh J concurring).

135 Swepston L and Tomei M "The International Labor Organisation and Convention 169. The ILO and Indigenous and Tribal Peoples" in Van De Fliert L (ed) *Indigenous Peoples and International Organisations* (Nottingham, Spokesman, 1994) p 56; Aboriginal and Torres Strait Islander Commission UN Draft Declaration on Indigenous Peoples: Plain Language Version, ATSIC, Canberra (Draft only, unpaginated); Burger J *The Gaia Atlas of First Peoples. A Future for the Indigenous World* (Gaia Books, London, 1990) gives an estimate of 250 million.

136 "The Roaring Days" in Wright D *Poetical Works of Henry Lawson* (Angus and Robertson, Sydney, 1925) p 11.

137 For a plain prerogative power perspective see Roberts-Wray K *op cit* p 116; for expansion on this statement of *ex facto jus oritus* see Roberts-Wray K, Chapter 5.

138 Recent creative approaches include: Hall GR "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) *Toronto Faculty of Law Review* 50:1 at 39; Lui G "Self-Government in the Torres Strait Islands" *op cit*; Corntassel JJ, Primeau TH "Indigenous Sovereignty and International Law: Revised Strategies for Pursuing Self-Determination" (1995) 17 *Human Rights Quarterly* 343; Hannum H *Autonomy, Sovereignty & Self-Determination: The Accomodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990); Werther GFA *Self-Determination in Western Democracies: Aboriginal Politics in A Comparative Perspective* (Greenwood Press, Westport, Connecticut, 1992); Otto D "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" (1995) 21 *Syracuse Journal of Inter-*

negotiations[139] followed by legislation, fine-tuned by an empathetic judiciary.[140] Constitutional entrenchment may need await a more enlightened electorate.[141] The point that bears reiteration about sovereignty is that it may carry an abundance of possibilities. The critical realisation however is that the term is not restricted to an absolute paradigm.[142] For this very reason authors like Street and Brazier suggest "jettisoning the word 'sovereignty' altogether as being too ambiguous."[143] Nevertheless, possibly no other word carries better with it the fundamental desire of peoples culturally in tune to exercise the maximum possible degree of control over their own destinies according to their own cultural dictates.

We as citizens of a liberal democracy believe we are entitled to justice. We are outraged if the system should deny us the opportunity to obtain such redress. We remain however conveniently oblivious to the foundation of this modern liberal democracy based upon invasion, dispossession and attempted genocide. The emergence of the common law has been noted many times as a unifying force. It may also be viewed as a liberating force. This is the view of legal scholar John Whyte: "[The common law] permitted the escape of individuals from serfdom and tutelage and allowed people to construct enforceable arrangements by which they ceased to be beholden to lord, canon or bishop. It allowed the breakdown of the fully organised society. In short, common law enabled the formation of new communities."[144] Haplessly for the indigenous peoples of Australia, the common law to date has proved to be more Shiva in the guise of the Destroyer rather than the Re-creator.

Brennan J observed in *Mabo* 2:

> It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the

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138—*Continued*
national Law and Com. 21; Macklem P "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford Law Review* 1311; Macklem P "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 *Queen's Law Journal* 73.

139 See eg Dodson M *Indigenous Social Justice: Regional Agreements* vol 2 A Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package, Sydney, Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995; *ATSIC Regional Agreements Seminar*, Cairns 29-31 May 1995; Fletcher *op cit.*

140 In both United States and Canadian precedent, construction of treaties and agreements favouring indigenous rights is well established. For US, see eg Wilkinson CF *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (Yale University Press, New Haven, 1987) pp 47-52, 104-105; for recent Canadian examples see *Jack* v *R* [1980] 29 SCR 244; *Simon* v *R* [1985] 2 SCR 387; *R* v *Sparrow* [1990] 1 SCR 1075.

141 Cf Canadian jurisprudence and constitutional progress in eg Henderson JY "Impowering Treaty Federalism" (1994) 58 *Saskatchewan Law Review* 241.

142 Steinberger *op cit* at 414; Walker D *op cit* pp 1163-1165.

143 *De Smith's Constitutional and Administrative Law* (5th ed) (Pelican, Harmondsworth, 1985) p 76; Benn SI "The Uses of 'Sovereignty' " (1955) *Political Studies III* No.2, 109; Nettheim (1988) *op cit.*

144 Whyte JD *op cit* at 62.

> Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.[145]

Brennan J, however, did not make the further observation that it was curiouser and curiouser to strip the indigenous "subjects" of their bedrock of sovereignty, viz, territorial integrity, and concomitant inherent rights to follow their own customs, values, ways and laws.

We need remind ourselves why in English legal history equity as a gloss to the common law arose. It was essentially because the common law was recognised as Procrustean and hence inappropriate to measure out justice. And so in time there may arise some new politico-legal or quasi-judicial structures that are not Procrustean-bound, that proceed on the basis that there are different realities and that justice for some indigenous peoples is a will-o-the-wisp if pursued within the confines of the current mainstream dominant politico-legal culture.

The orthodox belief is that the rule of law is at the foundation of our legal, political and social system. What the rule of law espouses is the virtue of equality, the same law for all;[146] no one irrespective of station in life is above the law. The doctrine denies the exercise of capriciousness, arbitrariness and idiosyncratic behaviour in the implementation of the law.[147] It is intended as a bulwark against tyranny. In the context of voluntary associations of peoples representing various cultures this is an admirable doctrine. It provides for principled order and strengthens cohesiveness with emphasis on consistency, stability and certainty. The inappropriateness of the doctrine arises where its imposition is in a colonial or post-colonial context and the essence of autochthonous cultures is relegated to near oblivion. The outward manifestations of these cultures, for instance, dance, music or art may be encouraged to survive and even to undergo some form of renascence. But the effect is intended to emasculate the subjugated cultures with the denial of sovereignty despite the plethora of possibilities of creative paradigms. Customary law which is at the heart of indigenous culture has proved too hard a nettle for the contemporary Australian legal system to grasp.[148] Australian political policy has never contem-

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145 *Mabo* 2, *op cit* at 39.

146 The public is constantly reminded of this eg Gordon M and Henderson I 1996. "Howard [John Howard Australian Prime Minister] ready to Take on States" *The Australian*, Wednesday April 3, at 1: " . . . we should understand that all are accountable before the laws of Australia and you have to treat all Australians equally" (lead article front page).

147 This by the way is on all fours with Blackburn's J assessment of the Yolgnu system as "a government of laws, and not of men" in *Milirrpum* v *Nabalco*, *op cit* at 267.

148 There has been nothing except piecemeal, ad hoc responses to the implementation of customary law as of this date (September 1996). See Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws*, Report No 31 (AGPS, Canberra, 1986); Crawford J "Legal Pluralism & the Indigenous Peoples of Australia" (1994) in Mendelsohn O, Upendra B (eds), *The Rights of Subordinated Peoples* (Oxford University Press, Delhi) p 178; Office of Indigenous Affairs. Department of the Prime Minister and Cabinet *Aboriginal Customary Laws: Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission* (AGPS, Canberra, 1994); Sarre R *Aboriginal Customary Law* Australasian Law Teachers Conference (La

plated legal pluralism. Characteristic of this stance are the observations of Sir Paul Hasluck: "The [1967] amendment to the Constitution certainly does not appear to me to mean that there shall be two different systems of law in Australia"[149] The application of policies of legal monism whether so intended or not moves towards cultural genocide of First Nations.[150] The dominant culture simply swamps the indigenous cultural values and in the process negates recognition of the worth of indigenous peoples. With a different mind-set there could be official and general support for indigenous agenda setting as to the direction indigenous cultural destinies might take. This is after all only within government rhetoric of self-determination. Yet even within the most liberal interpretations of the elastic boundaries that self-determination might develop, it must be remembered that acculturative forces will be at work. Swain poses it this way: "No people, however, can resist forever an ontological invasion."[151]

If indigenous peoples are successful in gaining the dignity of meaningful self-determination even within the restraints of a liberal democracy, this opens the way as to whether they "transcend the enticements of the alien 'cargo'[152] or whether they make conscious choices to go essentially in the same direction as the invading culture.[153]

Application of equality before the law is generally considered *sine qua non* of all versions of political liberalism. It is suggested however that this fine principle is not suitable for imposition on indigenous peoples who have never considered that they have ceded their sovereignty. How suitable is it if the legal systems of indigenous peoples have a different framework rooted in indigenous ontologies — what if justice is perceived to flow not from a compartmentalisation of functions but rather the perceptions are holistic? It continues the injustice to impose an alien legal system where the patrimony of the democratic state has been obtained through a brutal non-legal process: in this instance, what has been characterised as an act of state, which through the operation of the other bastion of the common law legal foundations, the separation of powers, currently enjoys immunity from legal challenge. Thus dispossessed the descendants of the original inhabitants now find themselves the

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148—*Continued*
Trobe University, Melbourne, 1995).

149 Address to Samuel Griffith Society, November 1992, cited in Griffiths M *Aboriginal Affairs: A Short History 1788-1995* (Kangaroo Press, Kenthurst NSW, 1995) p 239.

150 This is the nomenclature preferred by indigenous peoples in Canada but is starting to be used also in Australian contexts. See eg Foley S *The Badtjala People* (Thoorgine Eduational & Culture Centre Aboriginal Corporation, Hervey Bay, Queensland, 1994); Irene Watson writing on "First Nations" International Court of Justice: A Time to Begin" (1996) *Aboriginal Law Bulletin* 3:79 (April) at 9 is listed as a contributor as "a member of the Tanganekald Nation, part of the greater Ngarrindjeri Confederacy of First Nations Peoples" at 3.

151 Swain *op cit* at 291.

152 *Ibid.*

153 Cf Medcalf L *Law and Identity: Native Americans and the Legal Practice* (vol 62) (Sage Library of Social Research, Sage Publications, Beverly Hills, 1978).

beneficiaries of equality before the introduced law. In this process the notion of inherent *indigenous* rights becomes an affront to the dominant regime's commitment to this same doctrine of equality before the law.

The issue at stake may be framed solipsistically. Having dominated for more than two centuries what is now called Australia, can the dominating mainstream political, legal and constitutional systems make room for the "other"? Can the colonising "self" attiring itself in the garb of a western constitutional democracy with all of the fine virtues that that term connotes, having failed to exterminate the indigenous population, now make belated moves toward reconciliation?[154] But reconciliation if it is to accord with current government policy shifting from previous assimilative policies[155] to self-determination[156] requires at the least, if not a deconstruction of the present legal and constitutional frameworks,[157] an attitudinal deconstruction of cultural and/or racial prejudices which have their roots as far back as the earliest human histories.[158]

We may pose the question why has Australia pursued and now obtained legal and constitutional independence from Great Britain? The previously perceived ties whereby "Australians" were one with the "mother country" are obviously not sufficiently strong today to prevent the push for republican status. Are the similarities of Aboriginal and non-Aboriginal Australia so close, so culturally affinitive, that distinctness is seen as nonsense?

The gulf between the actuality of dispossession and the account of its legitimation,[159] including the act of state which by proclamation magically removes indigenous inherent rights, is immense; the sophistry which attempts to fill this void is demeaning of any concept surrounding the honour of the Crown and the majesty of the law. Puny judgments are delivered by puisne judges. Politicians working within a majoritarian system will not pursue with any passion issues of injustice which mistakenly are seen as pertaining to tiny minorities rather than to

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154 *Council for Aboriginal Reconciliation Act* 1991 (Cth); Lavery D "The Council for Aboriginal Reconciliation: When the CAR stops on Reconciliation Day will Indigenous Australians have gone Anywhere?" (1992) *Aboriginal Law Bulletin* 2:58 (October) 7-8; 1993 *Aboriginal Law Bulletin* 3:61 April (entire issue).

155 Barnes CE *The Australian Aborigines* (The Department of Territories, Sydney, 1967); Stone SN (ed) *Aborigines in White Australia: A Documentary History of the Attitudes Affecting Official Policy and the Australian Aborigine, 1697-1973* (Heinemann Educational Books, 1974).

156 Australia. House of Representatives Standing Committee on Aboriginal Affairs 1990. *Our Future Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources* (Canberra, Commonwealth of Australia); Jennett C "Aboriginal Affairs Policy" (1990) in Jennett C, Stewart RG (ed), *Hawke and Australian Public Policy: Consensus and Restructuring* (Macmillan Education Australia, Melbourne) p 245.

157 Cf Boyne R *Foucault & Derrida: The Other Side of Reason* (Unwin Hyman, London, 1990) particulary Ch 5, Post-hierarchical Politics.

158 See eg Rose P *The Subject is Race* (Oxford University Press, London, 1968) p 11.

159 See eg Vidich A, Glassman R (eds) *Conflict & Control: Challenge to Legitimacy of Modern Governments* (Sage Publications, Beverly Hills, 1979); Barker R *Political Legitimacy and the State* (Clarendon Press, Oxford, 1979).

"peoples".[160] No reform will eventuate until there is a growing and widespread recognition that the suppression of indigenous rights reflects a diminution of our own mainstream supposedly liberal values. Perhaps the legal educative starting point is an analysis of the rule of law[161] and its strengths as applied to a dominant, mainstream society *and* of its inappropriateness as applied to non-consenting, culturally distinct indigenous peoples who have never ceded their land nor their sovereignty.[162]

The legal history of Australia since 1770 amounts to the legitimation of a concatenation of arrogations. The totality of institutionalised racism erases the validity of indigenous sovereignty. It creates around indigenous revendication every pejorative association. Either at municipal or international fora, current mechanisms either do not exist or the barriers remain virtually insurmountable for successful claims of the recognition of inherent rights of indigenous sovereignty.[163]

When every argument and counter-argument has been raised concerning indigenous sovereignty, the staunch, democratic supporters of the rule of law are left to face the

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160 A large literature exists on the ramifications of the semantic differences arising from categorisation as minorities as opposed to "peoples". See eg Cobo J *Study of the Problem of Discrimination Against Indigenous Populations* (New York, United Nations, 1987). UN Doc E/CN4/Sub2/1986/7/Add4; Cristescu A *The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments* (New York, United Nations, 1981). UN DocE/CN4/Sub2/404/Rev1; Iorns C "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1981) *Case Western Reserve Journal of International Law* 24:2, 199; Pritchard S "International Law" *The Laws of Australia* (Law Book Company, Sydney, 1994) p 3; Goehring B *Indigenous Peoples Defined* (Purich Publishing, Saskatoon SK, 1993); Economic and Social Council 21 June 1995. United Nations, Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations. Thirteenth session; 24-28 July 1995; Item 4 of the provisional agenda: 'Standard-setting activities: Evolution of standards concerning the rights of indigenous people - New developments and general discussion of future action' Note by the Chairperson-Rapporteur of the Working Group on Indigenous populations, Ms Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples; Tomuschat C (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht, 1993); Brolmann C et al (eds) *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1993).

161 For a disparate set of responses as to what the rule of law reflects see: Hutchinson A and Monahan P *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987); Walker G de Q *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988); Bowring B "The Rule of Law as an Instrument of Oppression? Self-Determination and Human Rights in the New Latvia" (1994) 1 *Law and Critique* 69; see also Tatz C "Queensland's Aborigines: Natural Justice and the Rule of Law" (1963) *The Australian Quarterly* 35:3 (September) 33.

162 Eg "Organisation of Aboriginal Unity (OAU) Speaks Out" 1983 *Aboriginal Law Bulletin* 7 (April) 6-7; Coe P "The Struggle for Aboriginal Sovereignty" (1994) 13 *Social Alternatives* 10; "The Barunga Statement" 1988 *Land Rights News* 2:9 (July) at 26; Gilbert K *Aboriginal Sovereignty Justice The Law and Land [including Draft Treaty]* (Kevin Gilbert, Canberra, 1988); Miller B *Options for the Future: Local Government and Native Title on Queensland Aboriginal Communities* (Aboriginal Co-ordinating Council, Canberra, 1994) pp 59-60.

163 See eg the Human Rights Committee dealing with *Mikmaq Tribal Society* v *Canada*, UN Doc CCPR/C/43/D/205/1986 (1991). Note recent developments however in Watson I "First Nations" International Court of Justice: A Time to Begin" (1996) *Aboriginal Law Bulletin* 3:79 at 9.

quintessence of ironies: this fundamental principle is premised not on might preceding the claims of right yet unbridled power remains the juridical base upon which contemporary Australia is founded.