A GLOBAL VILLAGE?

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Tim Fischer takes on the Sami.

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This article focuses on the role of the Australian media in scrutinising statements made by politicians. It uses a case study of comments made by Australia's Deputy Prime Minister, Tim Fischer during debate on the Howard Government's proposed reform of the *Native Title Act* (the so-called '10-point plan' or 'Wik Bill'). The reforms proposed by the Howard Government would, if enacted, significantly diminish the rights of native title holders as they were defined by the High Court majority in the Wik decision. Deputy Prime Minister Fischer questioned the ability of a delegation of members of the European Parliament to question the Howard Government's treatment of Aboriginals given the failure of the European nations to adequately recognise the land rights of the indigenous Sami people of Scandinavia (inter alia).

This article suggests that while we live in an increasingly global village, the media in Australia has failed to utilise the resources available to it to scrutinise comments such as Fischer's. The media has a key role to play in evaluating the accuracy of such international comparisons. The media also has a key role to play in ensuring the information conveyed by politicians to the community is both accurate and sufficient.

The delegation

A protest was held outside Parliament House in Canberra on the day the Wik Bill was presented to the Senate. At least one member of the then visiting European Parliament Delegation to Australia gathered with Australian Aboriginal people and supporters of the Sea of Hands to protest against the Australian Government's amendments to the *Native Title Act 1993*. One delegate, Hugh Kerr, later wrote a letter to the *Australian* along the lines of 'tread carefully — Europe is watching.'[1] The Chairman of the European Parliament Delegation to Australia, Jim Nicholson, wrote to the *Australian* stating that Kerr as a delegate was not authorised to speak on *Wik* in that his views did not represent the views of the delegation or those of the European Parliament.[2]

In the Australian Parliament on the day the Bill went to the Senate, Tuesday, 25 November 1997, Deputy Prime Minister Tim Fischer was reported as saying that he would accept the presence of a European delegation like this at a time when Australia was dealing with indigenous land rights only when the Sami (Lapp) people had the right to claim over 70% of Scandinavia and the gypsies the right to claim much of other parts of Europe such as France and Germany.

Whatever one might think of the political astuteness of such a claim from the Trade Minister, it was one of the first occasions on which any other country's means of dealing with indigenous human rights has ever been raised in the Australian debate. Occasional references to other countries seem to have been restricted to comments along the lines of our not needing the 'Cappuccino Crowd' in Melbourne or Sydney, let alone the 'Champagne Charlies' and 'Machiato Mob' from Geneva telling us what to do. Mr Fischer at least dealt with the unwelcome

incursion of the outside world by recognising what seems to have been ignored in much recent governmental policy: that we live in a global community where similar issues have been confronted and dealt with. The statement could have been taken up by the media to suggest that perhaps looking elsewhere might break with the xenophobia that has increasingly dominated the Australian debate. Instead, Fisher 'acted the xenophobe'[3] and it was left to Kerr, despite the disclaimer of authority by the chairman of the European Parliament Delegation to Australia,[4] to defend his argument.

In his letter to the *Australian*, Hugh Kerr mentioned the comments by the Deputy Prime Minister in terms of 'the interesting experience of being attacked personally in Parliament.' Kerr noted that when he met Fischer later, he (Kerr) pointed out that with respect to any suggestion that Kerr keep his nose out of Australian problems and deal with the problems of gypsies in Czechoslovakia or Bosnia, neither are part of the European Union. However, Kerr considered that the main remarks Fischer had objected to concerned Kerr's argument that if Parliament passed the *Wik* bill and it was judged to be discriminatory, it would be 'bad for Australia's reputation in the world'.[5]

Tim Fischer's comments are indicative of the increasingly globalised nature of our world, and could have been taken up by the media to set the native title debate in a more international context. The Deputy Prime Minister's response was a curious one in the light of his earlier comments that native title is a domestic matter which should be resolved domestically in response to statements by Aboriginal leaders that they would seek support from bodies like the United Nations in their opposition to the Government's 10-point plan.

There are things about the Sami that our Deputy Prime Minister neglected to talk about. Yet only one mainstream Australian newspaper appears to have looked into the question.[6]

First, it could be noted that there is a difference between indigenous people (the Sami) and immigrants (gypsies) with respect to any possible land rights claims in Europe. The distinction between ownership of the land and traditional use of the land and protection of culture could have been drawn.

Secondly, surely the main issue is not the form of title per se, but how the rights of the Sami correspond to the rights which Australian Aboriginals would have under *Wik* or under the Commonwealth Government's 10-point plan amending the *Native Title Act 1993*.

If we accept that argument, then thirdly, the experience of the Nordic Sami people could be viewed as interesting because of a varying combination in the three relevant countries (Norway, Finland, Sweden) of a special regime which involves:

- laws guaranteeing the Sami a degree of autonomy (an elected body and Government funds);
- laws guaranteeing the preservation of the Sami language and culture;
- regulation of the traditional Sami means of livelihood practised on largely uninhabited lands categorised by the State as State property; and
- government interference or government-tolerated interference by private operators in the sphere of traditional Sami life.

The Scandinavian combination

Within Europe it is now widely recognised that indigenous people have a right to special cultural protection under international law. This has been translated into Scandinavian laws, drawing on the United Nations Covenant on Civil and Political Rights, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, and Protocol No. 3 to the Accession Treaty to the European Union (in the case of Finland and Sweden). Policies and programs have been put in place to maintain and strengthen Sami identity and culture.

Swedish adoption of the European Convention on Human Rights and membership of the European Union (in 1995) indirectly prompted certain human rights reforms. One. in particular, involved what has been called 'certain new (albeit weak) rights', including the right to primary and secondary school education, the right to engage in business activity, and the right of the minority Sami people to herd reindeer.[7] The right of the Sami has been characterised as a 'weak' right because that category of rights is formally recognised only to the extent that they must be in statute form.[8] The statute itself specifies the exact extent of the rights. Because they are limited in this way, Campbell has, therefore, seen these rights as 'constitutional' rights only in the 'most formal sense of the word.'[9] While the procedural protection in these rights is limited, they all involve substantive protection to varying degrees: they may prohibit certain types of restriction, for example, or prescribe only certain types of restriction.

Korsmo suggests that the 'major regulatory regime developed specifically for the Sami has been a series of reindeer management laws, beginning in 1886'.[10] The latest incarnation identifies a right of all Sami people which is the so-called reindeer herding right, based on time immemorial. This, however, entitles only those Sami living and working in the collective Sami village as full-time participants in the reindeer economy to exercise the right.[11] In reality, therefore, it covers only a small minority of the Sami although it does entail use of land and water for reindeer pasture, hunting and fishing.[12]

Related to this is another major Swedish issue. This concerns the legal dispute over the winter grazing lands in Harjedalen. The landowners took issue with the use of their land by Sami villages as winter feeding areas for the reindeer. The issue for the Court was whether the Sami reindeer herding right extends to privately owned land in Harjedalen. The argument of the Sami villages was that the right did encompass the winter pasture on the private property, having its basis in rights from time immemorial, custom, international law and in the fact that Sweden has recognised those rights in the reindeer management laws.[13]

The Sami argued that they were there on the territory first, using evidence from an archaeologist to support their case. The landowners used evidence from another archaeologist that cast sufficient doubt on the precise ethnicity indicated by the archaeological findings.[14] The Sami lost at the trial level and are supposed, therefore, to pay the landowners' legal fees. On one view, the landowners and large timber companies commenced the legal action by suing the Sami for exclusive rights to the forested areas because of the damage done to the property by the winter reindeer grazing. On another, more conceptual view, the judges 'could not connect beginning, middle, and end to their satisfaction; nor could they legitimize an out-of-state-time wholeness that would have

sublimated the frozen points on the ground into a vision of cultural continuity'.[15] It is precisely because *Mabo* allows for the acknowledgment that cultures change and adapt to major events and that this may by interpreted as incorporating the rights of the indigenous societies that the High Court decision has been praised by writers such as Korsmo in the comparative context of Sami rights.[16]

In Sweden there are currently plans for a new commission investigating the reindeer herding rights, particularly with respect to the legal position of the Sami in relation to the use of land and water. It is clear that part of the impetus for this is the ongoing tension between reindeer herding and other land use such as forestry. There is also a Commission looking into ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Swedish Government avoided ratification of the Convention earlier, arguing that Norway was ratifying it as a statement of intent rather than a statement of binding law, and Sweden would not sign it until it was in compliance. The issue has been under consideration for at least five years and the current commission is due to report shortly.

Norway, which has the largest number of Sami, included a 'Sami paragraph' in a constitutional amendment in 1988. Amendment 110a to the Norwegian Constitution made it the responsibility of the Norwegian state to ensure favourable conditions to enable the Sami population to maintain and develop its language, culture and social structures. One year earlier, Parliament had passed the *Sami Act*, which proposed the establishment of a Sami assembly and various proposals for Sami rights. With the constitutional amendment, the Sami Parliament may take up any issue deemed of importance for the Sami population.

The constitutional amendment in the 1980s made Sami and Norwegian the two peoples of one country and is framed in terms of a guarantee of their culture, including the material base: land, resources and seas. The Parliament is elected every four years by voters enrolled on the special Sami electoral register (which is effected by Sami declaring they speak Sami or have one parent/grandparent who can speak Sami) and opened in 1989. The Parliament has the role of defending the interests of the Sami, representing them in international forums, and most significantly, of ensuring that Norway fulfills its obligations to the indigenous population under international law.

In Norway, following on from the UN Covenant, the Norwegian state has changed the nature of its obligations in relation to the Sami people. The effect of the Norwegian legal changes is that the sum of the laws and decisions passed by Norwegian authorities — that is, the overall Norwegian Sami policy — must provide for the Sami people to safeguard and develop their cultural heritage. The King of Norway formally apologised to the Sami people for the 'Norwegianisation' policies of the 1950s.[17]

Perhaps by way of contrast to what appear relatively strong measures in Norway, there have been general policy provisions in lieu of real safeguards laid down by the government in Finland. Finland has the least number of Sami and high unemployment, and has experienced some problems between Finns, immigrants and Sami in the north. It is widely acknowledged that the ownership of traditional Sami lands in northernmost parts of Finland remains uncertain. Furthermore in Finland, there is no disputing that the Sami would like to have a larger right to rule their land, which is (in Finland) at the moment owned by the National Forestry Board.

However, several Finnish legislative enactments have specifically improved the position of the Sami people there. In 1991 the Parliament Act, a law of constitutional status, was amended by the insertion of a new provision (s.52A) which imposed a duty on Parliamentary Committees to hear the Sami in any matter of public consequence to them. An Act on the *Use of the Sami Language before Public Authorities* was also enacted in 1991.

In 1995 two major constitutional protections were extended to the Samis in Finland. With the first provision, an inclusion to s.14 of the *Constitution Act* relates to linguistic and cultural rights. By this provision, the Sami 'as an indigenous people' and other groups shall have the right to maintain and develop their own languages and cultures. The right of the Sami to use their language before authorities is to be prescribed by an Act of Parliament. Furthermore, the rights of those using sign language and of those who are in need of interpretation or translation because of disability is to be secured by an Act of Parliament.

The provision has clear links with the obligations under article 27 of the Covenant on Civil and Political Rights and is part of wider reform of Chapter II of the Finnish Constitution which relates to fundamental rights and freedoms. Another relevant constitutional provision is a new s.51 of the *Constitution Act* which provides that the Sami as an indigenous people shall be guaranteed cultural autonomy in respect of their language and culture, as specified by an Act of Parliament. The recognition of the traditional reindeer herding activity provides the Sami with the means of challenging activities undertaken on theoretically state-owned land administered by the National Forestry Board. So disputes have occurred in relation to logging activities in areas considered Sami homeland drawing on the protection of culture and traditional livelihood that has been recognised.

Use of knowledge

A further dimension to Scandinavian reforms is the concern with both indigenous territorial rights and the means by which recognition of those rights may protect and manage the environment. Part of the Finnish interpretation of the role of government, for example, has been to accord a central place to indigenous knowledge in the development of policies to protect particular areas. One such area is the Arctic. In Finland, it has been recognised *at governmental level* that over-harvesting, over-grazing and intensive tourism are threats to the arctic environment. In particular, it has been acknowledged that many activities in the Arctic have the potential to affect traditional land use and harvesting, herding, grazing land, and forests of indigenous people. For example, the traditional lifestyle of the indigenous people is indirectly affected through effects of activities on marine mammals, birds, or fish. These effects impact on not only the livelihood of the indigenous peoples but their entire way of life including the culture and the language.

Because many of these traditional resources are migratory, the guidelines to the Finnish Environment Institute Co-Operative Arctic Work acknowledge that a cumulative analysis must consider effects that occur along the migration route; further, that some activities may directly affect the harvest by interfering with subsistence hunting or fishing. The state does therefore try to enhance the participation of the Sami. This can be seen in forestry planning, physical land

use planning as well as conservation planning and will occur more and more in the future. The Sami people in Scandinavia and Kola peninsula form a Sami council, which is their political tool. Nationally they are also organised through Sami Councils and the national Sami Parliament, which is a Sami political structure that has been initiated in all three countries.[18]

Specific work has been undertaken in the circumpolar arctic. The Sami are the second largest group of indigenous peoples concerned with the area. The circumpolar work was, however, started by Finland in 1992, in Rovaniemi, where an Arctic Environmental Protection Strategy (AEPS) was signed. It is not legally binding but is otherwise relatively influential, since the ministers are the acting body every 1-2 years. In the AEPS, three indigenous peoples organisations have had a permanent participant status (Sami Council, Inuit Circumpolar Conference and AIPON, small indigenous peoples in the northern Russia). In Autumn 1996 the Arctic Council (AC) was formed and in summer 1997 the AEPS was integrated under the AC. The Arctic Council is seen as a real winning step for the indigenous peoples, since the three organisations mentioned before sit there with the same status as the eight arctic countries.

A Scandinavian summary

Generally, the Sami challenge to the claims of the Nordic states for sovereignty have until recent times been mainly concerned with traditional land use and ownership and the protection of cultural rights. Land usage, and in particular the traditional occupations of reindeer herding and husbandry, fishing and hunting, have been progressively translated into rights, and have provided a focus for further political activities. Ownership of the land has been less the issue than traditional use of the land and protection of culture.

With the according of protection to that traditional livelihood has come the possibility of restraining other, economic, activities that may be detrimental to the traditional livelihood. The point has been reached where the Sami have a right to comment on physical land use planning in the Sami Land. Their use of that right has varied. However, very often the Sami comment that they do not understand why someone else asks them to comment about the use of their land and that the land should be of Sami ownership. The status of hunting and fishing rights remains unclear. Further, as in Australia, there have been difficulties with respect to arguments about when culture begins, and difficulties in convincing courts and other members of the community that a particular activity falls within the scope of Aboriginal rights.[19]

So it is clear that there have in fact been bold starts and occasional retreats by Scandinavian governments, and that it is this which Tim Fischer pounced on when he made his comment that Australians might listen to European criticism when Sami rights were recognised. To date the Scandinavian governments have remained publicly silent regarding Fischer's comments. In an interview with Tromso's *Nordlys*, Norway's new Sami Parliament President, Sven Roald Nysto, said: 'I don't like Tim Fischer using us in this connection. That Europe treats indigenous people poorly isn't an excuse for the Australian Government to violate Aboriginal rights.'[20] He went on to say: 'I have a superficial knowledge of the conditions of the Australian indigenous peoples. I also have the impression that they live under tough social conditions. At the same time, I have the impression that they have had their rights to land and sea recognised in a far better way than the Samis.'

Nysto's point is a vital one which the Australian media could have taken up as part of scrutiny of Tim Fischer's comments. For it appears that in Scandinavia, traditional land usage has been acknowledged (particularly reindeer herding) and the Sami people can comment on land use. This is not to argue that rights of usage for reindeer herding and other traditional activities and right to comment on land use amount to any form of land ownership. For it is certainly apparent that the High Court decision in *Mabo* recognising native title to land has no comparable Scandinavian counterpart, and the closest to a formal recognition lies in cases brought under Article 27 of the International Covenant on Civil and Political Rights.

Thus the media could have scrutinised Tim Fischer's comments to indicate that there is an ongoing search for governmental resolution of a problem both Scandinavia and Australia face: the situation where the original inhabitants have gradually been deprived of their rights to the land and now, under the influence of modern ideas concerning indigenous peoples and ethnic minorities, are trying to recover their earlier position, at least in some respects. They could have drawn attention to the need for politico-legal standards guaranteeing the future of these territorially-based societies as political and cultural communities within contemporary nation-states. They could have noted the similarities in the clashes between traditional indigenous culture and local farm culture and the winding back of services to rural areas. They could have noted the similarities illustrated in this comment about Norway by Jull: 'A thousand years of northern settlement has neither assimilated Sami nor resolved development policies.'[21]

Yet in this area, as in so many others of vital public interest, the media failed to adequately scrutinise statements by one of our most important public figures. Another illustration of this failure to link Australia into the outside world can be found in the significance of the Multilateral Agreement on Investment (MAI) which has involved the Organisation for Economic Co-Operation and Development (OECD) Council of Ministers, who were scheduled to meet and sign the world's first MAI. The significance of the Multilateral Agreement on Investment, called by one commentator 'NAFTA on steroids',[22] for the purposes of this article lies in the related failure of the Australian media to scrutinise the process which had, until recently, looked likely to lead to its adoption. This reinforces the arguments advanced here about the importance of the media failure to scrutinise Tim Fischer's comments about the Sami or Lapp people.

Perhaps by way of conclusion it could be summarised that the rights of the Sami people in Scandinavia appear to amount to what we might call grazing use rights. If Mr Fischer liked, he could retaliate for what he perceives to be the unwarranted intrusion of any European Parliamentary member by suggesting to the various Scandinavian governments that they should deal with their own situation by upgrading the Sami grazing rights to freehold!

References

1. *Weekend Australian* 6-7 December 1997.
2. *Australian*, 10 December 1997.
3. Seccombe, 'From the Gallery' *Sydney Morning Herald*, 26 November 1997
4. Nicholson, J., 'Delegate not authorised to speak on Wik', *Australian* 10 December 1997.

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and to articulate certain common values. It recognised the First Nations, Quebec's distinct society, as well as racial and gender equality, among other characteristics. This section, called the 'Canada Clause', provoked vigorous debate. It must be emphasised that the Canadian Constitution has, since 1982, had an entrenched Charter of Rights and Freedoms which affords protection to all these groups. As the objective of the preamble was to provide guidance to the courts in their interpretation of the entire Constitution, no group wanted to be left out of the Canada Clause in case it provided double protection.

Commentators were divided on the necessity for, not to mention the consequences of, spelling out what we stand for. Would it lock us in to a set of values that future generations would reject? Should constitutions be a source of inspiration or a legal contract? Some argued that the preamble could serve as a statement of principles and play an educative role helping to socialise children and new immigrants. Others were afraid it would be a basis for claims of entitlement.

Discussion of the preamble in Australia was startlingly similar. Like Canada, there were two camps, the poetic and the prosaic. The former camp sees a preamble as a welcome mat of the Constitution, a section that contains aspirations and inspiration, and articulates fundamental values. In the other camp are those who fear that the courts will make a meal of it. As Professor Craven put it so colourfully, such statements in a preamble would be like lymph glands pumping their poisons right through the body of the Constitution thereby attracting judicial attention.

There was also a polarisation between minimalists and those who favoured wholesale change. It is not certain that a transition to a republic can be accomplished without a larger package which addresses broader concerns. Returning to the analogy of structural change, those who have renovated a house will appreciate that what might start out as a minor renovation to the kitchen soon spreads to other parts of the house. There are two reasons for this: first, the rest of the house might look tacky next to the brand new kitchen and second, it is better to put up with one major disruption than with a series of small ones. Opening up a Constitution for debate inevitably leads to 'big questions' that are almost cosmological in scope. In Australia, the conjunction of the millennium, the Olympics and the centenary of federation are driving these first order questions. Becoming a republic is becoming bound up with questions of identity.

In addition to these powerful forces is the temper of the times, that is, the growing desire of citizens to become involved. Discussions revolving around election of the new head of state illustrate this point.

While popularity of the notion of an elected head of state may demonstrate naiveté about how the system works, it is also symptomatic of a much deeper phenomenon. Many people want input into Constitution making, in part because they are cynical about representative institutions such as parliament and politicians, but also because they want to be engaged in important decisions. During the 1993 referendum campaign in Canada, an astounding number of people obtained copies of the Accord and demonstrated a voracious appetite for an explanation of its provisions.

The desire for meaningful input and the distrust of politicians is not confined to Canada and Australia. People are anxious about the pace of change and the apparent unwillingness on the part of governments to act on their behalf. These sentiments manifest themselves in a craving to reaffirm shared values and aspirations. Where better to place such a statement of principles than in the preamble to the highest law of the land?

Whether the people of Australia approve of the recommendations of the Convention remains to be seen. Whatever the outcome, the exercise has been a shot in the arm for the democratic process. I can only hope that Canada will follow the lead of its younger sibling. Big questions need to be debated and discussed openly. The people should have a conversation about the kind of country they want their children and grandchildren to inherit. At that stage, constitutional lawyers and political scientists can spring into action. Their task will be to articulate that vision in a way that satisfies the powerful urge for the Constitution to speak to the people in a language they understand.

References

1. Disillusionment flows from the belief that only an independent Quebec can provide nourishment to the French language and culture and that French-Canadians outside Quebec are doomed to be assimilated. Even within Quebec, French was vulnerable until provincial legislation made it the language of the workplace.
2. The hairsbreadth that separated the 'Yes' and the 'No' sides, 1.2%, shocked Canadians and delighted sovereignists who believe they will succeed next time.
3. Canada uses the first-past-the-post electoral system with candidates requiring only a plurality of votes to win a seat. This rarely translates into a minority government.

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11. Korsmo, F., above.
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19. Korsmo, F., above, p.3.
20. 19 January 1998.
21. Jull, above, p.25.
22. Richardson, C., 'The Multilateral Agreement on Investment', *46 Australian Rationalist* 22 at 22.