"The Consent of the Natives": Mabo and Indigenous Political Rights

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1. *Introduction*

The decision of Eddie Koiki Mabo to initiate a common law land claim in 1982, a claim decided by the High Court 10 years later, after the death of three of the five Murray Island plaintiffs including Mabo himself, represents a substantial pebble thrown into the pond of Australian public life which will continue to produce ripple effects for generations.

While the focus of the case was confined to land rights, there are elements in the judgments that will contribute to a resolution of other outstanding issues that go back to the Admiralty's 1768 instructions to Lieutenant James Cook. Those instructions included the following paragraphs:

> You are likewise to observe the genius, temper, disposition and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them presents of such trifles as they may value, inviting them to traffick, and shewing them every kind of civility and regard; taking care however not to suffer yourself to be surprized by them, but to be always on your guard against any accident.
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> 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.[1]

Cook found (but did not "discover") the eastern coast of Australia. He also encountered "natives" but neither sought nor obtained their consent to British assertions of sovereignty and British settlement. Aboriginal and Torres Strait Islanders continue to argue that they should regain powers of control over matters that concern their essential interests, and that "the consent of the natives" is a necessary prerequisite to decision-making on matters such as resource development or cultural heritage that affect their peoples. The issue is one involving the legal/political relationship between indigenous peoples and the non-indigenous society.

The decision of the High Court of Australia in *Mabo v the State of Queensland*[2] came at a particularly opportune time. It has the potential to be a

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1 McRae, H, Nettheim, G and Beacroft, L, *Aboriginal Legal Issues: Commentary and Materials* (1991) at 10.

2 (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1. (hereafter *Mabo (No 2)* with all page

key element in a much broader and decisive review of the political relationship between Australia and its Aboriginal peoples.

Other factors may also contribute to such a shift. At the national level they include the work of the Council for Aboriginal Reconciliation,[3] and the responses of governments to the report of the RoyalCommission into Aboriginal Deaths in Custody.[4] At State and Territory level, equally important developments may contribute, such as implementation of the recommendations of the Legislation Review Committee in Queensland,[5] or the protection of Aboriginal interests in a Northern Territory Constitution.[6] At the international level the United Nations Working Group on Indigenous Populations is expected to complete drafting in July-August 1993 of its Universal Declaration on the Rights of Indigenous Peoples.[7]

Among these (and other) developments, the *Mabo* decision not only lays a strong foundation for the recovery of land and the evolution of further important case law in that area, it also considerably strengthens the bargaining powers of Aboriginal and Torres Strait Islander peoples in the context of political negotiations. 1993 is the International Year for the World's Indigenous Peoples. The theme for the year is "Indigenous Peoples — A New Partnership".[8] Australia's indigenous peoples remain, on all relevant indicators, the weaker partner, but the *Mabo* decision provides them with some real strength. Aboriginal and Islander peoples are now able to address Australia from a basis of legal right rather than one of moral claim. Aboriginal and Torres Strait Island peoples have generally perceived their problems with nonindigenous Australia in terms of right and justice; other Australians have preferred to talk in terms of welfare.[9]

2. *Land Rights — Past Denial*

It is now clearly acknowledged that non-Aboriginal settlement in Australia proceeded on the basis that there was no need to deal with the indigenous inhabitants or even to acknowledge their laws, their rights or their interests. The judgments in the High Court themselves restate the assumptions which had characterised settlement, and then go on (in the case of the majority) to

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references to (1992) 107 ALR 1.

3 *Council for Aboriginal Reconciliation Act*, 1991 (Cth).

4 Johnston et al, *Royal Commission into Aboriginal Deaths in Custody — Final Report* (1991).

5 Legislation Review Committee Final Report, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland* (November 1991).

6 The Northern Territory Legislative Assembly's Committee on Constitutional Development has been presiding over discussions for several years and convened a conference in Darwin on 1 October 1992 on "Constitutional Change in the 90s". See also Loveday and McNab, *Australia's Seventh State* (1988).

7 Sanders, D, "The UN Working Group on Indigenous Populations" 11 *Human Rights Q* 406; UN Working Group on Indigenous Populations Tenth Session 20-31 July 1992 Geneva Switzerland. *The Australian Contribution* (1992).

8 Watson, I, "International Year for Indigenous Peoples" (1992) *59 Aboriginal L Bull* 11

9 Nettheim, G, "Justice or Handouts? Aboriginals, Law and Policy" in Hazlehurst, K M (ed), *Ivory Scales: Black Australia and the Law* (1987) at 8.

refute those assumptions and to declare the common law principles that should have been applied. According to Brennan J (with whom Mason CJ and McHugh J agreed) the blame for two centuries of dispossession lay not with the common law but with the exercise of executive power.[10] Toohey J also held that the common law, properly understood, supported recognition of traditional title.

The other three members of the Court took the view that the law had indeed denied Aboriginal title.[11] Deane and Gaudron JJ acknowledged that the law had accepted "the two propositions that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants",[12] and then proceeded to reject those propositions. Dawson J (dissenting) also held that the policy of denying or ignoring indigenous rights was embedded in the law but that it was not open to the courts to revise the policy or the law: "The policy which lay behind the legal regime was determined politically, and however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law".[13] If recognition is to be accorded to traditional land rights "the responsibility, both legal and moral, lies with the legislature and not with the courts".[14]

The issue of which aspect of government to blame for past dispossession is now irrelevant. The common law of Australia has now been authoritatively brought into line with the common law applied in other lands settled by the English — in Wales and Ireland, in Africa and Asia, in the Americas and the Pacific. Australia can no longer be associated with what Henry Reynolds described as "the distinctive and unenviable contribution of Australian jurisprudence to the history of the relations between Europeans and the indigenous people of the non-European world", namely the denial of "the right, even the fact, of possession".[15]

3. *Land Rights — Future Vulnerability*

Australian law now is able to recognise and even to protect Aboriginal title, but Australian governments are also able to continue the process of extinguishing Aboriginal title. The process began 205 years ago but continues to this day.

The common law right which the High Court has now acknowledged is vulnerable to extinguishment by or under legislation. This vulnerability is subject only, in the case of State legislation, to the limited "safety net" presented by any relevant Commonwealth legislation. In particular, the *Racial Discrimination Act* 1975 (Cth) proved critical in the *Mabo* litigation itself

10 Above n2 at 50.
11 Id at 143.
12 Id at 82.
13 Id at 111.
14 Id at 136.
15 Reynolds, H, *The Law of the Land* (1987) at 3-4.

when a four to three majority of the High Court held that s10 of the Act rendered ineffective a 1985 Queensland Act passed specifically to extinguish any land rights of Torres Strait Islanders that might otherwise be held to have survived annexation of the islands to Queensland in 1879.[16]

State and Territory governments, apparently at the request of mining interests in particular, have proposed to resolve uncertainties arising from the *Mabo* decision by legislation. The Northern Territory led the way by introducing into the Legislative Assembly a Confirmation of Titles to Land (Request) Bill 1993 on 3 March 1993.[17] The Bill requests the Commonwealth Parliament to pass an Act in, or substantially in, the terms set out in the Schedule (cl2(1)). The Schedule sets out the terms of the requested *Northern Territory (Confirmation of Titles to Land) Act* 1993. Under s6 the Act would apply "(a) notwithstanding any other law of the Commonwealth, the Northern Territory or a State; and (b) only in relation to a customary title which, but for this Act, was not extinguished by, or by action under, the grant of another title to land". It would validate every prior grant of title to land in the Territory and all NT laws granting or authorising grant of title to land since 31 October 1975 which would, but for the Act, have been, in whole or in part, invalid or ineffective. The requested Act would also validate future laws granting or authorising the grant of such titles. On the grant of any title which, otherwise, would be inconsistent with a customary title, the customary title becomes subject to the title to land, so granted, to the extent of any such inconsistency. The new title is valid and effective, and the person formerly entitled to the customary title is entitled to recover compensation from the Commonwealth.

Under s7 of the requested Act it is declared that the *Racial Discrimination Act* 1975 (Cth)

> does not have the effect, has never had the effect and shall not hereafter be treated as having or ever having had the effect, directly or indirectly, of invalidating, impairing or otherwise adversely affecting any title to land granted before or after the commencement of the Act.

Section 8 of the requested Act provides further detail about compensation.

In the campaign preceding the Federal Election on 13 March 1993 the National Party leader, Mr Fischer, initially expressed support for the NT legislation and for the enactment of Commonwealth legislation, but he subsequently retreated from this position in deference to the position stated by the Leader of the Opposition, Dr Hewson, and the Shadow Minister, Dr Wooldridge, that such legislation would be premature.[18]

The Federal Government had announced, on 27 October 1992, a series of consultations to culminate with a report in September 1993 concerning the issues arising from *Mabo*, and expressing a preference that any problems be

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16 *Mabo (No 1)* (1988) 166 CLR 186; (1989) 63 ALJR 84; (1988) 83 ALR 14 (hereafter all page references to (1988) 166 CLR 186.

17 Nason, D, "Perron Moves against Mabo" *The Australian* 4 March 1993 at 2.

18 Stevens, T and Nason, D, "Coalition's Mabo split widens" *The Australian* 26 February 1993 at 6; Stevens, T and Carbon, D, "Fischer retreats on Mabo draft Bill" *The Weekend Australian* 27-28 February 1993. Tickner, R, media release, "Further response to the NT Government on Mabo", 25 February 1993.

resolved by negotiation. The promised consultations initiated by the Prime Minister were to be with State and Territory governments, key Aboriginal and Torres Strait Islander organisations and the mining and pastoral industries.[19]

As regards the pastoral industry, the National Farmers Federation initially sought federal legislation to clarify the *Mabo* decision but then welcomed the Government's approach with its emphasis on negotiation.[20]

The Mining industry, however, seemed less prepared to accept this approach. Hugh Morgan of Western Mining Corporation declared:

> One of the early Bills a Coalition government must put to the Parliament, and if necessary to a double dissolution election, is either repeal of, or substantial amendment to, the *Racial Discrimination Act* 1975.[21]

Indeed, the press reports indicate that the precipitating factor for the introduction of the NT bill was the Chief Minister's concern to protect the giant McArthur River silver, lead and gold mine.[22]

Clearly, the Commonwealth legislation sought in the NT Request bill is designed, not to repeal the *Racial Discrimination Act* 1975 (Cth) but to roll it back as far as necessary to confirm past and future grants by the NT of interests to land which might otherwise be inconsistent with continuing native title. While some senior members of the federal Opposition Coalition seemed attracted by the proposal, the fact that others resisted it (at least for the time being), and the fact that the Opposition did not win government, does not alter the fact of the vulnerability of "native title". On 21 March 1993 the Northern Territory approach was commended in a joint media release by the Australian Chamber of Commerce and Industry, the Australian Chamber of Manufacturers, the Australian Mining Industry Council, the Australian Coal Association, the Business Council of Australia, the National Association of Forest Industries, and the National Fishing Industry Council.[23]

While the federal "safety net" remains as some protection against action at State and Territory level, a Commonwealth Parliament of whatever political persuasion could legislate at any time in such a way as to supersede the *Racial Discrimination Act's* protection.

In Canada, by contrast, the Constitution since 1982 has recognised and affirmed existing Aboriginal and treaty rights (s35) so as to provide some protection against their being overridden by ordinary legislation.

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19 Statement by the Prime Minister, Keating, P J, "Government response to High Court decision on native title" 27 October 1992; Tickner, R, Minister for Aboriginal and Torres Strait Islander Affairs, "Federal Government acts on Mabo decision" 27 October 1992. Hartcher, P, "Govt to act on 'native titles'" *SMH* 28 October 1992 at 1; Diaz, T, "Call for harmony on land claims" *SMH* 29 October 1992.

20 NFF News, "Mabo must be clarified" 20 October 1992; NFF News Release, "NFF welcomes Government's approach to Mabo" 28 October 1992.

21 Morgan, H W, "Mabo Reconsidered" *The Joe and Enid Lyons Memorial Lecture* 1992 Australian National University, 12 October 1992.

22 Nason, D, "Perron to fight Mabo mine threat" *The Australian* 24 February 1993.

23 Joint Media Release, "Business Calls for Urgent Response on Mabo" 21 March 1993. The statement was diplomatically worded, as was the response by the Minister for Aboriginal and Torres Strait Islander Affairs, Tickner, R, Media Release, "Response to Today's Statement on Mabo by Major Industry Groups", 21 March 1993.

4. *The Sovereignty Issue*

Generally, the members of the High Court in *Mabo* were at pains to avoid questions about the political relationship. While the majority felt able to decide that indigenous land rights survived Britain's acquisition of sovereignty over Australia, a number of the judges disavowed the court's capacity to decide on the legality of that acquisition of sovereignty. Yet, as Michael Mansell and others argue,[24] if Australia was not *terra nullius* in terms of land ownership, how could it have been terra nullius in terms of sovereignty? How could Britain have validly acquired sovereignty? Can indigenous sovereignty be said to survive?

Sovereignty was not an issue in *Mabo* except in the very limited sense of the plaintiffs' argument that any power to extinguish indigenous title belonged only to the "international sovereign" — Britain, succeeded by Australia, but never Queensland. The argument was not accepted.[25]

The sovereignty of Queensland and of Australia over Torres Strait islands had been contested in *Wacando v Commonwealth and Queensland*.[26] The argument turned, not on fundamental principles, but on discrepancies in nineteenth century Imperial and colonial instruments, but the High Court held that any problems had been cured by the *Colonial Boundaries Act* 1895 (UK).

The sovereignty issue had been argued on more fundamental grounds in *Coe v Commonwealth*[27] in conjunction with land rights arguments. The ultimate decision of the High Court was to affirm the decision of Mason J at first instance to refuse leave to amend the statement of claim. Two of the judges also commented on the tenability of the sovereignty argument.

It is worth noting that arguments about continuing indigenous sovereignty can take several forms. One, argued in *Coe*, is to assert indigenous sovereignty to the entire nation and to deny the sovereignty of the Australian state. A less confrontational argument, grounded in US jurisprudence, is to assert a continuing though subordinate sovereignty of particular indigenous nations and peoples while acknowledging the ultimate sovereignty of the settler state. One context in which these arguments has often been raised in Australia has been the criminal courts when Aboriginal defendants have challenged the jurisdiction of the settler court system to try them.[28]

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24 Mansell, M, "The Court Gives An Inch But Takes Another Mile" (1992) 57 *Aboriginal L Bull* 4.

25 Above n10 at 49 per Brennan J, at 84 per Deane and Gaudron JJ. Mason CJ and McHugh J agreed with Brennan J. Dawson J and Toohey J generally agreed that a power to extinguish native title belonged to State governments.

26 (1981) 148 CLR 1.

27 (1979) 53 ALJR 403.

28 *R v Murrell* (1836) Legge 72; *R v Bonjon* "Papers Relative to the Aborigines, Australian Colonies", 1844 British Parliamentary Papers, at 146ff; Irish University Press, Colonies, Australia, vol 18, cited in Hookey; *R v Wedge* [1976] 1 NSWLR 581; *R v Walker* (1989) 2 Qd R 79. Hookey, J, "Settlement and Sovereignty" in Hanks, P and Keon-Cohen, B (eds), *Aborigines and the Law* (1984) at 1. McRae, H, Nettheim, G and Beacroft, L, *Aboriginal Legal Issues: Commentary and Materials* (1991) at 94-100.

In *Coe*, Gibbs J firmly rejected the tenability, as well as the justiciability, of a sovereignty argument in either form. In regard to the more extreme version, he said:

> The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see *New South Wales v Commonwealth* (1975) 135 CLR 337 at 388, and cases there cited. If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an Aboriginal nation which has sovereignty over Australia, it cannot be supported.[29]

Jacobs J, too, rejected the "claim based on a sovereignty adverse to the Crown" saying that such issues "are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged".[30]

No such argument was raised in *Mabo* but members of the High Court took the opportunity to reiterate that the majority recognition that "native title" could continue after the assertion of British sovereignty did not carry with it any basis for challenge to that sovereignty.[31]

The correctness in the particular context of the proposition developed, particularly by Gibbs J, that the acquisition of sovereignty over Australia is non-justiciable has been questioned by Tasmanian Aboriginal lawyer Michael Mansell[32] and by the National Aboriginal and Islander Legal Services Secretariat.[33] While Henry Reynolds advanced the view that the "British claim of sovereignty over the whole of Australia between 1788 and 1829 was not surprising given the attitudes of European powers"[34] throughout the nineteenth century, it is possible to develop a cogent argument that the acquisition of British sovereignty over Australia without "the consent of the natives" was, even in the context of the time, contrary to both international and British law.[35] The problem remains one of finding a forum before which such an argument can be effectively asserted at this time.

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29 Above n27.

30 Id at at 409-410. The difficulties in asserting such a claim in the International Court of Justice are also formidable. Balkin, R, "International Law and Sovereign Rights of Indigenous Peoples" in Hocking, B (ed), *International Law and Aboriginal Human Rights* (1988) at 32-36.

31 Above n10 at 20 and 51, Brennan J; at 59, 71 Deane and Gaudron JJ; at 92, Dawson J.

32 Above n24.

33 Coe, P, "Statement on Behalf of the National Aboriginal and Islander Legal Services Secretariat" above n7 at 69.

34 Above n15 at 12-13.

35 Wallace-Bruce, N L, "Two Hundred Years On: A Re-examination of the Acquisition of Australia" (1989) 19(1) *Georgia J Int'l Comparative L* 87.

5. *"Domestic Dependant Nations"*

The alternative form of the sovereignty argument does not dispute the overall sovereignty of the Australian state but argues that the traditional powers of Aboriginal and Torres Strait Islander peoples to govern themselves continue as a form of sovereignty (albeit subordinate) within the overall Australian sovereignty. This derives directly from "the *Marshall cases*" decided by the US Supreme Court.[36] The proposition was accepted by Willis J in *Bonjon*[37] but rejected by the Full Supreme Court of New South Wales in *R v Murrell*.[38] In *Murrell* Burton J did not follow the US authorities because he took the view "that the Aborigines had not attained such a degree of institutional and political development as to justify the degree of recognition accorded to the Indian tribes".[39] In the words of Burton J:[40]

> Although it be granted that the Aboriginal natives of New Holland are entitled to be regarded as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers of civilisation and to such a form of government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own.

The suggested contrast between the institutional sophistication of native American tribes and Australian Aboriginal peoples was echoed in *Coe v Commonwealth* by Gibbs J in rejecting the subordinate form of the sovereignty argument:

> In fact, we were told in argument, it is intended to claim that there is an Aboriginal nation which has sovereignty over its own people, notwithstanding that they remain citizens of the Commonwealth; in other words, it is sought to treat the Aboriginal people of Australia as a domestic dependant nation, to use the expression which Marshall CJ applied to the Cherokee Nation of Indians: *Cherokee Nation v State of Georgia* (1831) 5 Pet 1, at 77. However, the history of the relationship between the white settlers and the Aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ, at 16, of the Cherokee Nation, that the Aboriginal people of Australia are organized as a "distinct political society separated from others", or that they have been uniformly treated as a state. The Aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an Aboriginal nation exercising sovereignty , even of a limited kind, is quite impossible in law to maintain.[41]

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36 Notably *Worcester v Georgia*, 31 US 515 (1832).

37 Papers Relative "Papers Relative to the Aborigines, Australian Colonies", *1844 British Parliamentary Papers*, at 146ff; Vol 8, cited in Hookey.

38 (1836) Legge 72.

39 Hookey, J,above n28 at 1 and 4.

40 Ibid.

41 Above n27.

Several comments may be made about this statement. One is that it responded to the statement of claim which had talked about an Aboriginal nation (singular), and rejected the proposition. It is not known whether the plaintiff, *Coe*, had the agreement of the various Aboriginal nations (plural) or peoples to the assertion of sovereignty in a single Aboriginal nation. The US cases recognise sovereignty as belonging to particular Indian nations, for example, Cherokee and Navajo, and do not postulate any pan-Indian entity.

A second point to note in the extract from Gibbs J is his reliance on the absence of "legislative, executive or judicial organs by which sovereignty might be exercised". This suggests that powers of self-government would only be recognised in the case of an Aboriginal "nation" which had institutional arrangements roughly comparable to those of modern European states. Clearly, even individual Aboriginal nations did not use such institutions, but nor did their relationships to land resemble those familiar to English property law: this was one reason for Blackburn J's rejection of the land rights claim in *Milirrpum v Nabalco Pty Ltd.*[42] Blackburn J's approach on this aspect was clearly rejected by the High Court in *Mabo*,[43] and it would be open to the Court to decide that forms of governance, too, do not need to resemble British models as a pre-requisite to recognition.

Another point made by Gibbs J in the extract from his judgment in *Coe* was that, if Aboriginal governmental organs did exist, they would have no powers except those conferred on them by Commonwealth, State or Territory laws. Again, the *Mabo* judgments suggest that this might be open to reconsideration insofar as the High Court accepted that the continuance of pre-existing rights requires no formal grant or act of recognition by the new sovereign.[44]

It is suggested, then, that the approach taken by the majority of the High Court in *Mabo* in regard to land rights is at least capable of being applied to acknowledge some forms of sovereignty or inherent powers of self-government in Aboriginal or Torres Strait Islander peoples that retain a sufficient degree of social cohesion. Recognition of such self-government rights would not challenge the overall sovereignty of the Australian state, and would not require the abandonment of traditional methods of social ordering in favour of "Western" models.

The Canadian experience is illuminating. In *R v Sioui*[45] Lamer J for the Supreme Court affirmed the historical acceptance by both Great Britain and France of the sovereign autonomy of Indian nations. A recent land claim in British Columbia asserts, in addition, the inherent right of self-government of the Gitskan-Wet'suwet'en peoples.[46] Since 1982 the Canadian Constitution

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42 (1971) 17 FLR 141 at 268-273.

43 Above n10 at 36-37 per Brennan J; at 62-64; Dawson J at 97 per Deane and Gaudron JJ; at 144-145, 146-150 per Toohey J.

44 Above n10 at 38-42 per Brennan J; at 76-77 per Deane and Gaudron JJ; at 142-144 per Toohey J; contra Dawson J, generally.

45 (1990) 70 DLR (4th) 427.

46 *Delgamuukw v Queen* (1991) 3 WWR 97. For comment (1987) 29 *Aboriginal L Bull* 15, (1991) 53 *Aboriginal L Bull* 7. While the action largely failed at first instance, leave was given to re-open the appeal hearing to permit the parties to address arguments based on the

has recognised and affirmed "existing Aboriginal and treaty rights". Efforts on behalf of aboriginal peoples since then have been directed to reaching agreement with federal, provincial and territory governments on a formulation of an inherent aboriginal right of self-government. Agreement was reached in October 1992 in *The Consensus Report on the Constitution* as part of a wider package of constitutional amendment proposals which, however, were rejected at referendum: the provisions relating to First Peoples are set out in Appendix A.[47]

6. *Self-determination: International Law*

In the meantime, indigenous peoples are placing continuing emphasis on the concept of self-determination under international law. The concept is relatively new but clearly encompasses a right to regain sovereignty or powers of self-government lost to colonial or other dominant nations. Assertion of a right to self-determination has been described as less problematic than invocations of sovereignty as a means by which Aboriginal peoples may regain some control over their own affairs.[48]

The right of self-determination finds expression in the Charter of the United Nations and in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants have an identical Article 1 which commences: "1.All peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development ..."

United Nations practice has been virtually to confine the right to self-determination to peoples in the "classic" colonial context of governance from a distant European power. For such peoples, self-determination came to be regarded as virtually synonymous with independence. Partly for this reason, national governments appear reluctant to extend the right of self-determination to other peoples, including indigenous peoples within independent states, for fear that acknowledgment of a right to self-determination would threaten the territorial integrity of established states.[49]

But self-determination is a process, and to concede a right to self-determination does not necessarily require that it lead to one particular outcome of that process, namely independence. The critical thing is the right of a people to make a free choice about their political/legal relationship with a State. A variety of other relationships may meet the needs of the indigenous

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Mabo decision from Australia.

47 Sanders, D, "Towards Aboriginal Self-Government: An Update on Canadian Constitutional Reform" (1992) 58 *Aboriginal L Bull* 12.

48 Barsh, R L, "Indigenous Peoples and the Rights to Self-determination in International Law" in Hocking, B (ed), *International Law and Aboriginal Human Rights* (1988) at 68.

49 There is an extensive literature on these issues. Two recent examples by Australian based scholars are Cass, D Z, "Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories" (1992) 18 *Syracuse J Int'l Law and Commerce* 21 and Iorns, C J, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty", (June 1992) *Case Western Reserve J Int'l L.*

people, from full integration to a variety of forms of autonomy within the State.[50] Full independence is likely to be sought only by peoples whose essential interests and human rights are not respected by the State.

The concept of self-determination is beginning to impinge on emerging international instruments relating to indigenous peoples. In 1989 the International Labour Organization completed revision of its earlier 1957 Convention No 107. The new Convention, No 169, is called *The Convention Concerning Indigenous and Tribal Peoples in Independent Countries.* It treated the question of self-determination with great caution and even qualified the titular reference to "Peoples" by Article 1(3): The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The language of the Convention is in procedural terms of "consultation" of indigenous peoples or of their "participation" in decisions affecting them. It stops short of acknowledging their right to "control" such matters or even to require their "consent", in other words, "self-determination". It has been subject to strong criticism from many indigenous peoples' organisations as inadequate to meet indigenous aspirations.[51]

Since 1982 there has been a United Nations Working Group on Indigenous Populations comprising five members of the expert Sub-Commission on Prevention of Discrimination and Protection of Minorities.[52] It is nearing completion of its most important mandate, the drafting of a Universal Declaration of the Rights of Indigenous Peoples. Its annual meetings in July in Geneva now involve large numbers of Government "observer delegations", Non-Government Organisations (NGOs) in consultative status with ECOSOC, and indigenous organisations, individuals and other experts. Some 615 people attended the 10th session in 1992.

Not surprisingly one of the most contentious issues concerns the draft language on self-determination. Many indigenous people demand that the right should be recognised. Many governments oppose it or at least insist on a qualifying reference that it does not extend to encompass any right to secession to sovereign independence.[53] (Key provisions of the draft emerging from the tenth session in 1993 are attached as Appendix B). Whatever the

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50 Hannum, H, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights.*

51 Nettheim, G, "International Law and Indigenous Political Rights: Yesterday, Today and Tomorrow" in Reynolds, H, and Nile, R (eds), *Indigenous Rights in the Pacific and North America: Race and Nation in the late Twentieth Century* (1992) at 13. Berman, H R, "The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No 107 at the 75th Session of the International Labour Conference 1988"(1988) 41 *The Review* (International Commission of Jurists) at 48; Swepston, L, "Response to Review 41 article in ILO Convention 107" (1989) 42 *The Review* (International Commission of Jurists) at 43.

52 Sanders, D, "The UN Working Group on Indigenous Populations" (1989) 11 *Human Rights Quarterly* 406.

53 Milner, C, "Statement on behalf of the Australian Delegation" in above n7 at 80; also O'Donohue, L, "Statement on behalf of the Aboriginal and Torres Strait Islander Commission" at 84.

form of the Working Group's final draft, it is likely to be subject to very close consideration by representatives of governments at higher levels of the United Nations system on its way to the General Assembly.[54]

7. *Self-determination: Australia*

At Geneva, the Australian Government has been reasonably supportive of Aboriginal and Torres Strait Islander claims to self-determination, albeit within Australia. The Government has also drawn attention to the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) as an exercise of self-determination, though Aboriginal non-government organisations tend to dispute this claim.[55]

Within Australia, too, Government Ministers are becoming less hesitant about the language of self-determination.[56] (Other phrases employed from time to time have included "self-government" and "self-management"). The Royal Commission Into Aboriginal Deaths in Custody in its final report placed considerable emphasis on self-determination as a means of addressing the underlying issues, devoting two chapters to exploring the concept within the Australian context.[57] The meaning attributed to the concept in the introduction to chapter 20 was that "what is involved is empowering Aboriginal people to make many of the decisions affecting their lives and to bring parties to meaningful negotiation about others".

While much of the discussion in recent times has proceeded at the national level, many of the problems in relationships between Aboriginal peoples and governments have traditionally arisen at State level and, indeed, at local government level. Just as positive responses can be sought from the Commonwealth Government, they can also be usefully sought from State and Territory governments. Two examples of possible developments will suffice.

Queensland long had the reputation of being Australia's "deep north" because of its discriminatory laws and oppressive reserve regimes.[58] Change began in the 1980s with legislation providing forms of land title for Aboriginal and Torres Strait Islander community councils. These were complemented by enactment of the *Community Services (Aborigines) Act* 1984 (Qld) and the *Community Services (Torres Strait) Act* 1984 (Qld).[59] The

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54 For a summary overview of International Law on the right of self-determination for indigenous peoples see Pritchard, S, "The Right of Indigenous Peoples to Self-Determination under International Law" (1992) 55 *Aboriginal L Bull* 4. See also Pritchard, S, "Declaration on Rights of Indigenous Peoples. Drafting nears completion in UN Working Group" (1993) 60 *Aboriginal L Bull* 9.

55 For a useful compilation of statements made by Australians at the 1992 session of the Working Group see above n7.

56 Hand, G, *Foundations for the Future* (1987)

57 Johnston et al, *Royal Commission into Aboriginal Deaths in Custody — Final Report* (1991) chapters 20 and 27. See also Report of the House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources* (1990). Brennan, F, "Aboriginal self-determination. The 'new partnership' of the 1990s" (April 1992) 17(2) *Alternative LJ* 53.

58 Nettheim, G, *Victims of the Law. Black Queenslanders Today* (1981).

Goss Government elected in 1989 secured enactment of the *Aboriginal Land Act* 1991 (Qld) and the *Torres Strait Islander Land Act* (1991) (Qld), which improved the land rights regime. It also set up a Legislation Review Committee of five Aboriginal and Torres Strait Islander people to review the community services legislation.

The Legislation Review Committee produced a discussion paper entitled "Towards Self-Government". The final report recommended a system of community self-government providing communities with choices at various levels. They can continue to operate under the *Community Services Act* or they may choose to adopt a constitution under proposed new legislation. If they pursue the latter option, a community may also choose to assume responsibility for any selection from a list of significant governmental functions and may choose to negotiate with State or local government for the performance of others.[60]

An even more far-reaching proposal from the Islander Co-ordinating Council representing Torres Strait Island communities in far North Queensland contemplates negotiation with both Commonwealth and State governments to establish a regional level of government.

In the NT there seemed to be possibilities of change to the long-running antagonistic relationship between Aboriginal communities and Land Councils and the Territory government, at least until the introduction of the Confirmation of Titles to Land (Request) Bill 1993 (NT). The Government had announced a new policy of seeking to negotiate (rather than to oppose) outstanding land claims under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and had participated in a recent negotiated agreement with representatives of the Jaywon people in respect of land for which a *Mabo* land claim was being proposed. The agreement provides NT freehold title to some of the land, allows a major mining development to proceed, and addresses a number of other issues.[61] In addition, the NT Legislative Assembly's Committee on Constitutional Development has been proceeding for several years to lead discussion on the evolution of a Territory Constitution which, it is suggested, would provide some recognition and protection for essential Aboriginal interests.[62] Presumably, such provisions will need to be negotiated with representatives of Aboriginal communities.

8. *Litigation, Negotiation, Reconciliation*

While other *Mabo*-style land claims have been announced and some even initiated,[63] the Commonwealth Government has set up a consultative

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59 The political evolution is traced and the legislation analysed in Brennan, F, *Land Rights Queensland Style. The Struggle for Aboriginal Self-Management* (1992).

60 Queensland, Legislation Review Committee, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland Final Report* (November 1991). Huggins, J and Beacroft, L, "The Final Report. Recommendations of the Legislation Review Committee" (1992) 55 *Aboriginal L Bull* 8.

61 Nason, D and AAP, "Blacks drop title claim to share gold mines riches" *The Australian* 11 January 1993.

62 Above n5.

mechanism with State and Territory Governments to develop processes for negotiation of land claims in preference to litigation.[64] If Canadian experience is indicative, it is likely that a number of potential claims through the court system will be resolved by negotiation. It is also likely that the settlements will address not only issues of land title and control of resources but also economic, social, environmental and a range of other considerations.[65] They will, indeed, be treaties under another name. Modern Canadian "comprehensive land claim settlements", including those yet to be negotiated, are treated as analogous to treaties so as to receive the constitutional protection accorded to "aboriginal and treaty rights".[66]

The Hawke Government, in response to the Barunga Statement from the Northern and Central Land Councils, promised to work for a negotiated treaty with Aboriginal people.[67] The treaty proposal was subsequently abandoned, partly because of Opposition parties' objections to the concept of an internal treaty. In place of that proposal bi-partisan support was won for the establishment of a Council for Aboriginal Reconciliation.[68] The 25 member appointed Council, comprising indigenous and non-indigenous Australians, is to perform a variety of tasks in the decade prior to the centenary of the Australian federation and is asked, among other things, to report whether reconciliation would be advanced by a formal document or documents. While it would be difficult to devise a single nation-wide instrument to meet the legitimate aspirations of the wide variety of Aboriginal and Torres Strait Islander communities, it is possible to contemplate a succinct statement of principles which would then be fleshed out in more detailed negotiations across the country. By these means "the consent of the natives" might finally be obtained.

Conclusion

The developments canvassed in this article relate to unfinished business concerning legal/political relationships between Aboriginal and Torres Strait Islander peoples and non-indigenous Australia. The *Mabo* decision did not deal with those relationships beyond the important issues of land rights. Many of these developments were also proceeding prior to, and independently of, the *Mabo* decision.

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63 Chamberlin, P and Hartcher, P, "Blacks launch four native land title claims" *SMH* 14 October 1992.

64 Tickner, R, Media Release, "Federal Government Acts on Mabo Decision", 17 October 1992.

65 Keon-Cohen and Morse, "Indigenous Land Rights in Australia and Canada" in Hanks, P and Keon-Cohen, B, *Aborigines and the Law* (1984) at 74.

66 *Constitution Act* 1982, s35(3).

67 *Above n1 at 317-320.*

68 *Council for Aboriginal Reconciliation Act*, 1991 (Cth). The Council issued an informative information kit in November 1992 which included, among other things, the Minister's Second Reading Speech, a paper "Aboriginal Reconciliation — An Historical Perspective" and an extract from Chapter 38 "The Process of Reconciliation" from the Final Report of the Royal Commission Into Aboriginal Deaths in Custody. For a detailed study of the underlying concept, see Brennan, F, *Sharing The Country. The Case for an Agreement between Black and White Australians* (1991).

How then does Mabo contribute to a resolution of outstanding issues at the legal/political level?

1. There are, as noted at above, aspects of the *Mabo* judgments on land rights which are capable of supporting judicial recognition of a subordinate level of sovereignty or an inherent right of self-government within Australia.
2. The possibility of "native title" existing in strategic parts of Australia is likely to strengthen immeasurably the bargaining position of some indigenous peoples and to lead to negotiated settlements in various parts of Australia which meet many important indigenous aspirations. The Mt Todd agreement is an early example. It also strengthens the clout of Aboriginal and Torres Strait Islander peoples at the national level in such exercises as the Reconciliation Process.
3. Commonwealth, State and Territory governments will be under some pressure to improve their legislation, for example, on land rights, cultural heritage, mining, and fisheries, if they wish Aboriginal and Torres Strait Islander peoples to work within that legislation rather than resorting to *Mabo*-based strategies based on their inherent rights. One early candidate for such legislative improvement is State and Territory legislation in relation to Aboriginal interests in National Parks. There may also be additional pressure for improved arrangements in NT and WA for the excision of Aboriginal community living areas from pastoral leaseholds.
4. The traditional reluctance of Australian governments to "let go" of Aboriginal communities and to allow them to run their own affairs (and even to make their own mistakes and waste money, as State governments have been known to do) may need to be moderated by the possible right of indigenous self-government.
5. The developments in International Law are of great potential significance. Even if governments manage to "fillet" the draft Universal Declaration of the Rights of Indigenous Peoples, there are sufficient elements in other international human rights instruments ratified by Australia to support important Aboriginal aspirations. In *Mabo* the International Convention on the Elimination of All Forms of Racial Discrimination was an influential element in the decision of majority judges to prefer, from among conflicting precedents, cases which did not involve racial discrimination.[69]

There are provisions in other Conventions ratified by Australia relevant to the position of indigenous peoples — the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The High Court has, in *Mabo* and other cases, shown its readiness to consider such material in resolving uncertainties about common law and statutory law. The fact that Australians now have a right of individual communication to the Human Rights Committee (under ICCPR), the Committee on the Elimination of Racial Discrimination (under CERD) and

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69 (1992) 175 CLR 1 at 29-30, 39-43, 57-58 Brennan J; 82-86, Deane and Gauron JJ.

the Committee Against Torture (CAT) can only serve to strengthen the willingness of Australian courts to listen to arguments based on the provisions of international human rights instruments.

It is unlikely that a single court decision will achieve for indigenous aspirations to self-government what the *Mabo* decision achieved for indigenous land rights, but the *Mabo* decision, coming at the time that it did, makes a significant contribution to moves occurring at a number of levels to address and to resolve the legal and political relationship between Aboriginal and Torres Strait Islander peoples and Australia. If resolution is achieved, it should be incorporated in the Commonwealth Constitution (possibly in time for its centenary) but also, usefully, in State and Territory Constitutions. The issues are, after all, Constitutional in the sense of going to the juridical foundations of the Australian nation.

Any effective resolution will require what the British Government required as long ago as 1768 — "the consent of the natives".

APPENDIX A

The Consensus Report on The Constitution (The Financial Post, Canada, 5 October 1992, 18-19)

IV First Peoples

Note: References to the territories will be added to the legal text with respect to this section, except where clearly inappropriate. Nothing in the amendments would extend the powers of the territorial legislatures.

A. THE INHERENT RIGHT OF SELF-GOVERNMENT

41. The Inherent Right of Self-Government

The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the *Constitution Act*, 1982, Section 35.1(1).

The recognition of the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada.

A contextual statement should be inserted in the Constitution, as follows:

> The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction:
>
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
>
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.

Before making any final determination of an issue arising from the inherent right of self-government, a court or tribunal should take into account the contextual statement referred to above, should enquire into the efforts that have been made to resolve the issue through negotiations and should be empowered to order the parties take such steps as are appropriate in the circumstances to effect a negotiated resolution.

42. Delayed Justiciability

The inherent right of self-government should be entrenched in the Constitution. However, its justiciability should be delayed for a five-year period through constitutional language and a political accord. (*)

Delaying the justiciability of the right should be coupled with a constitutional provision which would shield Aboriginal rights.

Delaying the justiciability of the right will not make the right contingent and will not affect existing Aboriginal and treaty rights.

The issue of special courts or tribunals should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to in item 53.(*)

43. Charter Issues

The *Canadian Charter of Rights and Freedoms* should apply immediately to governments of Aboriginal peoples.

A technical change should be made to the English text of sections 3, 4 and 5 of the *Canadian Charter of Rights and Freedoms* to ensure that it corresponds to the French text.

The legislative bodies of Aboriginal peoples should have access to Section 33 of the *Constitution Act*, 1982 (the notwithstanding clause) under conditions that are similar to those applying to Parliament and the provincial legislatures but which are appropriate to the circumstances of Aboriginal peoples and their legislative bodies.

44. Land

The specific constitutional provision on the inherent right and the specific constitutional provision on the commitment to negotiate land should not create new Aboriginal rights to land or derogate from existing aboriginal or treaty rights to land, except as provided for in self-government agreements.

B. METHOD OF EXERCISE OF THE RIGHT

45. Commitment to Negotiate

There should be a constitutional commitment by the federal and provincial governments and the Indian, Inuit and Métis peoples in the various regions and communities of Canada to negotiate in good faith with the objective of concluding agreements elaborating the relationship between Aboriginal governments and the other orders of government. The negotiations would focus on the implementation of the right of self-government including issues of jurisdiction, lands and resources, and economic and fiscal arrangements.

46. The Process of Negotiation

Political Accord on Negotiation and Implementation

A political accord should be developed to guide the process of self-government negotiations. (*)

Equity of Access

All Aboriginal peoples of Canada should have equitable access to the process of negotiation.

Trigger for Negotiations

Self-government negotiations should be initiated by the representatives of Aboriginal peoples when they are prepared to do so.

Provision for Non-Ethnic Governments

Self-government agreements may provide for self-government institutions which are open to the participation of all residents in a region covered by the agreement.

Provision for Different Circumstances

Self-government negotiations should take into consideration the different circumstances of the various Aboriginal peoples.

Provision for Agreements

Self-government agreements should be set out in future treaties, including land claims agreements or amendments to existing treaties, including land claims agreements. In addition, self-government agreements could be set out in other agreements which may contain a declaration that the rights of the Aboriginal peoples are treaty rights, within the meaning of Section 35(1) of the *Constitution Act*, 1982.

Ratification of Agreements

There should be an approval process for governments and Aboriginal peoples for self-government agreements, involving Parliament, the legislative assemblies of the relevant provinces and/or territories and the legislative bodies of the Aboriginal peoples. This principle should be expressed in the ratification procedures set out in the specific self-government agreements.

Non-Derogation Clause

There should be an explicit statement in the Constitution that the commitment to negotiate does not make the right of self-government contingent on negotiations or in any way affect the justiciability of the right of self-government.

Dispute Resolution Mechanism

To assist the negotiation process, a dispute resolution mechanism involving mediation and arbitration should be established. Details of this mechanism should be set out in a political accord. (*)

47. Legal Transition and Consistency of Laws

A constitutional provision should ensure that federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority.

A constitutional provision should ensure that a law passed by a government of Aboriginal peoples, or an assertion of its authority based on the inherent right provision may not be inconsistent with those laws which are essential to the preservation of peace, order and good government in Canada. However, this provision would not extend the legislative authority of Parliament or of the legislatures of the provinces.

48. Treaties

With respect to treaties with Aboriginal peoples, the Constitution should be amended as follows:

- treaty rights should be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which the specific treaties were negotiated;

- the Government of Canada should be committed to establishing and participating in good faith in a joint process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties. The governments of the provinces should also be committed, to the extent that they have jurisdiction, to participation in the above treaty process when invited by the government of Canada and the Aboriginal peoples concerned or where specified in a treaty;
- participants in this process should have regard, among other things and where appropriate, to the spirit and intent of the treaties as understood by Aboriginal peoples. It should be confirmed that all Aboriginal peoples that possess treaty rights shall have equitable access to this treaty process;
- it should be provided that these treaty amendments shall not extend the authority of any government or legislature, or affect the rights of Aboriginal peoples not party to the treaty concerned.

C. *ISSUES RELATED TO THE EXERCISE OF THE RIGHT*

49. Equity of Access to Section 35 Rights

The Constitution should provide that all of the Aboriginal peoples of Canada have access to those Aboriginal and treaty rights recognized and affirmed in Section 35 of the *Constitution Act*, 1982 that pertain to them.

50. Financing

Matters relating to the financing of governments of Aboriginal peoples should be dealt with in a political accord. The accord would commit the governments of Aboriginal peoples to:

- promoting equal opportunities for the well-being of all Aboriginal peoples;
- furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and
- providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.

It would also commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs and to meet the commitments listed above, taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of governments of Aboriginal peoples to raise revenues from their own sources.

The issues of financing and its possible inclusion in the Constitution should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to in item 53. (*)

51. Affirmative Action Programs

The Constitution should include a provision which authorizes governments of Aboriginal peoples to undertake affirmative action programs for socially and economically disadvantaged individuals or groups and programs for the advancement of Aboriginal languages and cultures.

52. Gender Equality

Section 35(4) of the *Constitution Act*, 1982, which guarantees existing Aboriginal and treaty rights equally to male and female persons, should be retained. The issue of gender equality should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to under item 53. (*)

53. Future Aboriginal Constitutional Process

The Constitution should be amended to provide for four future First Ministers' Conferences on Aboriginal constitutional matters beginning no later than 1996, and following every two years thereafter. These conferences would be in addition to any other First Ministers' Conferences required by the Constitution. The agendas of these conferences would include items identified in this report and items requested by Aboriginal peoples.

54. Section 91(24)

For greater certainty, a new provision should be added to the *Constitution Act*, 1867 to ensure that Section 91(24) applies to all Aboriginal peoples.

The new provision would not result in a reduction of existing expenditures by governments on Indians and Inuit or alter the fiduciary and treaty obligations of the federal government for Aboriginal peoples. This would be reflected in a political accord. (*)

55. Métis in Alberta/Section 91(24)

The Constitution should be amended to safeguard the legislative authority of the Government of Alberta for Métis and Métis Settlements lands. There was agreement to a proposed amendment to the Alberta Act that would constitutionally protect the status of the land held in fee simple by the Métis Settlements General Council under letters patent from Alberta.

56. Métis Nation Accord (*)

The federal government, the provinces of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the Métis National Council have agreed to enter into a legally binding, justiciable and enforceable accord on Métis Nation issues. Technical drafting of the Accord is being completed. The Accord sets out the obligations of the federal and provincial governments and the Métis Nation.

The Accord commits governments to negotiate: self-government agreements; lands and resources; the transfer of the portion of Aboriginal

programs and services available to Métis; and cost-sharing arrangements relating to Métis institutions, programs and services.

Provinces and the federal government agree not to reduce existing expenditures on Métis and other Aboriginal people as a result of the Accord or as a result of an amendment to Section 91(24). The Accord defines the Métis for the purposes of the Métis Nation Accord and commits governments to enumerate and register the Métis Nation.

APPENDIX B

Draft Universal Declaration on the Rights of Indigenous Peoples — E/CN.4/Sub.2/1992/33 pages 44-59

Preambular and Operative Paragraphs of the Draft Declaration as Agreed Upon by the Members of the Working Group at First Reading.

Thirteenth preambular paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens,

Fourteenth preambular paragraph

Noting that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Fifteenth preambular paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right of self-determination,

Sixteenth preambular paragraph

Encouraging States to comply with and effectively implement all international instruments as they apply to indigenous peoples, in consultation with the peoples concerned,

Seventeenth preambular paragraph

SOLEMNLY proclaims the following Declaration on the Rights of Indigenous Peoples:

PART I

Operative paragraph 1

Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government;

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity;

Operative paragraph 25

Indigenous peoples have the right to participate on an equal footing with all other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socioeconomic and cultural institutions, as appropriate, including in particular proper regard to, full recognition of and respect for indigenous laws, customs and practices;

Operative paragraph 26

Indigenous peoples have the right (a) to participate fully at all levels of government, through representatives chosen by themselves, in decisionmaking about and implementation of all national and international matters which may affect their rights, lives and destinies; (b) to be involved, through appropriate procedures, determined in consultation with them, in devising laws or administrative measures that may affect them directly. States have the duty to obtain their free and informed consent before implementing such measures;

Operative paragraph 27

Indigenous peoples have the right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, employment, social welfare in general, traditional and other economic and management activities, land and resources administration, environment and entry by nonmembers, and the environment, as well as internal taxation for financing these autonomous functions;

Operative paragraph 28

Indigenous peoples have the right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous peoples concerned for these purposes; States have the duty to recognize and respect the integrity of such institutions and their memberships;

Operative paragraph 29

Indigenous peoples have the right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms and with the rights contained in this declaration:

Operative paragraph 31

Indigenous peoples have the right to claim that States or their successors honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies, according to their original intent, or courts;

Operative paragraph 32

Indigenous peoples have the individual and collective right to access and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes with States. These procedures may include, as appropriate, negotiation, mediation, conciliation, arbitration or judicial settlement at national courts and, where domestic remedies have been exhausted, international and regional human rights review mechanism for complaints.