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Between Indigenous and Settler Governance

Edited by
Lisa Ford and Tim Rowse

ROUTLEDGE

Between Indigenous and Settler Governance

Between Indigenous and Settler Governance addresses the history, current development and future of indigenous self-governance in five settler-colonial nations: Australia, Canada, New Zealand, South Africa and the United States. Bringing together emerging scholars and leaders in the field of indigenous law and legal history, this collection offers a long-term view of the legal, political and administrative relationships between indigenous collectivities and nation states. Placing historical contingency and complexity at the center of analysis, the papers collected here examine in detail the process by which settler states both dissolved indigenous jurisdictions and left spaces – often unwittingly – for indigenous survival and corporate recovery. They emphasise the promise and the limits of modern opportunities for indigenous self-governance whilst showing how all the players in modern settler colonialism build on a shared and multifaceted past. Indigenous tradition is not the only source of the principles and practices of indigenous self-determination; the essays in this book explore some ways that the legal, philosophical and economic structures of settler colonial liberalism have shaped opportunities for indigenous autonomy. *Between Indigenous and Settler Governance* will interest all those concerned with indigenous peoples in settler-colonial nations.

Lisa Ford is a Senior Lecturer in History at the University of New South Wales.

Tim Rowse is a Professor at the University of Western Sydney.

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This volume had a long gestation. It began with a series of conversations with Anna Yeatman in early 2010 about the utility of bringing empirical methodologies to bear on the problem of indigenous self-determination in contemporary settler polities. Together we planned a symposium, and, using funds and facilities generously provided by the University of Western Sydney and the Centre of Citizenship and Public Policy, we brought together 17 scholars from around the world to engage with the messy anthropology, history, law and theory of indigenous–settler interactions in August of 2011.

The essays gathered in this volume all grew out of that meeting, and we extend special thanks to Anna Yeatman, Chris Tobin and the administrative staff of the erstwhile Centre of Citizenship and Public Policy for making it possible. The rigour of our contributions owes much to the critical engagement of the audience of our symposium, particularly our panel discussants, Sean Brennan, Chris Hilliard, Paul Patton and Anna Yeatman, and panel chairs, Saliha Belmessous, Megan Davis, Nick Kompridis, Sarah Maddison and Heidi Norman. We also thank the Honourable Margaret Wilson, who gave a paper in August 2011, but whose busy public schedule prevented her from publishing a chapter in our book.

Since August 2011, we have worked intensively with our contributors – and the scholarly and extremely concise essays gathered in this volume attest to their intellectual generosity and patience with that process. We also thank Colin Perrin and Melanie Fortmann-Brown of Routledge for their editorial assistance and Leah Grolman for lending her brilliant copy-editing skills to the task.

Lisa Ford and Tim Rowse

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Tim Rowse is a Professorial Fellow at the University of Western Sydney. He is the author of several books on Australian indigenous affairs, the most recent being (with Murray Goot) *Divided Nation? Indigenous affairs and the imagined public* (2007). He is currently studying the rise of a discourse of 'indigenous population' in Australia, Canada, New Zealand and the USA, 1760s–1930s.

Chapter 1

Locating indigenous self-determination in the margins of settler sovereignty

An introduction

Lisa Ford[1]

In 2007, Australia, Canada, New Zealand and the United States underscored their peculiar historical, legal and political interconnections. Despite the fact that they constitute the archetype of settler colonialism, the CANZUS states alone voted against the United Nations *Declaration on the Rights of Indigenous Peoples*. All four countries had relented and signed the document by 2010. Nevertheless, their 2007 objections are revealing. They argued that indigenous rights to self-determination and control of national resources fell within domestic rather than international jurisdiction; such rights were contingent on local democratic processes conducted under the legitimate authority of national settler sovereignties. Their dissent from the *Declaration* did not reflect a history of distinct severity in the treatment of indigenous peoples. On the contrary, the CANZUS states had long provided conditions that were conducive to the growth of a global movement for indigenous rights and their indigenous peoples, though still poor and oppressed, have fared much better than their counterparts in other parts of the world (Merlan 2009: 306–12). Rather, this paradox draws our attention to a key historical and legal continuity between North America and Australasian settler colonialism; indigenous recovery in these interconnected polities has taken place in the gaps and fissures of setter sovereignties – spaces that are historically emergent, fluid and contested.

This volume examines the history, current development and future of 'indigenous self-determination' in the CANZUS states. Though we deal only with Anglophone settler polities here, we note that 'indigenous' has become a global category, and that its boundaries are sometimes stretched by the politics of self-ascription, and at other times narrowed by rules of tribal membership (Gover 2010). By 'self-determination' we comprehend a broad range of indigenous collective action. Not only do we use 'self-determination' to describe independent, territorial sovereignty, we use it to refer to informal practices of corporate consultation and assertion, and to more formal treaty- or constitution-based recognition of tempered indigenous sovereignty or jurisdiction within settler states (Pitty and Smith 2011; Muehlebach 2003).

The work gathered here focuses chiefly on the period when technologies of settler governance intruded on indigenous life with new intimacy and persistence, from

the middle of the nineteenth century until the present. Our authors find that, even at their most racist and self-serving, settler states in Australasia and North America were complex institutions; their claims to jurisdiction, their efforts at dispossession, even their establishment of formal bureaucratic tyrannies over indigenous people were both presumptuous and unconsummated. This volume recovers some of the many different ways in which indigenous individuals and collectivities have crafted claims to equality, citizenship, difference, political autonomy and redress in the shadow of North American and Australasian settler sovereignties.

Our historical chapters find persistent pluralisms, where indigenous aspirations, collectivities and laws have continued and even structured the interaction of indigenous peoples with settler governments. Each suggests, in its way, that settler words like 'conversion,' 'guardianship,' 'protection' and 'assimilation' have obscured the breadth and resilience of modes of indigenous self-governance on missions, in reserves and in urban indigenous communities. Together they show that long after settler courts and parliaments defined and diminished indigenous jurisdictions, unexpected spaces remained open for some old and some very new modes of indigenous collective assertion. Some of these historical pluralisms are unsurprising: our contributors have recovered rich edifices of indigenous governance that set the rules of encounter on the trading frontiers of Canada, marshaled pan-Indian support in post-removal Indian Country in the United States and informed contemporary Māori–state engagements in New Zealand. Other modes of pluralism are unexpected: whether it be the enormously creative interaction between Christian conversion and indigenous resistance in nineteenth-century New Zealand and early twentieth-century Natal or the persistence of sorcery in contemporary Aboriginal communities.

Other chapters remind us that relationships between settler and indigenous governance are historically emergent – constantly reshaped both by historical context and by their ongoing interactions. Legal historians have clearly described the moment in the second quarter of the nineteenth century when CANZUS states predicated their sovereignty on exercises of jurisdiction over indigenous people in territory, markedly attenuating indigenous rights to govern themselves according to their own law (Ford 2010; Kercher 1995: 1–12; McHugh 2004). But some of our contributors suggest that this story is altogether too tidy. Settler states indulged in many moments of self-articulation. Before the nineteenth century, Vattel's *Law of Nations* convinced many that indigenous rights had no place in the law of nations. Other constitutive moments came later; for example, when British settler colonies were given legislative power over indigenous affairs, between the 1850s and 1890s.

Indeed, settler state making is still a work in progress. The exercise of settler jurisdiction over indigenous people remains patchy, and evolving definitions of indigenous governance and indigenous land rights by settler courts constantly redefine the relationship among sovereignty, territory and jurisdiction. The contemporary relationship of indigenous rights to land (*dominium*) and to autonomy or sovereignty (*imperium*) has yet to be resolved by philosophers and lawyers (McHugh 2011: 240–43). Their uncertain relationship is evident in shifting

Supreme Court definitions of the province of federal, state and Indian jurisdiction in the United States that have increasingly attenuated the capacity of long-established indigenous governments to govern Indian reservations. Meanwhile, the growing value of indigenous land claims in remote parts of Australia and Canada has proved even more challenging. On the one hand, indigenous land claims before settler courts have been predicated on ancient association, sacralized possession and corporate identity; even at their weakest, they subtly affirm indigenous corporate autonomy. On the other hand, mining booms and the ecological turn have transformed economic 'wastelands' into important sources of revenue, material bases that could be used to support much stronger institutions of governance among indigenous communities. Canadian and Australian courts in particular have yet to reconcile common law notions of 'property' with claims by Aborigines that they should be able to 'speak for country', regulate visitors, or negotiate with mining companies about access to mineral rights which have mostly been reserved to the Crown.

Nor is law the only mechanism through which indigenous collectivities have succeeded in altering the practices of settler statehood. Post-1960s reckonings with indigenous activism have resulted in the attenuation of executive and legislative policies of dispossession and assimilation in North America and Australasia. Since the 1960s, CANZUS states have all dabbled in self-determination, the recognition of their special duties to indigenous peoples and the return of tempered property rights to a lucky few indigenous communities. However, these ameliorative measures have always been ambivalent (Cronin 2007; Foley 2007; Kowal 2008) and in some ways have served to reaffirm settler sovereignties over indigenous peoples (McHugh 2011: 101). In recent decades, indigenous claims have slowly pushed CANZUS polities into a paradigm of negotiation which assumes the political or legal authority of indigenous collectivities to represent their members and to control resources. The neoliberal withdrawal of government has, arguably, made space for indigenous collective assertion by fostering mediated (if unequal) negotiations between indigenous peoples and mining corporations, even where indigenous peoples lack hard legal rights to the resources in play (Gover and Baird 2002; MacDonald and Muldoon 2006).

More challenging, perhaps, is this volume's engagement with the impact of the colonial encounter on indigenous people. Drawing on a rich, pan-colonial historiography stretching from Africa (Cooper 2005) to Australia (Attwood 1989), many chapters in this volume insist that, like their settler oppressors, indigenous peoples are themselves historically emergent as individuals and collectivities. There is no eternal indigene and, as Tim Rowse argues, perhaps it is time to stop weighing indigenous articulations of selfhood and collective rights against ahistorical categories of authenticity. Contact with Europeans changed indigenous life and indigenous people – not just in the realm of ideas, but in the material details of life. Indigenous peoples have crafted new subjectivities in the context of their Christian conversion which facilitated new collective assertions. Some indigenous people have adopted Western forms of government which have both

strengthened indigenous capacities for contemporary self-governance and goaded settler institutions into acts of further oppression. Settler contact opened new avenues for political discourse; as Bain Attwood pointed out some years ago, indigenous claims against settler states have probably always been hybrid discourses mediated through settler networks of people and of thought (Attwood 2003: xiii). Indeed, key indigenous intellectuals have accepted Western categories of thought about modernization, racial citizenship and assimilation and deployed them against settler oppression. Contemporary indigenous communities struggle to articulate their indigeneity through settler citizenship or, even more importantly, against rapidly changing economic structures that have reduced many indigenous people to welfare dependence, chronic illness and material want. At the same time, holders of the growing indigenous estate contend with each other about how to use, manage and dispose of their interests in land as conservators, culture-bearers and capitalists. The problem of reconciling this cacophony of indigenous subjectivities – capitalist, citizen, minority, Christian, pagan, hunter-gatherer, historical victim, repository of pre-contact culture and member of a semi-autonomous first people – forms one of the greatest problems of settler political theory and of contemporary indigenous politics (Anaya 2004; Anaya 1999; Kuper 2003; Rowse 1994; Waldron 1992; Waldron 2003). The historical remaking of indigenous peoples shapes and constrains their claims in dynamic interaction with the rich detritus of settler *and* indigenous custom, law and policy.

Every essay in this collection explores the messy array of gaps and perversities in settler regimes for indigenous governance. Together they illuminate the limitations and the possibilities of indigenous recovery historically, and in the face of ongoing dispossession and oppression. Some describe the emergence of new collectivities, new discourses and new practices that frame indigenous claims-making and self-determination to this day. Others have located and described those places in the margins of settler colonialism where the complexity of human interactions left space for indigenous peoples to express and adapt their corporate will and aspirations. These are tempered, circumscribed and problematic spaces. The most exciting essays here, it seems to me, explore how indigenous self-governance came to terms with settler sovereignty. They narrate histories of indigenous cultural and religious engagement, focus on past and present meeting points between laws, or find changing norms in the complexity of settler and indigenous practice that have created new places outside law for the expression of indigenous corporate ambitions. Indigenous collectivities have navigated multiple regimes of colonialism and bureaucratic management since 1800. Their successes and failures show that there are no inevitable or predetermined outcomes in the gap between settler and indigenous governance.

Chapter overviews

This volume starts with intellectual history. Ian Hunter criticizes an ahistorical tendency in postcolonial histories of early nineteenth-century indigenous–settler

relations – to cast legal pluralism on colonial frontiers as the performance of a moral colonial statecraft, as if diplomats and state-makers had worked within something resembling our understanding of the normative rules attending inter-state and quasi-state relations. Hunter invites us instead to understand the eighteenth-century law of nations in its own terms, according to its own distinct, historically situated morality. When Anglophone settler polities were most extensively settled, he reminds us, Vattel's *Law of Nations* vindicated the sovereignty of 'virtuous' nations, while refusing to apply standards of just conduct to relations between nations and, particularly, to relations with semi-sedentary indigenous peoples. Thus, Vattel's American admirers (including the drafters of the American Constitution) had no sense of legal obligation either to make or to honour treaties with American Indians. The extension of jurisdiction over indigenous people by the several states after 1800 and the diminished theory of indigenous sovereignty created by the Supreme Court in the 1820s and 1830s, were not moments of declension from admirable pluralism to unconscionable law. They marked the passing of the moral casuistry of the law of nations and the rise of the rule of law, imbued with its own tendencies to treat indigenous people unequally. In the history of settler–indigenous relationships, Hunter argues, the past provides no normative models; it serves only to explain the contemporary shape of our institutions and practices.

Paul McHugh and I describe a transformative moment in settler jurisprudence when the Crown – as erstwhile champion of native interests – disappeared into British colonial states. Responsibility for the management of indigenous peoples was transferred to Britain's settler colonies in the 1860s in response to settler agitation and new programs of protection and assimilation. This chapter focuses on a series of cases from New Zealand and Canada that redefined the relationship of the Crown (a new settler Crown) with indigenous peoples. Settler polities did not use their new legislative power to displace the Crown as the primary agent of indigenous–settler relations. Rather, with the collaboration of their courts, they reinterpreted the prerogative powers of the Crown in ways that made the Crown both more powerful and less accountable in its relationships with indigenous peoples. The Crown ceased to comprise a governor answerable to a distant empire, and 'shapeshifted' into a body of ministers and bureaucrats charged with managing indigenous people under a complex body of legislation outside the jurisdiction of courts. New Crown jurisprudence entangled indigenous people in a new web of relationships with anthropologists, missionaries and administrators that was always complex, oppressive and unequal, but could not extinguish indigenous people's collective aspirations.

We then cast back to three very different histories of pluralism – some stressing its promise, others its limits and cultural syncretism. Janna Promislow describes the quasi-legal negotiations surrounding the establishment of trading forts in Dene country in the McKenzie Valley in Canada's Northwest Territories. Histories of pluralism, she argues, too often focus on court battles about

jurisdiction. Informal, plural legal encounters also occurred on trading frontiers. Drawing from anthropology, ethnography and history, Promislow shows how we might use narratives of encounter between traders and various tribes in the region to recreate the indigenous rules of engagement that governed settler–indigenous relationships on Canada's trading frontiers.

Tim Garrison describes the very different syncretic structures of governance generated by a pan-Indian meeting organized by Cherokee John Ross in Tahlequah in 1843. Ross used hybrid European models to construct an international accord in Indian Country after the forcible removal of the Cherokee from the southeastern United States to the new trans-Mississippi Indian Territory. The meeting at Tahlequah was diplomatic theatre aimed at encroaching settlers, neighbouring indigenous tribes and Ross's rivals within the Cherokee nation. Like its pre-Removal state-making, Cherokee international diplomacy at Tahlequah was syncretic in nature, couching thoroughly Western notions of territorial sovereignty, extraterritorial jurisdiction and even cultural imperialism in the language and modes of post-contact indigenous treaty-making. While the resulting treaty was a qualified success, the proliferation of hybrid institutions in modern Indian Country attests to the success of Cherokee hybridity and Cherokee cultural imperialism in post-Removal United States.

Heather Douglas and Mark Finnane tell a contrasting history of pluralism in Australia. Long after Australian appellate courts ceased to consider indigenous people as self-governing peoples with their own laws, Australian bureaucracies and courts have left considerable latitude for indigenous law to punish crimes *inter se* (Finnane 2010; Finnane 2011: 244–59). Douglas and Finnane tell this story of pluralism through the reticence of settler courts to punish violence resulting from sorcery in indigenous communities from the mid-nineteenth century until the present. This is not a triumphal story of cultural survival, but a troubled story of social upheaval. Some anthropologists suggest that violence against alleged sorcerers has increased in indigenous communities in the face of chronic ill health and early death – it is itself an artefact of some of the worst impacts of settler colonialism on indigenous communities. Persistent legal pluralism, Douglas and Finnane remind us, is not always an uncomplicated good.

Our next series of chapters demonstrates how the effective plurality of colonial authority itself facilitated the survival of indigenous normative domains. In particular, it shows that while missions and states exercised authority over indigenous people, the concordance of their authorities was never assured. In this perspective, the missionary–indigenous encounter takes on particular significance in a history of indigenous self-assertion (cf. Comaroff and Comaroff 1991: 198–251; Elbourne 2003). Richard Boast and Norman Etherington investigate the ways in which missionaries acted (often unwittingly) to empower colonized peoples and to provoke conflict between missionaries and settler states. Boast notes the tremendous creativity attending Māori engagements with Christianity in New Zealand in the second half of the nineteenth century. Using the Anglican Christian Missionary Society's encounter with the Māori in southeastern Waikato

as a case study, he shows how some of the most devoted Māori converts to Anglicanism were radicalized by government oppression and Anglican ambivalence in the lead up to the New Zealand Land Wars. Multi-confessional evangelism, conversion and religious syncretism, he argues, are understudied elements of this crucial period of settler–indigenous conflict. The Christian encounter materially affected the form and nature of Māori collective resistance.

Norman Etherington, in our only chapter on Africa, contributes important comparative data about the complex relationship between Christian evangelism and settler colonialism in other Anglophone settler polities. His study of Natal at the turn of the twentieth century shows how well that state understood the radicalizing potential of missionary activity among Africans. While missionaries sought to transform indigenous culture, converts in southern Africa demanded 'more say in the conduct of church affairs' and used Christian conversion either to advocate for African supremacy or to secure positions of leadership in their communities. Both chapters suggest, in short, that missionary establishments were often sufficiently autonomous of state institutions to provide a space for individual and corporate indigenous agency.

This does not mean that the Christian encounter was not deeply transformative for indigenous peoples, as Tim Rowse points out in his exploration of the impact of Christian Universalism on the thought of four Australasian and North American indigenous activists in the nineteenth and early twentieth centuries. In a chapter that makes many readers uncomfortable, Rowse challenges us to move beyond assuming that Western categories of thought are always colonizing in nature and that 'real' indigenous people could only have employed them instrumentally or mimetically in the service of their people. Building on an important body of work, exemplified by the scholarship of Frederick Cooper, Rowse argues that his four historical subjects, Peter Jones (Canada, 1803–53), Charles Eastman (USA 1858–1939), Apirana Ngata (New Zealand 1874–1950) and William Cooper (Australia 1861–1941), sincerely advocated the Christian progress of indigenous peoples, with some, but not all, of the attendant 'virtues' of assimilation, agriculture and citizenship. They were remade men, seeking to create reformed indigenous collectivities in the settler colonial milieu.

As Rowse points out, for these intellectuals, innovations in economy were no less important than innovations in religious conviction and practice. Two micro-studies of Australian indigenous economy follow. The first follows neatly from Rowse's exposition of the material dimensions of indigenous ideological transformation: Diane Austin-Broos argues that the missionary encounter wrought ontological change on indigenous peoples. In her study of the Western Arrernte people, Austin-Broos describes the mundane materiality of their transformation from the late nineteenth century until the early 1970s by the ecological devastation of the desert by pastoralism and by the establishment of a Lutheran Mission on Arrernte country from 1877. A disastrous drought in the 1920s condensed these changes in a particularly – and for some, fatally – potent moment; Western Arrernte people flooded into the Lutheran mission where everything from the

permanent shade structures to the new disciplines of settlement (gardening, building, tanning, manufacturing handicrafts) transformed their relationship with the world. Mission life corroded hunter-gatherer economies and attenuated Arrernte ritual. Yet it altered rather than erased Arrernte collective aspirations – as their rapid dispersal to family-based 'country' in the post-1970s' self-determination era attests. The self-determination era in Australia wrought further economic transformation, replacing the missionary economy with a bureaucratic cash economy which has eroded local industries and resulted in widespread welfare dependence. This has weakened the economic base of indigenous collectivities; new institutions of corporate governance flail in the absence of viable economies to support them. Austin-Broos urges us to stop thinking about law and policy as if they had no material context in economy. Meaningful self-determination rises or falls on new and viable livelihoods for indigenous peoples.

Jon Altman's chapter also focuses on economy – but in the much broader context of the distribution and management of the indigenous land estate in the face of changing regimes of value. Altman reminds us that 22 per cent of Australia is held under some variant of indigenous tenure – from weak native title rights to fee simple granted under State or Territory land rights legislation. He notes several ironies about this estate. First, it is held by very few of Australia's indigenous people; most indigenous Australians live in cities or rural New South Wales and Victoria, where hardly any land rights have been acknowledged. Second, the indigenous estate exists only on unalienated land deemed too arid, too useless and too remote for agriculture, pastoralism or, until recently, mining. Third, the value of this estate is both contested and growing. New mining technologies and emerging regimes of value centering on conservation and tourism have presented new opportunities and risks to the owners of the indigenous estate. While indigenous rights to exploit subsurface minerals and national parks have been carefully circumscribed by legislation, negotiations over land use have nevertheless created a space for indigenous governance institutions. Yet, contradictory regimes of value have placed new pressures on indigenous proprietors as they debate how best to balance exploiting and preserving their increasingly valuable resource base.

Our penultimate section describes the impact of legal doctrine on the encounter between indigenous peoples and settler states since the 1960s. Kent McNeil traces the intersection between discourses of sovereignty and processes of redress in Australia, Canada and the United States. While McNeil accepts the 'fact' of settler sovereignty, he argues that it can and should make space for the semi-autonomous operation of indigenous law, particularly as it pertains to indigenous land holdings. The United States alone has created a jurisprudence which, however flawed, properly acknowledges indigenous corporate agency. Canadian case law is more ambivalent. In constrained ways, Aboriginal land rights regimes in Canada have tolerated indigenous jurisdiction over land and the people who traverse it, though this weak legal tolerance has been stretched and tested by informal exercises of jurisdiction by tribes in defiance of

the state (Alfred 2005; Simpson 2000). Alone of the CANZUS states, Australia's judges and legislators have insisted that the law rests on state and federal monopolies over sovereignty and jurisdiction. In Australian law and policy, then, rights of property ownership do not entail the right to govern people and territory.

In contrast to McNeil's comparatively positive appraisal of US law, Jacob Levy attacks the judge-made edifice of indigenous self-governance in the United States. Levy catalogues the corrosion of reservation governments' viability by a century of disruptive policy and half a century of thoughtless decision-making by the United States Supreme Court. In recent decades, successive courts have undermined the right of Indian reservation governments to govern the increasing number of non-Indians who live and work on Indian land. By effectively denying reservation governments criminal or civil jurisdiction over non-Indians, the Supreme Court has (practically, if not intentionally) made it difficult for tribal governments to welcome external investors and workers and has thus inhibited tribal economic growth, destroyed tribal tax bases and created enormous problems for law and order. Levy argues that Congress must intervene by constituting reservation governments as a formal level of government under federal sovereignty, subject to checks and balances appropriate to its jurisdiction over settler sojourners.

Shaunnagh Dorsett and Shaun McVeigh invite us to think jurisdictionally about the evolution of native title in Australian jurisprudence. While they acknowledge the primacy of settler jurisdiction, they argue that the very existence of common law native title affirms the existence and vitality of indigenous law in Australia. If we think jurisdictionally, common law native title and its 'definition' in s 223 of the *Native Title Act 1993* (Cth) can be understood as meeting points between indigenous and settler law – albeit meeting points that have been severely truncated by judicial interpretation of s 223, as illustrated by the Federal and High Courts' rejection of the Yorta Yorta Aboriginal Community's native title claim against the State of Victoria in the early 2000s. Dorsett and McVeigh argue that thinking jurisdictionally about native title makes us responsible for analyzing, and perhaps improving the quality of spaces of engagement between settler and indigenous law.

The final essays in the volume investigate the normative dimensions of individual and corporate indigenous agency in Australasia and North America. Carwyn Jones discusses the operation of Māori notions of law in contemporary New Zealand as Māori adapt and renew their relationship with New Zealand's state and society. Jones argues that the widespread use of the pōwhiri ceremony is not a meaningless formality, but a deep reassertion of the centrality of Māori law in New Zealand public life. The pōwhiri sets the terms of engagement among Māori and Pakeha in myriad contemporary forums. Jones shows how the Māori Party Constitution selectively renews aspects of indigenous law by endorsing core codes of behaviour (like manaakitanga – nurturing relationships) that should regulate their interactions with others in twenty-first-century public life. He also argues that Māori control of the allocation of resources to various groups

under resource settlements like the *Central North Island Forests Land Collective Settlement Act 2008* (NZ) has created a new space for the adaptation and application of Māori rules like manaakitanga, mutual respect for mana (spiritual authority) and building kotahitanga (unity).

In the final chapter, Kirsty Gover distills a political theory of settler–indigenous engagement from the empirical complexity of executive–indigenous relationships. Where Paul McHugh and I have described historical declension in the quality of indigenous–Crown relationships between 1860 and 1931, Gover finds a space for indigenous corporate recovery in the jurisprudence of the settler Crown. While settler law hesitates to recognize the sovereignty of indigenous tribes, Gover argues that the revived doctrine of domestic dependence in the post-civil rights United States, the emergence of a jurisprudence of Crown honour and fiduciary obligation in Canada and New Zealand, and even the much more decentralized emergence of collective engagements between aspiring indigenous land-claimants and corporations under federal legislative regimes in Australia, illustrate an emerging paradigm governing engagements between settler states and indigenous collectivities. While this paradigm is political rather than legal in nature, it recognizes the 'social fact' of partial indigenous autonomy within settler sovereignty. Gover uses her model to evaluate the sticky issue of tribal self-composition – whether tribes can exclude adopted children from the benefits of tribal membership on the basis of their ethnicity. She suggests that liberal philosophy cannot determine the constitution of any quasi-autonomous polity, so indigenous peoples must be entitled to constitute themselves illiberally. However, it may be morally incumbent on them to participate voluntarily in what Jeremy Webber has called 'mutual accommodation over the very long term' with settler states (Webber 2000: 70).

Concluding reflections

Together, the chapters in this book tell a series of complex stories about the encounter between indigenous collectivities and emerging settler states. Some find strong continuities – in doctrines of executive action, quasi-state relationships, missionary attitudes and discourses of civilization and of racial citizenship. Most tell grounded, local stories about the adaptation of indigenous groups to processes of settler colonialism. In their adoption of institutions, habits of mind and practices, in their reconstitution as groups, in their recasting of claims, and in their new emphases on tradition, indigenous people have filled the confined spaces left for them within Anglophone settler sovereignties with collective and individual aspirations.

As a historian, I instinctively reject the task of drawing the colourful threads of this volume into some call to action, some single future for indigenous governance. These stories deliberately confound synthesis. Their single message, if they have one, is this: describing and evaluating relationships between settler and indigenous governance is an inescapably empirical project.

It seems to me that empiricism deals more honestly, and sometimes more usefully, than theories of liberalism or settler colonialism with the historical, legal and political detritus that constrains our reality. To this end, the work gathered here collectively rejects the notions that settler states were ever total institutions and that settler colonialism is a structure bent inexorably on dispossession, subordination, erasure or extinction (cf Wolfe 1999; Wolfe 2007). Instead, this volume demonstrates the contingency and incompleteness of settler states and their collective, indigenous interlocutors, and it insists on the constitutive nature of their interactions, however unequal. These essays also avoid the abstractions of normative liberal theory. Scholars such as Will Kymlicka (see, eg, 1995; 2002) have crafted important justifications for special indigenous collective claims in and against ideal liberal democracies – work that has influenced scholars, policymakers and lawyers throughout Australasia and North America. Our essays build on these theories but focus instead on the complexity of constructing categories like citizenship, autonomy, self-determination and restitution in time, place and divergent aggregates of law, culture and politics.

Denis Galligan argued recently for a rapprochement between theoretical abstraction and empirical research in law. He argued that a range of theoretical and empirical problems, from the meaning of sovereign authority to the evaluation of local administration of justice, can be better understood by combining philosophical and empirical methodologies (Galligan 2010). The complex puzzle of incorporating indigenous claims for corporate autonomy and redress into the modern, liberal democracies that span Australasia and North America provides the perfect case in point. It is a puzzle comprised of competing notions of abstract justice, to be sure. But these abstractions always exist in tension with more mundane institutions and practices, including common law doctrine, legislation, bureaucratic practice, racism, cultural syncretism, social transformation, political opportunism, economic hardship and ecological diversity. Only by describing their history, their anthropology, their ideology and their practice can we fathom the myriad relationships between settler and indigenous governance in North America and Australasia.

Chapter 2

Vattel in revolutionary America

From the rules of war to the rule of law

Ian Hunter

Introduction

A good deal of the recent scholarship on the role of law in colonial contexts presumes that the initial contact between European and indigenous peoples was law-governed and thus potentially just.[1] Scholars contend that this legal negotiation was swept away later by tides of European land hunger, racism and political domination, to be replaced by a law corrupted by the colonial state. Some scholars have located the overarching norms of this original legality in a broad humanitarianism (Banner 2005a); others have ascribed it to the tradition of natural law (Kercher 2002; Malbon 1997; Reynolds 1996: 40–56; Reynolds 2003: 14–35). More recently it has been described as an initial acceptance of legal pluralism respectful of both indigenous and European law (Ford 2010; Ford and Salter 2008). All agree, though, that the promise of lawful and just relations between European and indigenous peoples was betrayed by a racist acquisitiveness supported by a lawless politics. Apparently this has left modern settler societies haunted by bad faith, hypocrisy and a guilty 'whispering in the hearts', reminding them of their betrayal of their own legal and moral heritage (Reynolds 1998). It turns out, however, that this darkest of clouds has the brightest of silver linings, since in the remnant light cast by still-uncorrupted legal norms jurists can propose to rectify the long injustice of colonial history, while historians can provide 'juridical histories' of the corruption of law that are oriented to its future restoration (Sharp 1997).

In this chapter, I sketch an historical argument for a different way of understanding the place of law in the context of colonial state-building, taking my methodological lead from an array of primarily New Zealand and Australian scholarship (Boast 2008; Hickford 2006; McHugh 2004; McHugh 2009; Pocock 2005; Sharp and McHugh 2001; Ward 2003; Ward 2006; Ward 2008). By investigating the writings of the American revolutionary statesmen-intellectuals, I argue that these state-builders did not operate within milieux governed by overarching norms of justice: norms that they betrayed and that we might restore. On the contrary, during the 1780s and 1790s these statesmen worked within a tradition of political thought whose central premise was that the actions

of states – engaged in warfare, conquest, annexation and colonization – are not subject to an overarching principle of justice. While their actions are indeed governed by customs and conventions, states are not themselves subject to the jurisdictions established within them. This form of thought belonged to the European tradition of *jus gentium* – the right of nations – to which the American founding fathers had access through its most influential compendium, Emer de Vattel's *Law of Nations* (Armitage 2007: 38–42; Armitage 2011).

In what follows I will show that the American revolutionaries' use of Vattel to justify American sovereignty and domain on the basis of warfare and conquest was not symptomatic of the corruption of European justice through its use to dispossess and colonize extra-European peoples. Rather, their use of Vattel indicates that European statecraft had long ago rejected justice as a principle for ordering the relations between *European* nations (Koskenniemi 2010), and had accepted the permissibility of conquest and the assimilation of conquered peoples *within Europe* (Korman 1996: 41–66). Far from betraying a higher law that might have included Europeans and indigenous peoples within an overarching (possibly pluralistic) jurisdiction, in using the Vattelian law of nations to justify their conquest and dispossession of the American Indians, the revolutionary statesmen were testifying to the absence of any such overarching law and jurisdiction, not just in the colonies but pre-eminently in Europe itself. Only later, when the discourse on sovereignty passed into the mouths of common lawyers, would conquest become an unspeakable justification.

Vattel's law of nations

The reason that the founding fathers made such intensive use of Vattel's *Law of Nations* from the 1770s through the 1790s was that it contained two components of great utility to statesmen engaged in revolutionary state formation, constitution building, internal colonization, and international war and diplomacy: a model of the domestic state as a virtuous republic (Book I); and a compendium of rules, conventions and treaties for managing international relations (Books II–VI). At the level of the domestic state, Vattel worked up an array of political, economic and religious policies into a model or theory of the virtuous republic by using a hand-me-down version of Thomistic natural law, in the form that he found it in Christian Wolff. At the centre of this metaphysical style of natural law lies the doctrine that human nature is imbued with various latent goods or virtues, the rules for the perfection of which constitute natural law, with justice being understood in terms of conduct that accords with this natural law (Brett 1997: 88–122; Schwab 2006). Using this construction to model the nation, Vattel argues that if by natural law individuals are required to perfect their natural goods or cultivate their virtues then, as collective individuals, so too are nations, who emerge here as corporate 'nation-persons' (Vattel 2008: 85–91). In this manner Vattel is able to present agriculture, commerce, (Protestant) religion, policing and military service as natural law virtues, the cultivation of which is the

condition of citizenship and rulership in the republic, the republic being conceived as a unified nation-person seated in a national country (*pays*) or fatherland (*patrie*). This model of the virtuous republic had initially been elicited for nation-building purposes in Switzerland, where the division of the country into Protestant and Catholic cantons had led to short-lived religious civil wars in 1656 and 1712, and where the conception of a supra-confessional moral republic recommended itself as a unifying model of the nation (Lau 2008). Vattel's conception of the nation as an autonomous self-perfecting republic would have its greatest effects in revolutionary America, however, where it provided the language for the United States Declaration of Independence (Armitage 2007: 38–42; Armitage 2011), and was put to work as a countervailing model of national unity against the language of states' rights (Madison and Jefferson 1835: 140–41).

More important for present purposes, though, is Vattel's transposition of this model into the register of international relations, for this holds the key to his suspension of international justice. Here Vattel's argument is that while it is true that the natural law requires individuals to perfect and preserve their natures, this only gives rise to justice at the level of the national state, whose civil law embodies the form of natural right. Since, however, each nation possesses its own corporate moral nature which it is obliged to preserve and perfect, and since it thereby possesses the sovereign right to determine how best to do this and thence to determine what is just for it, nations themselves cannot be subject to justice in their relations to each other. This would amount to infringing their sovereignty as corporate moral persons:

> Each nation in fact maintains that she has justice on her side in every dispute that happens to arise; and it does not belong to either of the parties interested, or to other nations, to pronounce a judgment on the contested question. The party who is in the wrong is guilty of a crime against her own *conscience*; but as there exists a possibility that she may perhaps have justice on her side, we cannot accuse her of violating the laws of society.
>
> (Vattel 2008: 76)

As a result, says Vattel, when it comes to adjudicating such concrete diplomatic issues as who is responsible for breaching a peace treaty, this cannot be decided on the basis of who is in the right or has justice on their side:

> But here it is proper to recall to mind what we have more than once observed – namely, that nations acknowledge no common judge on earth – that they cannot mutually condemn each other without appeal – and, finally, that they are bound to act in their quarrels as if each was equally in the right.
>
> (Vattel 2008: 674)

Vattel fills the space vacated by universal justice and the doctrine of just war with a compendium of rules, conventions and treaties covering myriad issues – war declarations and peace negotiations, treaty interpretation and war

reparations, the status of belligerents, neutrals and civilians, the rules of blockade, the immunities of ambassadors, and many more – which in fact constitute the 'voluntary law of nations' (Vattel 2008: 16–17). War is thus no longer just or unjust, but regular or irregular, which means undertaken in accordance with a set of rules – that it should be declared by a sovereign, publicly, and on the basis of a claimed national injury – which allow all warring sovereigns to be regarded as equally just. Sovereign states are consequently viewed as existing under conditions of permanent enmity and the threat of annihilation. Further, since the rules of regular war now provide justification for the actions of nations, the conquest of one nation by another in a regular war – including the dismantling of its government and the assimilation of its people – is justified under the law of nations:

> Every acquisition, therefore, which has been made in regular warfare, is valid according to the voluntary law of nations, independently of the justice of the cause, and the reasons which may have induced the conqueror to assume the property of what he has taken. Accordingly, nations have ever esteemed conquest a lawful title ….
>
> (Vattel 2008: 594)

The whole thrust of Vattel's handbook is to suspend the principle of universal justice and to derive the rules of the law of nations from diplomatic agreements and conventions. As a result, the judgments based on these rules are situational in a double sense: in being geared to particular circumstances rather than derived from a general principle; and in being dependent on the national diplomatic or political perspective from which the circumstances are assessed. Vattel's law of nations therefore operates not as a moral philosophy but as diplomatic casuistry, in the sense that it presumes conflict between fundamental principles and accepts that the application of lower-level rules and conventions – the law of nations – will depend upon situational judgments made by state servants confronting imprescriptible circumstances (Hunter 2010).

Rather than reflecting the corruption of European justice by its colonial and imperialist uses – a corruption supposedly reflected in a 'positivist' or 'realist' international law – Vattel's suspension of international justice and acceptance of conquest were grounded in a profound, dual historical transformation of early modern culture and politics: the territorialization of justice resulting from the fracturing of the 'universal' church and the rise of sovereign territorial states within Europe (Loughlin 2010: 69–83, 183–96, 238–43; Skinner 2008; Stolleis 1988: 268–97); and the associated 'secularization' of war- and peace-making that replaced the philosophy of just war and punitive peace with the casuistical rules of regular war and non-discriminatory peace (Heckel 1989; Koskenniemi 2009; Lesaffer 2008). As we shall now see, it was as the *summa* of these rules for the conduct of military diplomacy that Vattel's handbook would be cited by the American revolutionary statesmen when justifying their sovereignty over the American Indians and ultimate title to Indian land.

The rules of war

Evidence for the political and diplomatic use of the Vattelian law of nations is abundant in the works of the intellectual architects of the emerging United States during the 1780s and 1790s. Situated on the cusp of the revolutionary termination of British colonization and the onset of the United States' internal colonization of the continent, figures such as Jefferson, Adams, Hamilton and Madison made frequent and copious use of what they called 'the modern law of nations'. By this they meant the texts of Grotius, Pufendorf, Bynkershoek and, above all, Vattel, which they treated as a resource for addressing a wide variety of pressing problems: the constitutional delineation of federal sovereignty, the handling of such diplomatic issues as treaty obligations, neutrality, blockade, piracy and war reparations, and issues of citizenship and suffrage. Among these exigencies was an array of issues pertaining to the American Indians, including the grounds of their dispossession, their status as legal and political subjects in the new state, and their forced displacement in the face of a remorseless westward-moving internal colonization.

The immediacy with which the revolutionary statesmen drew on the Vattelian law of nations in their statecraft and diplomacy is evident in the characterization of the voluntary law of nations that Alexander Hamilton advanced in a 1795 discussion of the right to confiscate or sequester foreign debt during wartime. Hamilton had been a revolutionary war commander and was Secretary of Treasury in the new state from 1789–95. The discussion in question addressed the belligerent freezing of American assets in France and Britain, and in the course of it Hamilton offered the following thinly veiled paraphrase of Vattel's own formulation of the voluntary law of nations as:

> a system of rules resulting from the equality and independence of nations, and which, in the administration of their affairs, and the pursuit of their pretensions, proceeding on the principle of their having no common judge upon earth, attributes equal validity, as to external effects, to the measures or conduct of one as of another, without regard to the intrinsic justice of those measures or that conduct. Thus captures in war, are as valid, when made by the party in the wrong, as by the party in the right.
>
> (Hamilton 1904: vol. 5, 422)

Not only does Hamilton display intellectual mastery of Vattel's core position – that the territorialization of justice suspends it in the relations between states – but the discourse that follows displays his command of diplomatic casuistry. Here Hamilton cites Grotius, Bynkershoek and, centrally, Vattel in order to argue that while war does indeed provide a prima facie justification for France and Britain to freeze American assets, recent developments in the customary law of nations show that this action no longer satisfies modern standards (Hamilton 1904: vol. 5, 422–33).

There is similarly plentiful evidence that the founding fathers used *jus gentium* diplomatic casuistry as a means of formulating the grounds of colonization and

the status of Indian rights. In keeping with its casuistical form, they deployed the intellectual resources of the law of nations in a variable manner, depending on situational assessments of particular military and political circumstances. During the revolutionary period, the law of nations provided the framework in which the sovereignty of the British Crown and Parliament over the colonies could be denied by insisting that Britain had not conquered America but discovered it (Pagden 2008). In 1763 this permutation of *jus gentium* titles permitted John Adams to argue that as the king's tenure in the colonies was based on discovery, it was only a personal feudal one. According to Adams such 'manorial' tenure entailed neither sovereignty over the colonists nor ownership of the land, which the colonists now owned in their own right through purchase from the Indians (Adams 2000: 137–39). Rather than signifying a general American acceptance of native title, Adams' argument that colonial title to Indian lands derived from purchase rather than conquest should thus be seen in the context of the revolutionary repudiation of British sovereignty and eminent domain.

Not unexpectedly, then, in the post-revolutionary period, when the issue was controlling trade between the Indians and the rival imperial powers of Britain, Spain and France, *jus gentium* was invoked to defend a different kind of purchase right in relation to the Indians: namely, the new federal government's right of 'pre-emption' – or exclusive purchase right – with regards to Indian lands. In laying down this law on 3 June 1792 to the British emissary Hammond – who was seeking to engage in fur trade with the Indians from across the Canadian border – Secretary of State Jefferson answered Hammond's question as to the United States' right to 'Indian soil' by invoking: '1. A right of preemption of their lands, that is to say, the sole & exclusive right of purchasing from them whenever they should be willing to sell. 2. A right of regulating commerce between them and the whites'. Jefferson then explained to Hammond that:

> We consider it as established by nations into a kind of Jus gentium for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors.
>
> (Jefferson 1904–5: vol. 1, 225)

When the issue being confronted was the pretension of individual states of the union to transfer Indian land title, however, Jefferson was prepared to claim the more sweeping *jus gentium* titles of war and treaty as justifications for the federal government's control of Indian lands. In his advice of 3 May 1790 arguing the invalidity of Georgia's attempt to make grants of unextinguished 'Indian right', Jefferson, still in his capacity as Secretary of State to Washington, ran through the possible *jus gentium* grounds for the 'general government's' exclusive right in this regard. The 'taking possession of a vacant country, and declaring they mean to occupy it' had been one such possible ground. Where the country 'instead of being altogether vacant, is thinly occupied by another nation', however, the

'newcomers' have 'the exclusive privilege of acquiring the native right by purchase or other just means', which is the right of pre-emption. In the context of the Georgian land claims, though, Jefferson was prepared to advance the two further *jus gentium* grounds underlying pre-emption, namely, war and treaty: 'There are but two means of acquiring the native title. First war; for even war may, sometimes, give a just title. Second, contracts or treaty'. As the rights of war and treaty were central among those that the states had ceded to the 'general government' under the act of union and the constitution, Georgia no longer had the capacity to acquire or convey native title (Jefferson 1904–5: vol. 6, 55–57).

Perhaps this is enough to show that Jefferson's capacity to run through a variety of possible *jus gentium* grounds for the expropriation of Indian lands was indicative neither of the colonialist corruption of the state's legal foundations nor of their pragmatic dilution by 'imperial agents on the ground' (Benton and Straumann 2010: 29–36). We can view this capacity, rather, as indicative of the fact that the intellectual architects of colonial dispossession did not think that it had a legal or just foundation. This was because their intellectual architecture was shaped by a *jus gentium* that attributed 'equal validity' to the 'measures or conduct' of nations engaged in war, conquest and dispossession 'without regard to the intrinsic justice of those measures or that conduct' (Hamilton 1904: vol. 5, 422). Which of the *jus gentium* rights might be appealed to on a given occasion – whether rights of discovery, occupation (*terra nullius*), pre-emption, conquest or treaty – depended on the exigent circumstances in which they were invoked, and the situational assessment of these circumstances by statesmen and diplomats acting as servants of the emerging territorial state.

The rule of law

If acceptance of conquest as a foundation for American sovereignty and domain typified America's founding statesmen, then America's common lawyers were typified by their rejection of this foundation. Rather than being something that might be settled through historical evidence or forensic argument, however, this conflict was symptomatic of the existence of two incommensurable yet overlapping ways of approaching the political–jurisprudential nexus, grounded in divergent intellectual offices and personae. In their offices as statesmen and diplomats the revolutionary intellectuals viewed American territorial sovereignty and domain from the outside: as located in a space where justice did not apply, as grounded in conquest, and as requiring the repulsion of external enemies and the incorporation of conquered peoples. By occupying an office that tacitly presumed the existence of a pacified territorial state, however, America's fledgling estate of common lawyers viewed sovereignty and domain from the inside: not as the political-historical precondition for law and jurisdiction, but as creatures of a law that had always existed and, hence, as something that could never have originated in historical conquest.

In late eighteenth-century constitution-building America, the timeless justice of the common law was grounded in the twin mythoi of the 'common law mind': a

narrative of the time-immemorial customs (or 'ancient constitution') of a national people; and a philosophy of natural rights that were founded in reason itself (Pocock 1987: 235–42). As a result, when colonial jurists were eventually called on to adjudicate the legitimacy of colonization and the legal amenability of colonized peoples, their historical knowledge of the military and diplomatic basis of colonial jurisdiction sat uneasily alongside their professional ethos that legal jurisdiction must have a legal basis. Attempts to reconcile this uneasy situation were pursued via several strategies. These included the retrospective assimilation of an array of *jus gentium* titles – discovery, occupation, the 'agricultural argument', pre-emptive purchase (native title) – to the common law by turning them into ancient customs or natural rights; the expulsion of the inassimilable title of conquest from the legal domain altogether and its stigmatization as the corruption of a timeless legal order; and, eventually, the attempt to rediscover this lost legal order so that it might be restored by rectificatory jurists and mythologized by juridical historians.

We can see the assimilationist and rectificatory strategies at work in the 'Lectures on Law' that James Wilson delivered at the College of Pennsylvania, commencing on 15 December 1790. In addition to being the College's founding professor of law, Wilson was also an inaugural judge of the United States Supreme Court (1789) and an avid land speculator. Turning his back on the 'Jus gentium for America' advanced by the revolutionary statesmen and diplomats, Wilson sought to efface the military and diplomatic casuistry that had defined its use in colonial dispossession and state-building, and to transform *jus gentium* into part of the untainted common law foundations of the nation. Proclaiming his opposition to the principles of Hobbes and Pufendorf, this child of the Scottish Enlightenment provided a philosophical basis for these foundations. He did so by arguing that all law flows from mankind's obligation to perfect a shared 'rational and sociable nature' as declared in the law of nature and known through an indefeasible 'moral sense' (Wilson 2007: vol. 1, 505–25). In his discussion of 'municipal law' Wilson rejects Blackstone's view of it as founded in the supremacy of the Crown and Parliament – a view that he blames on the influence of 'Baron Puffendorff's' conception of law as the command of a superior – and instead invokes the twin mythoi of custom and consent (Wilson 2007: vol. 1, 549–71). The common law, on which rests the entire edifice of the polity and society, antedates all of the commands of kings and parliaments, and arises instead from the 'long use and custom' of a people which is then equated with their consent (Wilson 2007: vol. 1, 567).

It is in Wilson's lecture on the law of nations, though, that we can see how completely he sought to transmute the military and diplomatic casuistry of American *jus gentium* into an untainted legal foundation for the American nation. Here Wilson sets aside Vattel's 'voluntary law of nations', appealing instead to a 'natural law of nations' that requires nations to organize their relations in accordance with the obligation of mutual self-perfection that God has instituted for man and embedded in his nature and world (Wilson 2007: vol. 1, 529–33). As a result of this re-universalization of the law of nations, it now appears that European

colonizers and indigenous peoples shared a time-immemorial legal order and that colonization was a juridical act. This allows Wilson to ignore Jefferson's Vattelian doctrine that the state's right to the pre-emptive purchase of Indian land is grounded in war and treaty, instead treating such purchase as indicative of the reciprocal obligations imposed on both groups by the natural law duty to cultivate the earth. In this context, though, it is also the duty of the 'new inhabitants' to teach the original ones 'the arts and uses of agriculture', as this will allow the reciprocal expansion and contraction of their respective land rights to take place without coercion of any kind (Wilson 2007: vol. 1, 538). In the scarcely pacified space of the emerging United States it was thus already possible for leading common law jurists to forget the casuistry of combat between 'equally just' nations through which the revolutionary statesmen had understood colonial dispossession and internal colonization. Now the whole thing could be viewed as a legal transaction grounded in time-immemorial legal custom and timeless natural rights.

Are we right in viewing Wilson's common law mythos as an early version of that original, reciprocally just colonial legal order to which later juridical histories would appeal in their exemplary narratives of its corruption through a racist territorial politics? If so, we can identify a dual historical context for the emergence of this viewpoint. It would appear to have emerged with the transition from the period of colonial conquest and pacification to the period of the establishment of common law jurisdiction as an instrument of a unifying colonial state. And it would appear to indicate of a shift from the ethos of the revolutionary statesmen and diplomats, for whom the territoriality of justice was expressed in a casuistry of war and conquest, to the ethos of common law jurists, for whom the justice of the territory was expressed in a timeless legality from which conquest had to be effaced.

In the event, the actual operation of the United States' common law in adjudicating cases that raised issues of ultimate jurisdiction bore little resemblance to Wilson's reciprocally just originative legal order. In delivering the Supreme Court's decision in the famous case of *Johnson v M'Intosh* (1823), Chief Justice Marshall adopted a quite different view of the foundations of common law jurisdiction in the United States. Marshall set aside both counsel for the plaintiff's argument that the colonists' purchase of land proved the Indians' right to own and sell it, and the defence counsel's use of the 'agricultural argument' to invalidate that right. Instead, with his eye firmly on the role of the court in executing the newly acquired sovereignty and eminent domain of the United States government, Marshall argued that the ultimate ground of these rights lay elsewhere: firstly in the 'principle of discovery' through which rival European powers had excluded each other from claimed territory; secondly, in the titles of conquest and purchase through which they had converted this principle into proprietary dominion over a territory (*Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823)).

It is striking that Marshall invokes these *jus gentium* titles not to show continuity between the law of nations and the common law but in order to acknowledge the

hiatus between them. This gap issues from the fact that while conquest provides the *jus gentium* title of the state's territorial sovereignty and eminent domain, this title is incapable of being disputed or adjudicated within the courts established within the conquered territory. American courts may not adjudicate American conquest since as the '[c]ourts of the conqueror' they are its creatures and instruments:

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.
>
> (*Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823))

Here Marshall, who was himself a member of the revolutionary generation, comes as close as possible to adopting the Vattelian outlook of Hamilton and Jefferson: that conquest and dispossession are measures or conduct to which the law of nations attributes 'equal validity' between nations 'without regard to the intrinsic justice of those measures or that conduct' (Hamilton 1904: vol. 5, 422). Yet he adopts this viewpoint not in the persona of the statesman or diplomat engaged in war- and treaty-making, but in the persona of the jurist acknowledging that the justice of the legal order is itself not founded in justice. It is this liminal historical situation that lends a certain normative ambivalence to Marshall's most famous obiter:

> However extravagant the pretension of converting the discovery of an inhabited country to conquest may appear; if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.
>
> (*Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 591–92 (1823))

Marshall had already made it clear that, as a result of the Treaty of Paris (1783) that concluded the revolutionary war, the United States was the direct inheritor of the sovereignty and domain rights that the British government had acquired through discovery and conquest, which thus also formed the United States' ultimate title to America. It is quite clear, then, that both here and elsewhere he is declaring United States' courts, and the Supreme Court in particular, incompetent to adjudicate the ultimate title to sovereignty and domain on which its own jurisdiction is based. Far from being an 'early version' of a modern doctrine in which domestic courts voluntarily withdraw from 'political' questions (Banner 2005b: 185–86), Marshall's declaration was in fact a late expression of an outlook lying at the heart of early modern *jus gentium*: that the justice internal to domestic courts is framed by external relations of war and diplomacy to which justice does not apply.

Conclusion

Juridical histories often interpret Marshall's reasoning as symptomatic of bad faith, hypocrisy or a troubled conscience, brought about by his guilty acknowledgement of a prior inclusive and reciprocal legal order in the same judgment that enunciated its destruction through an exclusive territorial sovereignty and jurisdiction (Banner 2005b: 178–90; Kades 2001; Robertson 2005: 95–115). In light of the preceding discussion, this interpretation might now seem less persuasive than many have found it. Still in touch with the American *jus gentium* that viewed the acquisition of sovereignty and jurisdiction as an achievement of war and diplomacy rather than law, Marshall viewed the notion of an originative natural or common law justice underpinning colonial jurisdiction as one of those 'private and speculative opinions of individuals' that are incapable of adjudication in the '[c]ourts of the conqueror' (*Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823)). The ambivalence of Marshall's enunciation of the justice of national sovereignty and dominion arose not from his repression of an originative reciprocal legal order, but from his recognition that the foundations of this sovereignty and jurisdiction lay not in law and justice but in war and conquest.

It should come as no surprise, then, to find that Marshall's gritty declaration of the extrajudicial basis of United States jurisdiction in conquest would be soon transmuted into a common law pearl through smoothing attestations to its 'immemorial' lineage. Just a few years after Marshall's judgment, in his authoritative *Commentaries on American Law*, James Kent was already prepared to attest that:

> The rule [in *Johnson v. McIntosh*] that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists … was founded on the pretension of converting the discovery of the country into a conquest, and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage (Kent 1826–30: vol. 2, lec. L, 310)

It would prove only a short walk from Kent's *Commentaries* to those juridical histories claiming that American jurisdiction was born from the law itself, and that because it had been corrupted at birth or soon after – by racism, imperialism, greed or simply by 'power' – this jurisdiction could be rectified by that same law, or at least by its historians.

Note

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Chapter 3

Settler sovereignty and the shapeshifting Crown

Paul McHugh and Lisa Ford[1]

For the indigenous peoples of Australasia and Canada, the notion of the Crown has been the great mystery of Anglo-imperial legal faith. Since the beginning of settlement, the Crown has shifted and changed behind the cloak of settler law and practice. For most indigenous people, the Crown (representing the British monarch and his or her representatives in the colonies) began as an interlocutor – a treaty partner, a sometime ally and an intermediary between avaricious settlers and indigenous people. In the early nineteenth century, refined legal claims to sovereignty in Canada and Australasia also made the Crown a prosecutor of indigenous crimes, sometimes for the first time. This chapter focuses on the gradual, but ultimately more radical, transformation of the Crown between the mid-nineteenth century – when most settler colonies were given power to manage indigenous affairs – and the passing of the Statute of Westminster in 1931, when the Crown was tethered decisively to a series of settler nation states.

Using case law from New Zealand and Canada, we describe the contested and halting nature of this transformation. In the 1860s, some years after they had provided for settler self-government, imperial authorities transferred control of indigenous affairs to responsible Ministers in the Canadian and New Zealand legislatures. Until then, the Governor or the army had managed those relations in the imperial interest under the prerogative – though since the Buxton Committee Report on Aborigines (1837),[2] imperial interest had been increasingly bent on humanitarian goals like civilization rather than treaty-making and negotiation. By the 1860s, with the cumulative wearying effect of the Mutiny and New Zealand Wars and the growing home debate about the cost of Empire, earlier humanitarian commitment to metropolitan guardianship of non-Christian societies waned. Canada acquired jurisdiction to legislate for indigenous people in 1860, New Zealand in 1862, and both local legislatures soon set about erecting statutory regimes for the management of their indigenous populations.

This is an old story but its impact on the jurisprudence of the Crown is one of its most enduring, and least considered, results. The transformation of the Crown did not signal the end of prerogative dealings in favour of legislation. In Canada and New Zealand, the Crown remained an interlocutor with indigenous polities, using the language and some of the pomp of its imperial predecessor.

What it did entail, however, was the rise of a new jurisprudence that both subordinated the will of the Crown to local settler legislatures and, at the same time, reasserted the Crown's non-justiciable prerogative power over indigenous affairs. While the words and, for a while, the formats of engagement were the same, the Crown ceased rather suddenly to act as a check on settler ambition. Old languages of diplomacy and new practices of subordination eased the transformation of the Crown into the emissary of settler colonialism, entangling indigenous peoples in a non-justiciable web of executive discretion and statutory regulation.

The Imperial Crown to 1860

The role of the Crown in settler–aboriginal relations in the eighteenth century was patchy. Colonial diplomacy with aboriginal polities before the 1750s had been a haphazard affair. In the American colonies it was controlled sometimes by governors, sometimes by elected legislatures and sometimes by local office holders (McHugh 2012). Indeed, the assertion of Crown control of aboriginal–settler relations formed one strand in the highly contested articulation of the imperial constitution after the Glorious Revolution (Greene 1986; Mancke 1999: 15–16). If the British Parliament sought to assert its sovereignty over trade law and taxation in the American colonies over the course of the long eighteenth century, then the King in Council sought to assert its prerogative over frontier affairs in the period of the French and Indian wars. First, in 1755 William Johnson was appointed as the Crown's Indian Agent to the powerful Iroquois by Major General Braddock, who had arrived in New York to direct the defence of the colonies against the French and their Indian allies. Johnson had acted as Indian Agent on behalf of the colony of New York from 1746–51 but this reappointment constituted a marked shift in frontier politics. The Royal Proclamation of 1763 then institutionalized Crown aspirations to control indigenous affairs in the thirteen American colonies and the westward interior. Through it, George III established a western line beyond which British settlement was prohibited, declaring land west of the Appalachian Mountains to be reserve land for Indians. In proclaiming the capacity of the Crown to control the pace of settlement of the interior, the Proclamation also acknowledged the role of the Crown as one of protection of, and diplomacy with, the tribes. The Crown both acknowledged its obligations to 'the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection' and forbade the purchase of lands from Indians by anyone but the Crown, a stipulation that would later be read as a limitation on indigenous rather than settler rights ('Proclamation of 1763', Shortt and Doughty 1907: 121–23; Purdy 2006; Hickford 2011).

Without the interference of either local legislatures or the British Parliament, prerogative control of indigenous affairs continued long after the British Monarch's commitment to the Proclamation of 1763 had declined. In what became Lower Canada, the terms of the Proclamation were largely ignored by the British

military, which controlled indigenous affairs in Canada until the 1830s. The Crown argued that the Mi'kmaq and Maliseet peoples of the Maritime colonies fell outside the terms of the Proclamation because their title had been extinguished by French colonization in the seventeenth century before being ceded to Britain by the Treaty of Utrecht (1713). In the colonization of New Brunswick, the Crown set aside only tiny reserves for Indians and otherwise thought itself entitled to settle Loyalist colonists emigrating north from the Thirteen Colonies (the United States of America, from 1783) on erstwhile Indian land. Nor did the Crown follow the principles of the Proclamation when colonizing Prince Edward Island from the 1790s onwards. While the Proclamation had at first seemed to protect Indians in Quebec from land seizure, the *Clergy Endowments (Canada) Act 1791* (Imp) (*Constitution Act*) offered Indian land to settlers who swore an oath of allegiance to the Crown. The *Constitution Act* also divided Quebec into Upper and Lower Canada. In less settled Upper Canada, the Crown retained a system of treaties and negotiation on the lines established by William Johnson but now treaties became active tools to dispossess and to make land available for settlement, rather than strategic alliances in balance-of-power diplomacy (Carter 2008: 201–5). This was to become their main function ever after. Between 1784 and 1804, the British Crown used treaties to obtain millions of acres for colonial occupation by British emigrants; 'Some treaties were coerced, some were secured on false representations, some poorly described the lands transferred, some were not reduced to writing and recorded, and some of the promised payments were not made' (Harring 1998: 28).

Geopolitical conditions both accompanied and explained this change. Between 1783 and the end of the Anglo–American War in 1814, the power of Indians to influence British–American relationships in North America had waned; settlement began to expand explosively in quick boom–bust cycles and some Indians in Upper Canada turned both to agriculture and to Christianity. Together these developments encouraged humanitarian officials in Upper Canada to promote a program of civilization rather than diplomacy from the late 1820s. They asked: should the annuities due to Indians who had sold land continue to be paid in the form of cash, weapons and consumer goods? Would it not be more constructive to embody those payments in the means of an agricultural livelihood: seed, farm animals, ploughs and houses? Both the finances of Upper Canada and the Imperial purse would also be less burdened by the continuing cost of obsolete Indian diplomacy were Indians to become self-supporting farmers. The idea that Indians were sovereign nations with their own territory, hunting economy and law had all but collapsed by the 1830s, replaced by a vision of Upper Canada as a land in which a minority of 'civilized' farming Indians would survive in the midst of a flourishing settler colonial economy (Carter 2008: 206–8; Hall 1984: 99–101; Harris 2008: 318–20, 333–34). Similar humanitarian logic underpinned the judicial decision to extend criminal jurisdiction over crimes among Aborigines in New South Wales. Justice Burton, on the recommendation of humanitarian missionary Lancelot Threlkeld, reasoned that legal subjecthood, not juridical

independence, would provide the best protection for Australian Aborigines (Ford 2010: 201).

In this climate, it is no surprise that Crown treaty-making came under Imperial review in the 1830s and 1840s. Stories of treaty malfeasance emerged from around the Empire. For example, in August 1836 the Governor of Upper Canada, Sir Francis Bond Head, signed a US Removal-style treaty with minority factions among the Ojibway and Ottawa peoples. Sceptical that Indians could be civilized, Head's treaty provided that all Indians could continue hunting and gathering if they left their homelands to live on the Manitoulin Islands. His treaty with the Ojibway and Ottawa secured their agreement to give up their ancestral title to the Islands, so that Manitoulin could become the inviolable sanctuary of all Indians who declined to embrace the new disciplines of Christianity and agriculture. Missionaries and the newly formed Aborigines Protection Society objected that these treaties both wrought injustice and thwarted aboriginal civilization (Binnema and Hutchings 2005: 130; Upton 1973: 58).

News of Head's scandalous repudiation of the policy of 'civilizing' arrived in London at an auspicious moment: around the time of the creation in February 1837 of the Aborigines Select Committee under the leadership of anti-slavery crusader Thomas Buxton. The Committee was instructed to:

> consider what Measures ought to be adopted with regard to the NATIVE INHABITANTS of Countries where BRITISH SETTLEMENTS are made, and to the neighbouring Tribes, in order to secure to them the due observance of Justice, and the protection of their Rights; to promote the spread of Civilization among them; and to lead them to the peaceful and voluntary reception of Christian Religion.[3]

The phraseology of these instructions itself indicates a rebalancing of diplomacy against the newer and mounting imperatives of civilization. More importantly, however, in March 1837, the Committee heard two items of evidence suggesting that treaties were poor instruments of a native protection policy. Reverend Stephen Kay criticized a 'treaty' in the Cape Colony that, from 1798–1823, forbade all 'intercourse' between 'Caffres' and colonists on either side of the Great Fish River. While Kay did not oppose treaty-making per se, he alleged that the enforcement of this 'treaty' – an understanding between the Governor and a chief Gaika – restrained and punished native peoples but imposed no controls or punishments on the colonists who transgressed it.[4] On 22 March 1837, Thomas Hodgkin took aim at William Penn's highly regarded treaty of 'amity and friendship' with the Indians of Pennsylvania (date disputed, circa 1683). Hodgkin conceded that Penn was an exemplary humanitarian; however, he argued that the very success of Penn's treaty in establishing a peaceful frontier attracted colonists in such numbers as to severely reduce Indian hunting grounds. Hodgkin asserted that this process had been repeated elsewhere in the United States:

> By means of [treaties] the Indians have rapidly lost large and rich tracts of land, which would not so soon have changed their owners as rapid spoliation. Such treaties unaccompanied by the beneficent measures which formed a part of William Penn's plan, have been beneficial to the whites, but irreparably injurious to the Indians.[5]

According to Hodgkin, Christianity and agriculture alone could save the Indians, though he noted that they had generally resisted both.

The Buxton Report joined a growing chorus of humanitarians in concluding that treaty-making would have little to contribute to the protection of indigenous peoples from the impact of colonization. Instead, the Committee identified

> but one effectual means of staying the evils we have occasioned, and of imparting the blessings of civilization, and that is, the propagation of Christianity, together with the preservation, for the time to come, of the civil rights of the natives.[6]

To this end, the Committee recommended that,

> As a general rule … it is inexpedient that treaties should be frequently entered into between local Governments and tribes in their vicinity. Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace.[7]

It suggested, instead, that the task of Aboriginal Protection should continue to fall within the Crown Prerogative, which should be exercised to control the acquisition of indigenous land, prevent the exploitation of indigenous labour and prohibit the sale of 'ardent spirits' among indigenous people.[8] Indigenous crimes, meanwhile, should be regulated by British law exercised with the utmost indulgence.[9] Aborigines would be saved, in the long run, by being 'civilized' by Christianity and agriculture and by being 'subjected' to all the benefits of British law. Prerogative-based relations under the mantle of diplomacy thus transformed into subjecthood and protection under Crown beneficence.

Nonetheless, this rhetoric of protection did not simply and neatly displace diplomacy as a mode of Crown management of Indian affairs. In Canada and New Zealand (as well as the Cape – the Committee's primary focus) the potency of indigenous tribes in colonial political life could not be stifled by the legal claim to Crown ascendancy and tribal subjection. Whether or not the Empire or its colonial courts asserted jurisdiction, governors necessarily continued to conduct relations with the tribe and its leaders as distinct polities within the colony. Indeed, the Treaty of Waitangi itself stands as a testament to the afterlife of Crown-led diplomacy in Britain's settler peripheries. In subsequent debates among New Zealand colonists about native policy, the Treaty was sometimes wielded as a

potent weapon in the rhetorical and legal armoury of those who wanted the executive to protect Māori from dispossession and other harms occasioned by colonization. An early example was the protest made against colonial Secretary Earl Grey's 1846 instructions about the registration of Māori land ownership. Auckland settlers petitioned against the instructions as a Treaty violation; they were concerned for their security against, and their trade with, Māori (Orange 1987: 127).

At the same time, the rhetoric of protection hastened the devolution of authority over indigenous people to settler peripheries in two ways. First, it created opposition. Centrally imposed magistrate-protectors and colonial governors were expected to use prerogative powers in the service of a distinctly imperial interest in the middle of the nineteenth century – to control settlers and to ameliorate the lot of indigenous people in the face of explosive expansion. Opposition to this regime formed strands in calls for settler self-government on the one hand, and for the forcible dispossession and assimilation of indigenous peoples on the other. Second, the call for indigenous civilization and subjection that underpinned Crown protective regimes after 1830 offered aid and comfort to an emergent settler colonial liberalism predicated on the development of native lands for agricultural enterprise and the settlement of Christian emigrants. If the only plausible future of indigenous peoples was to become part of British civilization, then the long-term worth of any treaty with indigenous peoples was to be measured by whether it hindered or facilitated the flourishing of settler colonial society. This configuration of humanitarian thinking created one of the grounds on which settler colonists could urge the British government eventually to devolve control over native affairs to the political and judicial elites of the colonies. So, when the empire acceded to calls for settler self-government after 1850, the British Crown surrendered its power over indigenous affairs soon after (Evans *et al.* 2003: 43–62).

Settler Courts and the Settler Crown, 1860–1931

Settler legislatures quickly effected their new control of indigenous affairs through the statutory regimes of New Zealand's *Native Land Acts* (1862) and Canada's *Indian Lands Act* (CSLC 1860, c 14) and *Gradual Enfranchisement Act* (1869, 31 Vic, c 42) (later consolidated into the enduring *Indian Act 1876* (RSC 1985, c I-5)). These regimes regulated tribal life for more than a century. However, settler governments also harnessed the regalia and authority of the Imperial Crown in its diplomatic form. The aura of the Imperial prerogative was not discarded; it was redeployed and magnified by the settler authorities even as they employed legislation to build regimes for the cultural transformation of the tribes. The land cessions negotiated by the settler authorities in New Zealand and in Canada used the *mana* of the Crown instrumentally, extending and deepening its authority in the process (see Boast 2006). Diplomacy (as a vestigial means) and dispossession (as a most pressing end) had become inseparable. The means by which the settler Crowns opened up the Canadian prairies by the Numbered

Treaties (see Talbot 2009) and New Zealand's central North Island (see Waitangi Tribunal 2009 and 2010; Binney 2009) from the 1870s were almost immediate and graphic illustrations of how the techniques of the imperial era were deployed and magnified for acquisitive ends by settler governments. The pomp and panoply of these processes – their high ceremonialism and militarism – invited the tribes to see them as nation-to-nation compacts rather than as acts of subjection and subordination. Subsequently, they were to learn bitterly that the Crown's outward shape belied its absolutist, settler core.

Vindication of the use of Crown prerogative for the ends of settlers also became a judicial imperative, carried out in local, rather than imperial, courts. Key judicial statements in local courts during the late nineteenth and early twentieth century magnified in forthright terms the non-justiciable, singular authority of the Crown over aboriginal affairs. They did so in a way that radically enhanced the power of the Crown – simultaneously charging it with responsibility for relations with indigenous collectives and individuals, while affirming the absence of any juridical accountability and of any legal plurality. Therefore, when the New Zealand Supreme Court considered the enforceability of land cessions between the Crown and tribes in *Wi Parata v The Bishop of Wellington* (*Wi Parata*), Prendergast CJ explicitly enhanced the Crown's sovereign primacy over the tribes, even as he acknowledged the state–state appearance of their relationship. The entry into land cessions 'although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation.'

> The exercise of the right [to silence the aboriginal title] and the discharge of the correlative duty [undertakings then made] constitute an extraordinary branch of the prerogative wherein the sovereign represents the whole body politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power.
>
> (*Wi Parata*: 78)

Thus:

> *Quoad* this matter, the Māori tribes are *ex necessitate rei*, exactly on the footing of foreigners secured by treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore not examinable by any Court … Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.
>
> (*Wi Parata*: 79, emphasis added)

As a result, he said, 'the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and, of necessity must be the sole arbiter of its own justice' (*Wi Parata*: 78). The Chief Justice then admitted

that statute might render justiciable any rights under such cessions; nonetheless, 'a statute cannot call what is non-existent [Māori customary law] into being' (*Wi Parata*: 79). The relevant statute was declaratory and did not expressly bind the Crown. In his judgment 'these enactments introduce no new principles [of justiciability], but merely provide a convenient mode of exercising an indubitable prerogative of the Crown' (*Wi Parata*: 80). In short, the local court in *Wi Parata* held that the prerogative endowed the Crown with a free rein in its relations with tribes even where statute – New Zealand's Native Land Acts – had seemed to put the aboriginal title on a statutory footing (as 'customary title').

This expansive view of Crown prerogative was roundly criticized by the Privy Council in *Nireaha Tamaki v Baker*. An action was brought to restrain the sale of land over which, it was alleged, Māori customary title had not been extinguished. Lord Davey indicated that the recognition of customary title by legislation (the *Native Land Acts*) meant that the executive could no longer treat its recognition and dealings with such tribal entities as matters of open-ended discretion tied to the prerogative. Instead, the Board distinguished the prerogative (i.e., radical) title of the Crown over such land from the use of the prerogative in its management and extinguishment. In the Board's view legislation passed by the settler Parliament had firmly displaced any prerogative management and submitted it to a form of statutory regulation.

> But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said, and not denied, that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists.
>
> (*Nireaha Tamaki v Baker*: 576)

Statute now recognized customary title and probably displaced any residual prerogative capacity ('if such a right still exists'), a question that did not arise. This meant that the title's recognition did not depend 'upon the grace and favour of the Crown'; instead, it fell within the Court's jurisdiction: 'It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers o[r] discoverable by them in evidence' (*Nireaha Tamaki v Baker*: 577).

After a similar argument in *Wallis v Solicitor-General*, the New Zealand Bar angrily protested against the aspersions cast by the Privy Council on the independence of the judiciary from the Crown. The arbiter of 'subserviency or want of independence' by the judiciary, according to Williams J, should be 'a unanimous public' not 'four strangers sitting 14,000 miles away'.[10] The Privy Council could perceive the transformed legal foundation for dealings with Māori from

non-justiciable prerogative to justiciable statute. This willingness was not shared by New Zealand's legislature, bar or judiciary. Soon after *Nireaha Tamaki v Baker* legislation was passed securing the non-justiciability of Crown dealings with customary title (*Land Titles Protection Act 1902* (NZ) ss 85, 87, as amended by *Maori Land Laws Amendment Act 1908* (NZ)).

Similar reasoning emerged contemporaneously in Canada. Chancellor Boyd's first-instance judgment, *R v St Catharine's Milling & Lumber Co* (1885) (hereafter *St Catharine's* (1885)), constituted a resounding and lengthy exposition of the executive's non-justiciable discretion in extinguishing First Nations' title. His judgment was approved by the Ontario Court of Appeal (four judges) (*R v St Catharine's Milling & Lumber Co* (1886)) and the Supreme Court (four judges, with two dissenting) (*St Catharine's Milling & Lumber Co v The Queen* (1887)). Boyd declared that section 91(24) of the *British North America Act 1867* (Imp) (30–31 Vict, c 3) (BNA Act) had vested the power of dealing with Indians in the Dominion and that the Indian interest over unceded lands was not justiciable, much less proprietary in character (as the Dominion had self-interestedly argued). Notwithstanding, the Indian interest – the recognition and formal extinguishment of which was impressed politically rather than legally on the Dominion – represented 'any interest other than that of the Province' under section 109 of the BNA Act. This meant that cession by treaty vested clear title in the Province rather than the Dominion.

Chancellor Boyd's judgment was based upon established colonial practice, which he set out in fulsome references:

> The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal population in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated 'justly and graciously,' as Lord Bacon advised, but no legal ownership of the land was ever attributed to them.
>
> (*St Catharine's* (1885): 206)

He then cited legal and judicial opinions, including that of Marshall CJ in *Johnson v M'Intosh*,[11] as well as the consistent pattern of Canadian policy and local law-making before and after Confederation. He argued that the land cession procedures of the Royal Proclamation of 1763 did not bind the Crown,[12] though he did observe that those procedures had 'always been scrupulously observed' (*St Catharine's* (1885): 226). He also noted that the Proclamation did not 'reserve' title for Indians, but he reasoned, in any case, that the Proclamation was superseded by the *Quebec Act 1774* (Imp) (14 Geo 3, c 83). Reservation occurred after formal cession, at which time First Nations became 'invested with a legally

recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement' (*St Catharine's* (1885): 230). Thus, to the extent that Indian title had any legal texture, it came under the canvas of the Indian Acts enacted by the Dominion under section 91(24) of the BNA Act. Chancellor Boyd's emphasis upon the broad nature of Crown discretion was not a simple exclusion of common law aboriginal title (as it would be formulated a century later (see Smith 1993)); rather, it was a ringing validation of settler state sovereignty in opening up lands for white settlement.

For the Privy Council, the nature of Indian title was mostly immaterial to the *St Catharine's* case. Although, as Lord Watson noted, 'There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point' (*St Catharine's Milling & Lumber Co v The Queen* (1888): 55). The Board felt no need to stress the political rather than legal foundations of Indian title, or the non-justiciable nature of Crown discretion in dealing with it. For the Privy Council, regardless of its character as property, Indian title represented an 'interest other than that of the Province' which, upon being removed, vested title absolutely in the Province (rather than Dominion). This was a matter of statutory interpretation rather than an exercise in the vindication of settler sovereignty that had preoccupied the Canadian courts.

Canadian officials went further in their efforts to assert the primacy of its settler Crown in the twentieth century. A flurry of indigenous petitions in the early twentieth century sought to revive the protective functions of the British Crown. In 1915, many of the First Nations signed a petition supporting the call by the Nisga'a Nation of the large Nass Valley for a treaty with the Crown. First Nations were further inspired by the Privy Council decision in *Amodu Tijani v Secretary, Southern Nigeria*, which allowed Nigerian Chief Oluwa's claim for compensation for land expropriated around Apapa in Lagos, Nigeria. In response, the Indian Rights Association, formed in 1916, drafted a petition to King George in 1926 protesting the unilateral diminution of reservation land. This formed the makings of a legal challenge that prevailing wisdom, wielded most influentially then by Duncan Campbell Scott as Deputy Superintendent-General of Indian Affairs, regarded as costly, ill-founded and inherently doomed (Foster 2007; Titley 1986: 155).[13] In response, the Canadian government underlined the inaccessibility of the courts with a legislative restatement of settler sovereignty: it amended the *Indian Act 1927* (RSC, c 98) to prohibit anyone (aboriginal or otherwise) from soliciting funds for Indian legal claims without a special license from the Superintendent-General (see Watson 2011: 530–32).

In Canada, as in New Zealand, courts and legislatures crafted a new jurisprudence predicated on the belief that First Nations were precluded from commencing actions based upon any sense of a collectively held right, even where that right had been put on a statutory footing. This was less a case of

active denial of indigenous rights than it was an aggressive expansion of the non-justiciability of Crown action. In its conduct of indigenous affairs, the Crown might be bound by political obligations to a voting public or by moral imperatives to its indigenous wards, but the latter were not relations conceived as capable of being encompassed by law. When the Privy Council deemed New Zealand statute law to have rebuilt native title into a justiciable form, local legislation restored its non-justiciability. When Canadian Indians made moves towards mounting a Privy Council challenge against forced expropriation, the Canadian legislature blocked what was seen as pointless and costly legal activism. The result, by the end of the nineteenth century, was a combination of statutes and case law that encircled native title and indigenous lives, while denying indigenous peoples the capacity to challenge them. In today's era of common law aboriginal rights, we tend to characterize this moment as an active obstruction of native rights. In reality, it constituted a new fixation with an absolute and singular sovereign order in which the pluralistic elements of tribal nations' presence were regarded as an interim phenomenon that was inherently evanescent, and so matter of Crown tolerance.

Conclusion

Indigenous people in Canada and New Zealand still live in the shadow of the settler Crown. The great gains in indigenous rights since the 1970s have rested on the reconfiguration of the moral duties of the Crown to its indigenous wards, which courts have haltingly translated into the faintly justiciable obligations of fiduciary duty and trusteeship. At the same time, turn of the century jurisprudence of Crown prerogative and, with it, settler sovereignty, has set absolute limits on the potential of indigenous people to achieve corporate self-governance or meaningful redress within the settler Crowns' constitutional systems.

However, as so many of the chapters in this book illustrate, regimes of indigenous management established under the aegis of the Crown in late nineteenth- and twentieth-century self-governing Anglophone polities were never total institutions. They formed rubber, rather than iron, cages for indigenous peoples (cf Weber 2001: 123). New settler–Crown regimes – founded on bureaucracy outside the reach of law – left gaps and fissures for indigenous people to form coalitions, preserve cultural practices and craft new claims-making strategies, some of which focused on trying to preserve and revive the functions of the Crown. While for indigenous peoples the change from imperial protection to settler guardianship was to become a very real one, it was not as sudden or comprehensive as we sometimes imagine. The oxygen of autonomy remained. However, the survival of those pockets into the modern era, and the variegated histories of sovereignty they each relate, reflect indigenous peoples' resistance and capacity for regeneration, rather than the good will of settler sovereigns or, at least until recently, any mood of accommodation inside settler constitutional systems.

Notes

1 We would like to thank Tim Rowse for his substantial contributions to this paper.
2 Sir Thomas Fowell Buxton, 'Select Committee on Aborigines in British Settlements: Report, Minutes of Evidence, Appendix, Index', *House of Commons Parliamentary Papers*, 1837, Paper no. 425 (hereafter 'Buxton Report').
3 'Buxton Report', 1.
4 Ibid, 61–2.
5 Ibid, 114.
6 Ibid, 45.
7 Ibid, 80.
8 Ibid, 77–9.
9 Ibid, 80.
10 Protest of Bench and Bar, 25 April 1903, [1840–1932] NZPCC Appendix, 730. Discussed by Williams 2007; Tate 2004 and 2005.
11 'All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right': *Johnson v M'Intosh*: 588. See also Purdy 2006. On this view and contemporaneous perception of Chief Justice Marshall's judgments as validating unfettered executive discretion, see Hickford 2011: ch 4.
12 He notes that this 'has frequently been referred to, and by the Indians themselves, as the charter of their rights': *St Catharine's* (1885): 226.
13 Although this was the orthodox view of the time, as Foster has stressed (and as the dissents in the *St Catharine's* cases signaled), it was by no means the sole view: Foster 2007: 61–84.

Chapter 4

'It would only be just'

A study of territoriality and trading posts along the Mackenzie River 1800–27

Janna Promislow

In the early nineteenth century, the British Empire did not have much interest in the Mackenzie River – the Deh Cho, as the Dene call it. Until settlers became aware of the area's oil resources in the early twentieth century, it was known mostly for the Franklin expedition's ill-fated search for a Northwest Passage. The Great River was transferred to the Dominion of Canada as part of the North-Western Territory in 1870[1] but it was still some time before settlers frequented the region. In the early period, only fur traders maintained a presence and British territorial claims to the western sub-arctic 'bore no relationship whatever to the complex legal and quasi-legal rules that governed' relations between the indigenous and European traders on the ground (Ford 2010: 18).

This chapter presents a case study of the legal and quasi-legal order governing relations along the Deh Cho in the early nineteenth century. It focuses on the establishment of Fort Good Hope by the North West Company (NWC) and later the Hudson's Bay Company (HBC). The Companies' negotiations with the Dene about trading post location reveal neglected operative norms of territoriality and governance – on a trading rather than settler frontier. Here, I review the establishment of Fort Good Hope before exploring the normative frameworks of both European and Dene traders. I argue that the European fur traders – whether they realized it or not – worked largely within Dene law and jurisdictions to establish and maintain their presence in the Dene territories. In contrast to the creative misunderstandings and enduring convergences of Richard White's 'middle ground' (White 1991: 52, 84), the inter-societal norms that supported trade at Fort Good Hope were characterized by syncretic adaptations and static misunderstandings that did not significantly alter Dene territorial or governance norms.

These norms cannot be adequately appreciated through western models of territorial governance. Hunter-gatherer societies such as the Dene had distinct territories but without sharp geopolitical boundaries; they lived in distinct political communities but land rights or entitlements were not necessarily delimited by membership or territory and their governance institutions were not coercive (see Ingold 1999; Nadasdy 2002). Indigenous political forms are also obscured by our research materials, which are largely written accounts recorded

by European fur traders and explorers. I therefore use ethno-historical methods, including ethnographic materials and Dene stories, to bring Dene perspectives and Dene law into sharper view through the distortions of historical records.[2]

I identify the indigenous traders in the chapter with the names by the English and French record keepers. This choice has been made out of necessity: Dene political and territorial configurations have shifted over time, rendering a proper delineation of implicated indigenous groups and their territories to their present-day descendants beyond the scope of this study.

Fort Good Hope and the fur trade in the Mackenzie River District

European traders reached the Mackenzie River at the end of the eighteenth century. NWC traders found the land less rich in furs than they had hoped: significant numbers of beaver pelts – the most lucrative fur – came only from the Liard River region, with less valuable pelts dominating returns from Great Bear Lake and the northern reaches of the Mackenzie (Keith 2001: xii). The remoteness and harsh climate of the region made it difficult to supply. Company traders nevertheless complained about the Indians' 'indolence' and blamed them for the low productivity of the region.

NWC traders were generally well-received in Dene territories. They brought trade goods, such as flints, kettles and, later, guns which made Dene lives easier. Other items, such as beads, added to symbolic and decorative materials already used and traded (Krech 1982: 431). Moreover, the footprint of the NWC traders in Dene lands was quite small. Few stayed after they retired and those that did were often the French or Iroquois engagés who had been sent *en derouine*, a practice of spending winters in the camps of the Dene (Brown 1980: ch 4).[3] Wintering in the Dene camps allowed engagés to form close, sometimes familial, relations with their indigenous trading partners. Although this practice gave rise to abuses, engagés generally helped cement relationships by being absorbed into Dene society rather than challenging it (see generally Brown 1980: ch 4). Further, unlike settlers, traders did not threaten Dene access to land and resources. Disease aside (see Krech 1982: 192), the NWC's appearance along the Deh Cho did not threaten the Dene, their lifestyles, or their lands.

The story of Fort Good Hope begins with the NWC but ends with the HBC. The post was founded in 1806 by Alexander McKenzie, nephew and namesake of the famous explorer. By 1806, the NWC had established trade with the Slavey, Dogrib Indians, and some groups of Hare Indians in the southern parts of the Mackenzie, but had not yet reached the Loucheux, the most northerly Dene people (Keith 2001: 13–18). Fort Good Hope was built to bring the trade to the Loucheux.

Relying heavily on French employees, Indian interpreters and established Indian friends, McKenzie established contact with the Loucheux at the Trading River in the summer of 1806. He promised to return to establish a trading post

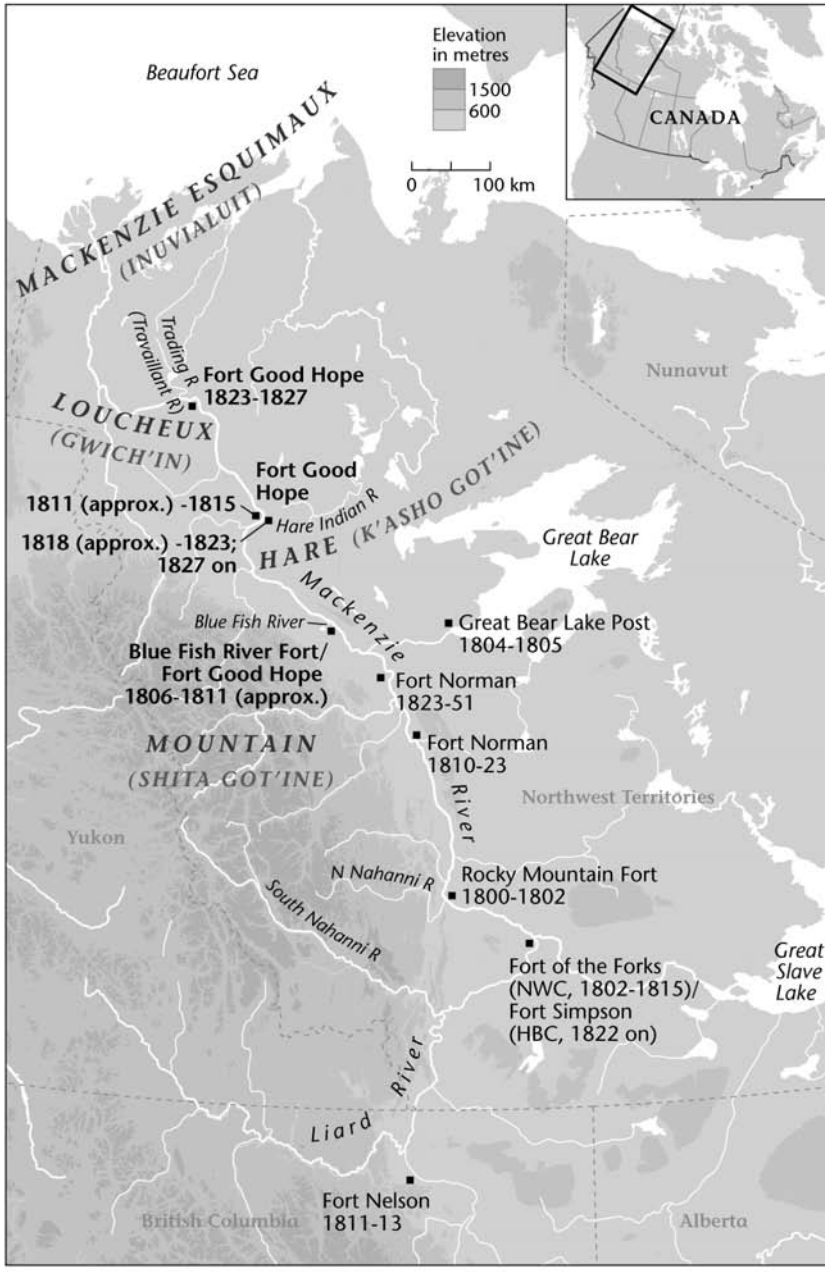
there but broke his first promise within days when he instead established a post more than 100 miles south at Bluefish River.[4] The Loucheux participated in trade notwithstanding McKenzie's breach of faith; the Bluefish River post was significantly closer to them than any other trading establishment (see Map 4.1).

Within approximately six years, the trading post was relocated from Bluefish River north to the confluence of the Hare Indian and Mackenzie Rivers, where it was renamed Fort Good Hope (Krech 2003: 190). It was later relocated twice after the NWC merged with the HBC in 1821. In 1823, it moved from the Rapids in Hare territory to around the Trading River in Loucheux territory.[5] In 1827, it moved back to the Rapids. According to Krech, the 1823 'New' Fort Good Hope was built to make the trade more accessible to the Loucheux, again reflecting the Fort's original purpose (Krech 2003: 191). Trading company records about the 1811 and 1823 moves do not exist but the discussions generated in 1827 provide a rich source for examining the norms governing the establishment of trading relationships and trading posts.

Setting up shop: welcoming strangers into Dene lands

McKenzie's 1806 meeting with a group of over 50 Loucheux set the normative stage for the trading relationship that followed (Keith 2001: 240). Trade was preceded by dancing and with the passing of 'a few words' in which the parties shared their concerns and expectations. The Loucheux party expressed concern that McKenzie did not have sufficient trade goods but McKenzie reassured them he 'had plenty of goods[,] that the only thing they wanted to get [from the Loucheux] was Beaver for which I would give them any of my goods Except my Guns' (Keith 2001: 240–41). The Loucheux responded that 'they did not expect to get such valuable articles as that but hoped the Esquimaux would not come to attack them while I [McKenzie] was there' (Keith 2001: 241). The Loucheux repeatedly expressed concern that Fort Good Hope would, given periodic hostilities between the Loucheux and McKenzie Esquimaux, fall prey to attacks – perhaps angling to have a trade in guns. McKenzie promised to 'come to the same place next spring,' instructing those gathered 'to have all their peltries & provisions there' and promising 'that if they were able to maintain a fort that they should have one' (Keith 2001: 141). To this, the Loucheux responded that 'they were not able to hunt for a fort that they often wanted themselves' (Keith 2001: 141).

McKenzie followed fur trading convention by recognizing a trading captain (or chief) from among the Loucheux. Trading leaders were identified by companies for their charisma and, sometimes mistakenly, their influence, in the hope that they would succeed in bringing people – and pelts – to the Fort to trade (see Morantz 1982; Promislow 2008).[6] Their status was recognized with gifts and protocols that potentially enhanced their position within their own community, particularly if they redistributed the gifts in accordance with leadership norms of generosity found across many hunter-gatherer societies. From the Loucheux,



Map 4.1 'Upper Mackenzie District trading posts, 1800–1827' Cartographer: Eric Leinberger

McKenzie chose a man named Yakiban, whom he described as 'the Greatest Raskall amongst them' (Keith 2001: 241).

Customs and ceremonies, such as the recognition of trading chiefs, signalled the norms governing trading relationships. In Cree and Anishnabek territories, for example, pipe ceremonies established and renewed brotherhood, a status necessary to trading relationships and that potentially entailed other obligations as well (Wallace 1954: 31). Apart from McKenzie's note that an hour of dancing preceded trading, we know little of the ceremonial protocols that accompanied trade between the NWC and the Loucheux. Twentieth-century writers suggest dances were (and are) important events for Dene. Dene drum dances 'commemorate the arrival of important persons to the community and … acknowledge the return of kinsmen' (Asch 1975: 246). They might also express some ambivalence; Loucheux dances and songs 'honoured the visitors and at the same time expressed a threatening or defiant tone' (Slobodin 1962: 69). In contrast, George Blondin, a Dene elder, explains that '[t]here is such a good feeling at drum dances; everyone is smiling and laughing and they remember they are all one family under the Creator' (Blondin 1997: 60). These contemporary viewpoints suggest that the dance McKenzie witnessed was more important than he imagined. Like the pipe ceremony elsewhere, it celebrated the arrival of the traders and the formation of a trading relationship, but may have also entailed a tension between newfound brotherhood and the otherness of strangers.

The commitments made in the 1806 conversation also illuminate normative expectations of the trading relationship, particularly when contrasted to earlier Hudson Bay trading experiences. In 1668, Pierre Esprit Radisson reported a protocol-rich conversation with the Chief of the local lowland Cree people when he settled the first French trading post along the Hayes River. The Chief reportedly adopted him as kin and promised loyalty. Radisson responded in kind, forming an alliance that encompassed trade and diplomatic ties tantamount to those expected of a kin network. He also promised the Cree protection against famine, if only by bringing trade goods to their lands. By their mutual promises and gift exchange, Radisson understood that he and the Cree had both cemented 'the great bond of friendship' and secured permission to build a trading house in the Hayes River peoples' lands (Promislow 2010: 85–86).

In contrast, McKenzie did not promise an alliance to defend the Loucheux. He specifically excluded guns from their exchange, perhaps because the NWC also wanted to trade with the Esquimaux, or perhaps because military alliances were unnecessary in the absence of imperial competition. For whatever reason, the NWC must have been confident that trade in guns was not essential to establishing trading friendships along the Mackenzie River. Unlike Radisson and the Cree, McKenzie and the Loucheux evidently did not commit to mutual support in the necessities of life, notwithstanding the Loucheux's statement that they were 'often wanting.' Instead, McKenzie demanded that the Loucheux return with 'peltries & *provisions*' to support a trading establishment in their lands. From

McKenzie's perspective, provisioning was not the two-way obligation of a kin-like alliance; it fell to the Loucheux as part of the commercial exchange. In comparative perspective, the terms of friendship sought by McKenzie look very light.

The Loucheux response suggests that they too sought a limited friendship. The Loucheux stated that they 'were not able to hunt for a fort' and that they 'often wanted themselves.' Read together, it seems that the Loucheux told McKenzie bluntly that they could not provision a trading post within their midst (cf Keith 2001: 241, n 113). Later records from Fort Good Hope also demonstrate the Loucheux preference that the post be self-sustaining, reinforcing the interpretation that the friendship with the new traders did not extend to a shared subsistence. Whether this inability was because their resources were not sufficient, or because they did not have the time, ability, or desire to support outsiders is unknowable.

These conversations demonstrate that traders were welcome but other incidents indicate that the Dene also expected the NWC to meet certain obligations. From 1807–15, revenues from the Mackenzie River District declined and the Dene were withdrawing from trade (Keith 2001: 57–58). The war of 1812 and exceptionally cold weather (1810–21) affected already tenuous supply routes from Montreal, and the NWC's battles with the HBC over its Red River Settlement strained the company's resources even further. Cold weather may also have restricted Dene engagement in trade.

Bad conditions were exacerbated by violence: Fort Nelson postmaster Alexander Henry Jr, his family and four employees were killed by three Dene (Slavey) brothers in the winter of 1812–13. The NWC abandoned the Fort and 'some proposals were made among the Gentlemen Proprietors to retaliate' (Masson 1960: 109). However, importantly, the NWC did not pursue vengeance or compensation, nor did it seek the trial of the offenders under common law, though it knew their identity (Masson 1960: 109).[7] Indeed, the brothers were received at Fort Liard nine years later as if nothing had happened (Keith 2001: 439). In doing so, they departed from common practice in fur trade country; traders often sought vengeance or compensation from the perpetrators' relatives after such incidents according to indigenous law (Foster 1994; Reid 1999). Instead, local NWC traders identified with indigenous law differently by blaming Henry's ineptitude and supply problems for the violence, perhaps an acknowledgment that the Dene-set terms of the trading relationship had been breached (Masson 1960: 109, 126; Keith 2001: 65).

NWC withdrawal from the District in 1815 was not well-received by the Dene. Wentzel noted that the Company's order to evacuate the district 'was … done … to the great hazard of our lives, for the natives having got wind of the move, had formed the design of destroying us on our way out.'[8] No adverse incidents were recorded, however, and Wentzel reported a warm welcome from the Dene when he led a trading party down the Mackenzie the following year (Keith 2001: 18).

Location, location: subsistence and territoriality

Subsistence concerns dominated the conversations around the relocation of Fort Good Hope in 1823 and 1827, and through them we can glimpse the importance of Dene strategy and normativity to the trading relationship. Securing enough food for the northern trading posts was a constant concern for the NWC, 'due in part to the poor understanding the traders had of the distribution and habits of the animals in particular regions and in part to plain ineptitude. Other problems stemmed from natives not provisioning the posts' (Krech 1982: 432). Clearly, the Loucheux maintained their expectation that the post be self-sufficient, despite company pressure. Further south, NWC representative John Thomson met similar expectations in establishing the Rocky Mountain Fort in the fall of 1800. His choice of location was criticized by Big Chief, the Rocky Mountain trading leader, who told him that:

> [They were] not Built in the proper place, as he intended that the Fort should have been further down about half a Days march, at a Much more convenient place where there is a River quite close out of which [the NWC] might take a sufficient quantity of Fish every spring & Fall to feed all hands. (Keith 2001: 42)

Krech blamed the failure of the Trading River location on famine conditions and illness amongst the Dene during its brief existence there (Krech 1982: 432). Such complaints were frequent in 1825 and 1826. However, the record also suggests that the Loucheux were not interested in provisioning the post, whether or not they suffered famine. It seems that three of the trading post's regular hunters – Capot Blanc, Capot Rouge and Misere – were not Loucheux but Hare Indians, serving the Fort before and after the move into Loucheux territory.[9] Also, in the lead-up to the 1827 relocation back to Hare territory, the Loucheux Chief, Barbue, seemed to sympathize with, and even support, the move. When Fort Good Hope Chief Trader Charles Dease raised the issue with him during the summer of 1825, Barbue is reported to have said that 'it was the old Chief that asked for its removal and that he would say nothing on the subject but if the Whites starved where they were *it would only be just* that they should build where they could procure a livelihood.'[10]

While Barbue's comments register his distaste for the relocation, they align with the advice that the Rocky Mountain Big Chief and the Loucheux gave NWC traders decades earlier. The Dene consistently indicated that they had limited time, interest or ability to support both their families and these newcomers. Barbue's stance may merely have responded to difficult climatic conditions in the 1823–27 period, or it may have reflected a view that the trading post was not well situated within Loucheux territory. Dease, however, did not report conversations about alternate locations in Loucheux territory, suggesting that Barbue was not overly interested in relocating the post on Loucheux lands.

Barbue's reference to 'justice' also raises a normative aspect of the trading relationship. Sharing was (and remains) a dominant Dene ethic (Blondin 1997: 72) but this did not mean simply sharing food; it meant sharing resources so that one's family could be self-sufficient. Consequently, denying access to adequate means of self-support would be unfair. Accordingly, the newcomers were expected to be self-sufficient and were given both permission and information necessary to access provisions. The HBC traders may have missed the normative subtleties of Barbue's response and its reassertion of the conditions of trader presence first stated to McKenzie 20 years before. Instead, the HBC continued to seek Barbue's agreement to the relocation, reflecting their own normative investment in Loucheux consent but also attempting to enforce indigenous provisioning commitments as the HBC saw them. As Edward Smith, the Mackenzie District Chief Trader commented, 'we will at least [receive] some benefit from having made the proposal. It will make them more punctual in bringing in Supplies of Provisions.'[11]

After several more conversations with both Hare and Loucheux, the traders secured the Fort's relocation at a meeting in spring 1827. Both the Little Chief (chief of a Hare band) and Barbue had gathered at Fort Good Hope, representing some, but certainly not all, of the Hare and Loucheux who frequented the post.[12] Smith invoked Dene notions of fairness when he explained that the Company needed to relocate the Fort because of 'the difficulties we Experience in coming this distance twice a year, the risk of their supplies being stopped by the Ice, together with the General Scarcity of Provisions to subsist the people during the long Winter Seasons.'[13] He encouraged the Loucheux to visit the Fort after relocation, offering the same 'reduced prices' to which the Dene in the more southerly parts of the Mackenzie were accustomed. All in all, Smith's news was well-received: 'The Loucheux present consented more readily than I expected they would … As to the Hare Indians[,] nothing could have given them greater pleasure & they did not conceal their Satisfaction.'[14] The move back to the Rapids followed swiftly after this meeting and trade resumed at the old location by the end of June.

The reasons for the Loucheux's consent may not have been solely normative; Barbue's advanced age and illness in 1827 may also have impeded his capacity to act against the move (Krech 2003). The Company's official explanation for the move, meanwhile, was that the Loucheux were afraid of going so close to the Esquimaux, an explanation that seems baseless. No Esquimaux attacks on the Fort were recorded, the Loucheux had guns by this time, and the reported conversations do not mention Esquimaux aggression.[15]

The role of Hare and Loucheux relations in facilitating this move were also obscure to the HBC, though their records do signal their significance. When the Loucheux, including Barbue and a party from the lower Loucheux band, visited the Fort soon after the move, the Hare greeted them and 'came down to see the Loucheux and have a dance which is their custom of showing a friend by disporition,'[16] This ritual confirmation of Hare and Loucheux friendship facilitated the Loucheux's continued attendance at Fort Good Hope for at least the next 13 years, when the HBC finally established a trading post elsewhere in Loucheux territory.

Territoriality and governance along the Deh Cho

Reflecting on the importance of subsistence and the nature of inter-Dene relations, we can begin to piece together what the location and relocation of Fort Good Hope tell us about territoriality along the Deh Cho. Territoriality implies some measure of control exercised by a group over a specific region (Elden 2010: 757), a quality not easily discerned from this portrait of the Mackenzie District. In the seventeenth century, Radisson understood the chiefs as exercising authority over the land on which the trading posts were built. By the nineteenth century, in the absence of imperial competition, the NWC traders still sought (and occasionally ignored) the consent and assistance of important men in locating trading posts but they tended not to secure authorization for their presence on Dene lands. Nineteenth-century trading companies also harboured some territorial aspirations: they sought to carve up the territories they traded in and to assign particular groups of Indians to particular forts. Traders such as Wentzel mapped approximations of indigenous group territories according to their limited geographical and demographic knowledge (Keith 2001: 74–75). In the 1820s, the HBC governing council listed 'the Indians and freemen considered appertaining to each District throughout the Country.'[17] Foreshadowing Indian agents' and treaty commissioners' lists but lacking the force of law, these maps and lists sought to assign a trading location to each Indian to prevent Indians from evading their debts by travelling to different trading posts year to year. Companies also used gifts to try to instil loyalty, occasionally refused to trade with indigenous traders who attended the 'wrong' trading establishment, and tried to influence Dene trading patterns through the institution of the trading chief. Their efforts were thwarted by Indian mobility.

The negotiations about the Fort's location expressed more about Dene territoriality than the traders noticed. Reading trader records with more recent ethnographic studies allows us to read through the information in the traders' reports. Like the territorial sensibilities of Radisson and later traders, Dene territoriality also involved governance structures, strategies of control and spatial sensibilities. Dene governance, however, was decentralized and non-coercive; leadership was not confined by strict geo-political boundaries. Moreover, inferring principles of governance from the actions of Dene trading chiefs such as Barbue requires cautious interpretation. Traders may not have correctly identified leaders, their territories, nor understood the leaders' authority to govern.

At the regional level, it is tempting to describe Dene groups like the Hare and Loucheux as 'tribes' but ethnographers such as June Helm warn against it because these 'regional groups' lacked governance structures or regular coordination above the band level (Helm 2000: 167–68). Bands, according to Helm, were groups of people who hunted, travelled and camped together, often composed of two or three nuclear families (Helm 2000: 169). Chiefs with regional or 'tribal' influence emerged only occasionally.[18] Nevertheless, there were clear regional identities amongst the different Dene groups, demarcated by distinct dialects of the Dene

language.[19] Within these regional groups, membership was fluid with kin affiliations serving as an 'entrée to band units' but, as Helm notes, '[a] kindred has no "shape" or boundaries' (Helm 2000: 168–69). Thus, kin relations may have anchored band membership but kin did not create geopolitical boundaries for the basic (band) or larger (regional group) units of Dene political community. Even without geopolitical boundaries, people and bands still belonged to particular places more than others. Such attachments were evident when Dene hired to hunt for the post deserted the Fort or requested leave to return to their lands and families, to their homes.[20] They may have had many reasons for leaving the Fort – including occasional rough and disrespectful treatment by the NWC or others – but they also had places they needed to be, places strongly associated with their relations and their relations' seasonal camps.

The trading post records suggest that boundaries were defined more by the friendship status than by geography. The ceremonial welcome of the Loucheux by the Hare when Fort Good Hope returned to Hare lands in 1827 can be interpreted to support this model of jurisdiction; as can the Loucheux's acceptance of, and assistance to, Hare hunters when the post was located in Loucheux lands. When Dene travelled – for trade or other reasons – they traversed and used resources in what the traders identified as the territories of other regional groups; yet no permissions were required, nor were there adverse consequences so long as friendships were in good standing. It required effort to maintain friendship; it could not be taken for granted. Hostilities between regional groups (other than the Loucheux and Hare), as well as with the Esquimaux, were reported by traders and are confirmed in Dene stories (Blondin 1997: 93, 149).

We can distil Dene spatial sensibilities and relationships from Dene stories that NWC traders Wentzel and George Keith dismissed as fanciful. Dene stories identify special places, particular resources and where important events took place. The story of The Copper Woman, for example, tells how a Chipewyan woman who lived amongst the Esquimaux for many years brought copper into Dene lands and situated it at the place where she sank into the earth – a place named in the story as 'Sat in the Same Place Mountain' (Helm 2000: 286–89). Some Dene stories are about particular resources, such as a fishery where the Johnny Hoe River empties into Great Bear Lake. There, elders report that 'the Dogribs would begin building a fish weir from the east side, and the Slaveys from the west. When they met in the middle, they would celebrate with a feast' (Sahtu 2000: 88).

Embedded in these stories are ethics of sharing resources, respect and other principles which shaped and reflected Dene territoriality – their moral and legal responsibilities in relation to land, kin, neighbours and friends. As the Sahtu Heritage Sites and Places Joint Working Group explains in its report:

> Traditional place names serve as memory 'hooks' on which to hang the cultural fabric of a narrative tradition. In this way, physical geography

> ordered by named places is transformed into a social landscape where culture and topography are symbolically fused.
>
> (Sahtu 2000: 21)

Viewing geography as social landscape rather than geopolitical topography enables us to comprehend a territoriality of shared lands and shared authorities. If both the lands upon which the trading posts were located and the trading posts themselves were understood to be shared resources, then the NWC and HBC did not require 'local authorities' to sanction a decision about Fort Good Hope's location. The decision was not a local one, nor were there local authorities attaching to a bounded geopolitical territory. What decision-making authority (or influence), then, would a trading chief such as Barbue have had over the use of the lands to which he and his band were particularly attached?

Chief Sonfrere from Hay River was asked such a question in the early 1970s, when he gave evidence to support Dene efforts to register a caveat over 400,000 square miles of land in *Re Paulette et al. and Registrar of Land Titles* (1973) 42 DLR (3d) 8 (*Re Paulette*).[21] His answers aptly stated the legal principles obscured by the historical record. When questioned about various bands' rights to different geographic areas, Chief Sonfrere explained through a translator that although the boundaries are not written on maps and not drawn out on maps, the people from each community realize and respect other people's areas; although they are not written,

> although they are not drawn on maps, they have respect for each other's areas, and he realizes how much the people from Fort Smith use it as well as the people from Fort Providence, but when it comes to helping each other it does not matter, they help each other.
>
> (transcripts from *Re Paulette*: 121–22)

When questioned about whether foreigners would have rights to use his band's area to hunt and fish, he responded 'I personally alone by myself cannot make such a decision. I have to consult other chiefs across the Territories and then we are going to discuss it and reach a decision on that sort of thing' (transcripts from *Re Paulette*: 122). And, finally, when asked about how a group of white people coming into his hunting and trapping area without permission would make him 'feel,' he answered, 'If such a thing is going to occur, they should consult with me, and I will consult with my people and there will be a decision made in such a thing, but they should never just barge in like that' (transcripts from *Re Paulette*: 125).

Consultation and respect were and are the two key principles guiding the Dene in their land and resource use. Under these principles, determining the location of trading posts in the early nineteenth century required consultation with the bands and groups affected. Thus, it was not necessarily a problem if traders dealt with individuals who lacked the political authority to grant permission, as Dene

norms required these individuals to consult their band and friends about the decision. The NWC's adherence to the principles of consultation and respect may have been marginal in some cases but such consultation likely went on between Dene people, regardless of NWC's participation. The NWC and HBC muddled along sufficiently to establish friendships, engage in trade and, usually, to maintain their welcome according to Dene rules.

The relative impermanence of individual traders, the occasional mobility of the forts within Dene territory and their lack of interest in resources beyond furs and food, would also have been consistent with the territorial and governance principles of their Dene hosts. The traders' practices in the Mackenzie River District did not advance a colonial agenda. They were merchants more than colonists, adding to and adjusting Dene practices to accommodate their trade. They may have changed some Dene norms by recognizing trading leaders and introducing new trade goods, but such change was of limited scope. Many individuals traded outside of the relationships with particular trading leaders and the trading leaders lacked authority to remake Dene territorial authority into the companies' image of jurisdiction. Similarly, the companies were not able to encourage Dene to specialize in a provisions trade, though a few Hare Indians were employed as fort hunters. The normative frame regarding territory and land use – that of sharing resources to support self-sufficiency – remained intact. Territoriality and governance authority along the Mackenzie River remained firmly on Dene terms in the early nineteenth century.

Conclusions

This study confirms much that is already known about colonial claims in settler states: sovereignty was not achieved merely by its assertion and indigenous systems of law and governance remained in place after contact. What this study adds is a closer look at the interaction of indigenous and British legal and quasi-legal rules, particularly about territory and governance authority, in a geographic and political context far removed from settler activity. It demonstrates that in trading contexts, indigenous legal and political systems were not just left intact, but provided the operative norms for indigenous–newcomer relations.

Notes

1 Imperial Order-in-Council admitting Rupert's Land and the North-Western Territory into the Dominion of Canada, 23 June 1870.
2 For criticisms of 'upstreaming' in ethnohistory, see White (1991: xiv). Contrast White (1999: 109, 116–17); Clendinnen (2003: 133).
3 For example, Jean-Baptiste Laprise was an *engagé* who appears to have never left the Mackenzie District (Keith 2001: 404–6).
4 The estimate of distance is based on Shepard Krech's (1982: 430) map of the region.
5 The precise location of the post in Loucheux territory is unclear from the trading post records.
6 Regarding the Dene specifically, see Helm (2000: 167–87).

7 The *Courts of Justice, Canada Act 1803* (Imp) provided for such a trial in Upper or Lower Canada; but see Foster (1990) who argues that this legislation was intended to address European rather than indigenous violence.
8 W.F. Wentzel, 'Account of Mackenzies River with a Chart from Mr. Wentzel', in Keith (2001: 362).
9 Capot Rouge is identified as Hare on 1 August 1825, HBCA B. 80/a/3. Capot Blanc and Misere are not identified as clearly but their associations in the trading post record suggest that they were also Hare.
10 C. Dease to E. Smith, 31 August 1825, HBCA B 200/b/a (emphasis added).
11 E. Smith to C. Dease, 3 October 1825, HBCA B 200/b/a.
12 The Old Chief, mentioned by Barbue, died in January 1826 (Fort Good Hope Trading Post Journal, 27 March 1826, HBCA, B. 80/a/3).
13 Fort Good Hope Trading Post Journal, 2 June 1827, HBCA 80/a/6.
14 Fort Good Hope Trading Post Journal, 2 June 1827, HBCA 80/a/6.
15 The company position was reported by Governor George Simpson, quoted in Krech (1982) from HBCA D 4/92/fo. 29. It probably derived from Sir John Franklin's 'unwelcome reception' from the Esquimaux in 1826 rather than from Loucheux–Eaquimaux relations (Krech 1982: 433).
16 Fort Good Hope Trading Post Journal, 28 June 1827, HBCA B 80/a/6. Note 'disporition' appears to be a version of 'disport' meaning to amuse, entertain or divert.
17 E. Smith to M. Macpherson, 15 April 1825, HBCA B 200/b/a.
18 Helm identifies Akaitcho, a famous Yellowknife who assisted the first Franklin expedition, as a leader with wide influence but not 'tribal leader in any overtly recognized sense' (Helm 2000: 167–68).
19 Language and other divisions amongst the people are explained and reflected in various origin stories. See, for example, the Tlinchodene/Dogrib story – 'The Mountain Which Melted' (Petitot 1976: 23).
20 See, for example, Capot Blanc's expression of a desire to 'go on his own Lands and join his relations,': Fort Good Hope Trading Post Journal, 26 January 1824, HBCA B 80/a/2. See also 18 December 1824, when Le Canard, a young Hare Indian, is hired as a hunter but leaves within a few days because he misses his father too much (Good Hope Trading Post, HBCA B 80/a/3).
21 Though the Chiefs succeeded in having the Dene interest in land recognized as cognizable at law, their effort to register a caveat failed on appeal: *Paulette v The Queen* [1977] 2 SCR 628.

Chapter 5

Pan-nationalism as a crisis management strategy

John Ross and the Tahlequah conference of 1843

Tim Alan Garrison

In the spring of 1843, the painter and portraitist John Mix Stanley, who possessed the only daguerreotype camera on the southern plains, was collecting images of American Indians. He hoped, in the future, to be able to tour the eastern United States with a gallery of Native portraits and artifacts. Aware of Stanley's plan, Pierce M. Butler, the federal agent to the Cherokee Nation, told him that John Ross, the principal chief of the Cherokees, was organizing an international council of indigenous nations in the Cherokee capital of Tahlequah and that Stanley would find leaders from a variety of tribes at the meeting. When Stanley arrived in Tahlequah in June, he found a gathering of thousands of indigenous people in the town and he collected several portraits of prominent Native leaders from around the Indian Territory and beyond. Unfortunately, none of the images survives, for a fire swept through the Smithsonian Institution in 1866 and destroyed the prints (Foreman 1933: 213; Sandweis 2004: 208–10; Taft 1953: 9).

What did survive was a painting of the council by Stanley and it has developed a mysterious status among students of American Indian history. Although the painting has been described as 'one of the most valuable and important Indian pictures in existence,' often mentioned or reproduced in history books and regularly displayed at the Smithsonian, we actually know very little about what happened at the event Stanley realized so colourfully in his work. The painting, titled 'Indian Council Convened by John Ross at Tah-le-quah,' and sometimes referred to as 'International Indian Council', depicts a large gathering of Native men dressed in a kaleidoscopic variety of dress. While it is impossible to identify most of the characters in the artistic play, two figures do stand out: General Zachary Taylor, the future president of the United States; and Ross, who sits at the centre of the picture wearing a black suit and tie. While several scholars have discussed the pageantry of the meeting, they have never examined in any detail the reasons why Ross decided to call the 'Grand Council' in the first place (Bushnell 1925: 511; Hoig 1998: 195). This paper examines the political and diplomatic motivations that moved Ross to call the international convention, his efforts to organize the meeting, and the meeting's product – a compact that established formal guidelines for intertribal relations in the Indian Territory. Above all, as we will see, Ross called the delegates together to reassert the

sovereignty and territorial propriety of his nation after its removal from the American southeast, using strategies suspended between indigenous and settler governance.

When the Cherokee population arrived at their new home after traversing the Trail of Tears in the winter and spring of 1839, Ross immediately began working to solidify his political position and to secure the nation's property and autonomy from future encroachment. By 1842, when Ross decided to call an international council, the Cherokee people had already moved to revive its national institutions. Ross's government had re-established its bicameral legislature, its multi-level judiciary and its law enforcement apparatus. It had reinstituted criminal and civil legal codes and translated them into the Cherokee language, set up a system of commercial law, and authorized a census. The government had sanctioned the building of 'missionary stations' in the nation and prohibited gambling and the sale and importation of liquor. Ross had made arrangements to publish a new national newspaper, the *Cherokee Advocate*, and named William Potter Ross, his nephew and a graduate of Princeton, as its editor. The government had also established 11 public schools under the authority of a national superintendent, initiated plans to create a school for orphans, and set up pensions for the blind (*Constitution and Laws* 1975: 5–15, 17–19, 21–27, 33, 43, 44, 52–54, 57–58, 59–61, 66, 75–82; Goode 1863: 63).

These achievements are particularly remarkable in light of the chaotic state of political affairs in early post-removal Indian Territory. As Ross contemplated his international agenda, he faced a series of domestic problems that would have chastened any chief executive. First, he was in the middle of a bitter political conflict with two competing factions of Cherokees – the 'Treaty Party' and the Old Settlers – and had not yet consolidated his authority in the West. In 1794, 1810–11 and 1819, several thousand Cherokees had moved away from the encroachments and trespasses in the East and settled in the Arkansas River Valley. In 1828 the United States induced most of these 'Old Settlers' to relocate to the northeastern portion of what would become the Indian Territory (now northeastern Oklahoma). The Old Settlers were joined in 1836 by Treaty Party adherents. Treaty Party Cherokees, who had accepted the idea of relocation as early as 1832, had signed or supported the 1835 Treaty of New Echota and had soon thereafter departed for the West. When the main population of Cherokees arrived in 1839 – having been forcibly relocated under the Treaty of New Echota – a leadership struggle developed between the Old Settlers, the Treaty Party and the 'Late Immigrants,' as the new arrivals were denominated. The Old Settlers expected to maintain their own political structure, integrate the Late Immigrants and secure per capita shares from the proceeds of the New Echota treaty. The Late Immigrants, who made up about two-thirds of the Cherokee population in the Indian Territory, expected to assume power by majority rule, to restore the political and judicial institutions they had constructed in the Southeast, and to retain Ross as their principal chief. The Treaty Party dissidents, for their part, generally allied with the Old Settlers. Some

among the Ross Party accused the Treaty Party and the Old Settlers of conspiring to keep Ross and the Late Immigrants out of power. To make matters more difficult for Ross, United States officials often interfered with or prolonged treaty settlement negotiations and some of them openly sought to diminish his influence. Therefore, Ross had political motivations for calling the international meeting. He wanted to establish himself as the undisputed leader of the Cherokee Nation and to revive his administration of the government in the West. Hosting an international conference, in which other tribal nations acknowledged his status, would provide him with elevated authority among those Cherokees who had not become entrenched in one of the competing factions (*Constitution and Laws* 1975: 3–4, 38–39; Goode 1863: 59–60; McLoughlin 1993: 10–58; Moulton 1978: 108–22; Reed 1979: 148–55; Wilkins 1986: 329–34).

At the same time that Ross was negotiating with the Old Settlers, he was also engaged in a simmering civil war with the Treaty Party dissidents. Most Late Immigrants had lost friends, family, homes and wealth in the Removal, and Ross supporters held the Treaty Party responsible for the losses. On 22 June 1839, gunmen affiliated with the Ross faction, but acting as far as we know without the chief's imprimatur, brutally killed Major Ridge, John Ridge and Elias Boudinot, the leaders of the Treaty Party. In 1829 the Cherokee Nation, under Ross's direction, had reaffirmed an earlier statute that provided for capital punishment for any individual who sold national lands without the government's consent. Ross's partisans maintained that the killers of the Treaty Party leaders were simply enforcing national law; the outraged Ridge faction held that Ross had ordered a political execution of his rivals. For the next seven years, retaliatory killings back and forth between the factions wracked the Cherokee Nation. Ross, in fact, was constantly in danger of assassination and was often protected by bodyguards. As he began to organize the international meeting, Ross was trying to becalm a situation that threatened to sunder the nation. Hosting an international council, Ross believed, would help foster national unity among the factions, even if those among the Treaty Party despised him personally (Benson 1860: 254; McLoughlin 1993: 15–17, 41–42, 46–47; Moulton 1978: 136; Moulton 1985: 163, 164; Reed 1979: 156–60; Wilkins 1986: 208–9, 334–39).

If his domestic situation was not troubling enough, Ross confronted genuine international concerns. Firstly, the five largest nations of indigenous peoples removed from the Eastern United States in the 1830s – the Cherokees, the Creeks, the Chickasaws, the Choctaws and the Seminoles – had been forced onto lands already occupied by other Native nations. The Cherokee Nation border had long overlapped with Osage territory in the west, and the United States government had never resolved this disagreement or the contentious Osage relations with the Delawares, who had moved into a portion of Cherokee territory. The other Native peoples whose residence in the territory predated the relocation of the Southeastern nations feared that their own lands might be seized or trespassed upon by the nations who had recently arrived from the Southeast. Some American observers, in fact, feared a major conflagration in the territory. Ross

hoped that an international council might resolve some of these conflicting territorial claims and allay the fears of American and indigenous peoples living in and around the Indian Territory (Bowes 2007: 131–37; Goode 1863: 81, 84; Smith 1928: 186–87).

Ross also had concerns about maintaining law and order in the new Cherokee territory. The ability of the Cherokees to retain their sovereignty depended, to some extent, on perception. American settlers were itching to get into the region, and manipulative speculators and politicians in adjacent Arkansas alleged that the Indian Territory was lawless. They called for the United States to establish order in the indigenous territories, even though the removal treaties had promised that the Indian nations would have autonomy over their new lands. The chief needed to demonstrate to the United States that the Cherokee government was capable of maintaining domestic stability (McLoughlin 1993: 41–56).

Ross's people, moreover, encountered a variety of financial, social and environmental issues in their new homeland. The Cherokees during this period suffered from recurrent epidemics of malaria, typhoid and smallpox. Occasional slave revolts provoked unrest among Cherokee owners of bondsmen. Thousands of Cherokees were desperately poor and hungry as well, for they had been impoverished by removal, lacked the necessary tools and implements for farming, and were having difficulty adjusting to the distinctly different soil, seasons and water supplies. Ross was constantly engaged with the United States in an effort to deal with these issues while, at the same time, he was trying to resolve the financial aftermath of the removal and recover monies and annuities that the American government owed the Cherokee people. While an international conference would not have resolved any one of these problems immediately, Ross understood that an introductory gathering of nations could facilitate an environment where cadres of governments could begin to join together to confront common problems (Annual Message, 14 November 1842, in Moulton 1985: 147, 149–51, 154–56; *Constitution and Laws* 1975: 73; McLoughlin 1993: 34–39; Moulton 1978: 100–101, 134).

The event that moved Ross to call for an international conference more than any other, however, was the United States' threatened assault on Cherokee political and territorial rights. After Ross had arrived in the Indian Territory, he spent much of his time trying to get the United States government to renegotiate the Treaty of New Echota; he believed the $5,000,000 price offered for the Cherokees' homeland in the East was far below the fair market value. The chief also spent national time and treasure collecting evidence of 'spoliation' cases in which the United States owed the Cherokee Nation or individual Cherokees compensation for property seized in the East. Ross also wanted United States military posts moved out of the nation, and he demanded that the United States government keep traders and trespassers from entering Cherokee territory. He sought formal assurance from the United States government that the Cherokee Nation held complete dominion over its new land in the Indian Territory. In 1841, United States President John Tyler had promised that

he would authorize treaty negotiators to 'give to the Cherokee nation full indemnity for all wrongs which they may have suffered, establish upon a permanent basis the political relations between them and the people of the United States, [and] guaranty their lands in absolute fee simple' (Moulton 1978: 130). In the end, though, the United States failed to follow through on Tyler's promise.

Ross continued to push his demand for a reconsideration of the New Echota agreement after 1841. Frustrated with the chief's persistence, in August 1842, John Spencer, the United States government's secretary of war, threatened to survey the Cherokee Nation, divide up its territory and distribute it to Cherokee individuals in small 'allocations'. The lands that remained after the allotment, Spencer warned, would be sold to 'white' Americans. Ross understood that allotment would mean the inundation of Cherokee territory by non-Cherokees and the subsequent destruction of his nation's autonomy. Ross recognized Spencer's letter for what it was: an attempt to intimidate the great defender of Cherokee sovereignty into backing off of his demands for a New Echota revision. Instead, Spencer's threat spurred Ross to action. Whereas before he had merely intended to try to resolve several jurisdictional conflicts among the Indian nations, the chief now planned to use the international council as a mechanism to inform the United States that the Cherokee Nation intended to defend its national sovereignty and territory against any encroachment (McLoughlin 1993: 31–32, 40–41; Moulton 1978: 130, 133).

We have no direct evidence of what Ross hoped to achieve with the conference, specifically. However, we do know the context of the chief's cogitation. In the past, the Cherokees had reacted to internal emergencies by alliance and accretion. In the eighteenth century, distinct Cherokee towns, unified only by world view, similar dialects and a generally common culture, had responded to the trauma of colonization by unifying into a centralized nation. Ross also knew that indigenous nations had constructed pan-Indian solutions to external threats in the past and that Woodlands nations during the colonial and early national eras had often responded to trader depredations and the migration of settlers into their territory by constructing military alliances to repel the colonial advance. While it is difficult to know exactly how grand Ross's ideas were for his international convention, we do know that he was a pragmatist who had been consistently motivated by nationalistic impulses. Ross sought stability, territorial security and economic prosperity for his nation, and he had learned that international diplomacy and cooperation were sometimes keys to achieving those objectives. Perhaps Ross agreed with those who hoped that an international conference would create momentum for the transformation of the Indian Territory into a multi-tribal state, with the Cherokees playing a primary leadership role. This 'state' or confederation, some had theorized, would continue to have a close relationship with the United States or even be admitted as a state on an equivalent plane with the others in the Union (Bowes 2007: 122–47; Foreman 1933: 201–5; Moulton 1978: 128; Prucha 1984: 304–9).

The federal officials who mattered at the time, however, did not embrace this plan. T. Hartley Crawford, the United States Commissioner of Indian Affairs, perceived any pan-tribal gathering as a prelude to war. In November 1842 he ordered federal agents to block plans for future conventions. This did not deter Ross. He pressed agent Pierce Butler to allow him to proceed with the meeting. Butler argued on Ross's behalf that the meeting would reduce the 'commotion and confusion' that existed in the Indian Territory. Butler added: 'If we cannot control them in council, it will be impossible to do so out of council.' Crawford finally relented and allowed Ross to proceed with his plans (McLoughlin 1993: 45; Satz 1975: 228–29).

On 1 December 1842, the Cherokee legislature called for an international meeting. The preamble of the *Act to Authorize a General Convention of Neighboring Tribes* declared that:

> it appears necessary for the mutual peace and happiness of the several Tribes living contiguous to each other, and from their advancing state of civilization and continual intercourse among each other, that some plan be devised, and regulations adopted, for their good understanding, and securing mutual happiness among each other.
>
> (*Constitution and Laws* 1975: 68–69)

The Act provided Ross with the authority to appoint a delegation to confer with representatives from the neighbouring nations:

> for the purpose of coming to some definite understanding for the adjudication of all unsettled business that may exist, and to enter into such international laws and regulations as may be deemed necessary for the welfare and prosperity of the respective tribes.
>
> (*Constitution and Laws* 1975: 68–69)

Ross then sent messengers by foot to 36 nations, including all of those in the Indian Territory and some as far west as the Rocky Mountains. William H. Goode, who had recently set up a Methodist mission at the nearby abandoned site of Fort Coffee, wrote that, 'Considerable interest was excited by the call, and no little speculation indulged as to the real design of the movement.' 'Some,' Goode wrote, 'attributed private and designing motives to the prominent Cherokees, and especially to John Ross.' American settlers in neighbouring Arkansas feared that 'there was about to be a hostile combination of the Indian tribes against the whites,' Goode reported, and 'the department at Washington was addressed on the subject.' Goode, who had developed relationships with many Native people in the Indian Territory, declared that there was no reason for concern. He noted that Ross had not provided any 'specific object' in his invitation; he took the chief's intentions as genuine (Goode 1863: 67; Moulton 1985: 164).

Reports differ on the number of indigenous nations that appeared at the council (Moulton 1978: 134; Woodward 1982: 238). Estimates of the number present in

Tahlequah around the time of the council ranged from 'three or four' thousand to upwards of 10,000 (Foreman 1933: 206; Goode 1863: 67; Sigourney 1932: 556). According to Butler's account, 211 delegates, representing 18 nations, attended the convention (Sigourney 1932: 556). Striking by their absence were representatives from the Choctaw Nation, who, according to Goode, 'stood aloof from the whole proceeding.' One source reported that the Choctaws said that they did not want to travel to Tahlequah just to listen to people 'talk and get drunk.' They said that they would rather 'stay at home and "tend to our own business."' It is likely that the Choctaws refused to submit to a process that subordinated them to Cherokee leadership (Sigourney 1932: 557; Benson 1860: 52; *Baltimore Sun* 1843 8 August).

Although the number of nations in attendance was smaller than the Cherokees had hoped, they must have been pleased with the spectacle they created. The delegates were lodged in log cabins in a three acre enclosed area on the Cherokee council grounds, while spectators and observers camped out in the surrounding fields. 'Public tables were arranged for all the guests,' reported one witness, 'with a bounteous supply of beef, hominy, cornbread, and other edibles.' The widespread availability of alcohol did not mar the proceedings. General Zachary Taylor, who observed the council for the United States government, noted to the Adjutant General's Office that he was pleased with the peaceful nature of the council and that he had concluded that the meeting's results 'can be no other than beneficial, as well as to the red man as to us'.

On Friday 23 June, the sound of a horn called the delegates to the opening of the council, which was held in a 'large well-roofed shed.' Special ritual peace pipes and wampum belts were laid upon a large table in the center of the room, and the delegates sat on benches that extended 'out like radii of a semi-circle.' A number of interpreters were gathered to translate the remarks of the delegates into their various languages (Foreman 1933: 206, 208 n 16; Goode 1863: 69–71; Sigourney 1932: 558).

John Ross stepped forward first to address the meeting. He was, Goode wrote, 'much such a man in appearance as Martin Van Buren, only a size smaller; quite equal, I should think, in mental caliber and business tact, to the average of our Congressman.' Goode concluded that Ross was, 'in point of talents and acquirements, the first man present' (Goode 1863: 70, 72; Moulton 1978: 134–35).

Ross spoke to the council in English and began his scripted address with a welcome: 'Brothers: You have … smoked the pipe of peace, and shaken the right hand of friendship around the Great Council fire, newly rekindled at Tahlequah, in the West, and our hearts have been made glad on the interesting occasion.' He declared that constructing peaceful relationships among the Indian nations was of paramount importance:

> For it is in peace only that our women and children can enjoy happiness and increase in numbers. … We should, therefore, extend the hand of friendship from tribe to tribe, until peace shall be established between every nation of red men within the reach of our voice.

The chief briefly reflected on the recent past of the Southeastern tribes: '[W]hen we see that our ancient fire has there been extinguished, and our people compelled to remove to a new and distant country we cannot but feel sorry; but the designs of Providence, in the course of events, are mysterious' (Goode 1863: 73–75; Moulton 1985: 165).

Ross then explained his reasons for calling the Grand Council. He noted that 'tribes that were once separated by distance have become neighbors, and some of them, hitherto not known to each other, have met and become acquainted.' The Southeastern nations, Ross implied, had been forced by removal to live within close proximity to each other, and to reside near the peoples of the southern Plains who had experienced unique histories and practiced distinct cultures. Regardless of their differences, Ross suggested, all of the Indian nations in the territory were going to have to find a way to live with each other. This could only be done, the chief argued, by 'adopting such international laws as may be necessary to redress the wrongs which may be done by individuals of our respective nations upon each other' (Moulton 1985: 165).

The opening addresses lasted for the remainder of the session; and after a weekend of food, fellowship and religious services, the delegates went back to work. Unfortunately, because Goode departed from the scene after the opening weekend, we do not know how the council process worked. No other extant notes on the meeting survive. However, we do know that on 3 July the delegates produced an agreement that revealed the major concerns of the gathered nations. The preamble of the compact noted that, 'The removal of the Indian tribes, from the homes of their fathers, east of the Mississippi, has there extinguished our ancient council fires, and changed our position with regard to each other.' It pointed out that the United States had, by treaty, guaranteed to the nations of the Indian Territory that 'the lands we now possess, shall be the undisturbed home of ourselves and our posterity forever.' The purpose of the council, the compact read, was 'to preserve the relations between our several communities, to secure to all their respective rights, and to promote the general welfare' (*Baltimore Sun* 1843 8 August; *Constitution and Laws* 1975: 87; Goode 1863: 84).

In the first of the compact's eight articles, the parties declared that, 'Peace and friendship, shall forever be maintained between the Nations, parties to this compact, and between their respective citizens.' Several of the subsequent articles dealt with issues of crime and violence in the Indian Territory. One of the institutional foundations of social regulation for pre-contact Woodlands peoples had been the clan law of blood revenge, which provided the clan of a victim of a killing the right and duty of revenge against the clan of the assailant. While the principle had inhibited blood feuds within indigenous societies, in the colonial period it had prompted several wars between Native and settler communities. In 1810 the Cherokee Nation had officially abrogated the law of blood revenge, partly to avoid disastrous retaliatory strikes by settler warriors and partly because some of their leaders had become convinced that the nation needed to move toward a secular, prosecutorial form of justice. With the Tahlequah agreement,

the parties to the compact followed the Cherokee lead and agreed that, 'Revenge shall not be cherished, nor retaliation practiced, for offenses committed by individuals.' This particular provision must have seemed quite ironic to those Treaty and Ross Party adherents who were even then engaged in a bitter civil war over the Ridge/Boudinot killings (*Constitution and Laws* 1975: 87; Reid 1970: 73–84; Strickland 1975: 58–59).

The parties to the compact also worked out the thorny but significant issues regarding criminal jurisdiction, and the fact that five of the eight articles of the compact relate to that concern indicates the degree of unrest and uncertainty that existed in the Indian Territory at the time. Article four of the agreement provided the parties with jurisdiction over another signatory nation's citizens where that person was accused of 'willful murder' in their territory. The alleged assailant, the compact said, 'shall be subject to the same treatment as if he were a citizen of that Nation.' Article five included an extradition procedure. The provision declared that when an individual 'citizen' of any one of the compacting parties committed a crime and fled into the territory of another compact nation, the principal chief of the latter nation, upon presentation of 'reasonable proof' of 'guilt,' was required to turn over the alleged perpetrator to the nation with jurisdiction over the criminal act (typically, the nation where the crime was committed). In article six, the parties agreed that if one of their citizens committed a crime outside of all of the signatories' territories, 'the person so offending, shall be subject to the same treatment, as if the offense had been committed within the limits of his own Nation.' Article four required thieves to return stolen property, 'taken by force or fraud,' to its owner; if the property could not be located, the agreement required the convicted to pay full compensation for the value of the stolen goods (*Constitution and Laws* 1975: 88).

The eighth article dealt with a common problem in the Indian Territory. Bootleggers were shipping whiskey into the region, and the federal government was doing very little to stop it. The convening nations determined to take matters into their own hands. The first clause noted that 'the use of ardent spirits,' was a 'fruitful source of crime and misfortune.' The convention agreed to 'recommend its suppression within our respective limits.' In the second half of the article, the parties agreed that 'no citizen of one Nation, shall introduce it into the territory of any other Nation.' This particular clause was reaffirmed years later by most of the nations in the Territory at a council in Eufaula, Creek Nation (*Constitution and Laws* 1975: 88; Foreman 1933: 214–15).

It was, in the end, the third article that was most important to Ross, as it spoke directly to his concerns as principal chief of the Cherokee Nation. In that provision, the signatory nations directed a powerful statement to the United States government. In the first lines, the parties cleverly linked the path toward acculturation with national territorial dominion: 'To provide for the improvement of our people in agriculture, manufactures, and other domestic arts, … a fixed and permanent location on our lands, is an indispensable condition.' Then the authors of the agreement again reminded readers that they had been relocated against their will,

that the United States had promised to respect the territorial integrity of their new national lands, and that they intended to work together to hold the United States to that promise. 'We hereby solemnly pledge ourselves to each other,' article three declared, 'that no Nation, party to this compact, shall, without the consent of all the other parties, cede, or in any manner alienate, to The United States, any part of their present territory.' This was Ross's response to Secretary of War Spencer; while he would compromise on the amounts owing the Cherokees, he would never surrender territory to the United States (*Constitution and Laws* 1975: 87–88).

In what must have been a major disappointment for Ross, however, only the delegates from the Cherokee, Creek and Osage nations signed the compact. Representatives from the Chickasaw Nation and other tribes declared that they lacked the authority to bind their nations or wanted to consult their leaders back home before signing. The Potawatomi delegates said that they refused to sign because different bands of the nation had their own particular circumstances to consider and because their agent had informed them that the United States government objected to the provision prohibiting the future cession of their lands. The Delawares and Shawnees held back, apparently because they feared falling under the authority of the Cherokees. The Wyandots, for their part, preferred to work toward a collaboration of northern nations. With the signing of the agreement, the grand international council of the Indian Territory drew to a close. The Cherokees, ever hospitable, provided the delegates with food and supplies for their journey home (Bowes 2007: 146–47; *Constitution and Laws* 1975: 88–89; Sigourney 1932: 558).

The Cherokee and Creek nations renewed, reaffirmed and supplemented provisions of the agreement several times over the years, and the Tahlequah meeting set a precedent for several subsequent 'Grand Councils' among the Southeastern nations and the tribes in the West. Although signed by only three nations, the Grand Council's product helped to reduce international conflicts in the Indian Territory, the American Civil War being an exception. Cherokee historian Grace Steele Woodward, for instance, maintains that after 1843 'major intertribal conflicts became practically nonexistent in the Indian Territory' (*Constitution and Laws* 1975: 89, 395–97; Faulkner 2006: 35–36; Woodward 1982: 239).

That being said, the Council did little to achieve Ross's political goal, which was to establish his authority over the Old Settlers and the Treaty Party. In fact, the competition for control of the Cherokee government did not end until 1846, when Ross abandoned his efforts to renegotiate the Treaty of New Echota and the factions agreed to a general amnesty for all crimes committed since the Ridge/Boudinot killings (McLoughlin 1993: 34–58; Moulton 1978: 145–53).

Ross also did not achieve lasting protection for the sovereignty of the Cherokee Nation. Article three, in which the nations pledged to refrain from future cessions, unsettled United States officials and incited settlers already aching to move into the Indian Territory. The editor of an American newspaper, the *Democratic Review*, feared that the compact would not protect the Indian nations:

> Our greatest apprehensions, we must confess … arise from the peculiar geographical position of the Indian Territory. … Our population is on the broad move West. Nothing, it is evident, will now repress them this side of the Pacific. … [T]he removed tribes are precisely in the centre of this path.

The editor then asked:

> Whether this new tide of emigration be successful or unsuccessful, will those who compose it spare to trample on the red man? Will they suddenly become kind to him, to whom they have been unkind? Will they cease to desire the lands which their children want? Will they consent to see the nation separated by an Indian state? Will they award honors, nay, justice, to that state? Twenty years will answer these questions
>
> (*The United States Democratic Review* 1844 'Our Indian policy' 14: 184)

In fact, within 20 years of the council compact, the Cherokee Nation and the other southeastern nations in the Indian Territory were entangled in the American Civil War. Their fateful decision to ally with the Confederacy resulted in treaties requiring those nations to surrender large parcels of land to the United States and to allow that great force of settlement and market – the railroad – directly into and through the Territory. While some Native leaders continued to dream of an international indigenous state, the decision to join the losing side in the Civil War resulted in a settler inundation that overwhelmed the nations most likely to have participated in such an endeavor. In the last years of the nineteenth century, the United States adopted the Curtis Act, which required the Native nations of the Indian Territory to allot their national, communally owned lands to individual heads-of-household, and hundreds of Native families lost their allotments through fraud and coercion in the coming decades. By 1907 the governments of the Indian Territory were no more. The United States extinguished the Territory, ended the dreams of a pan-Indian confederation and established a new settler state, Oklahoma, in its place.

Despite its failures, it is not difficult to define John Ross's international council as a great personal achievement. Ross, who served as principal chief until his death in 1866, was a remarkable politician who almost single-handedly forestalled the destruction of Cherokee political autonomy during his long tenure. The fact that he could organize a meeting as significant as the Grand Council at a time when his nation was involved in a civil war, and as he was engaged in the reconstruction of a nation, is a tribute to his executive ability. Ross remains significant because he was committed to a single, driving idea: that the Cherokee polity was a sovereign nation possessing dominion over its territorial estate.

Chapter 6

Obstacles to 'a *proper* exercise of jurisdiction' – sorcery and criminal justice in the settler–indigenous encounter in Australia

Heather Douglas and Mark Finnane[1]

Introduction

Frustrated with what he repeatedly described as the 'very painful situation' of dealing with Aborigines in colonial courts, South Australian Chief Justice Charles Cooper questioned in 1846 whether 'a *proper* exercise of jurisdiction' was achieved in bringing Aboriginal people before courts for offences committed among themselves (Ward 2006). In this chapter we explore how the practice of and belief in sorcery has been, and continues to be, a significant obstacle to the 'proper exercise' of jurisdiction in some *inter se* cases.

In many Australian Aboriginal communities, and in other colonized countries, beliefs about sorcery have endured, and indeed increased, in recent times. Such beliefs often underlie violent criminal activity. For example, increasing numbers of ritual murders have been identified in South Africa and Melanesia (Comaroff and Comaroff 2004a: 514; Forsyth 2006: 4) and arguably the same trend can be seen in some of the remote parts of Australia (Martin 2008: 97–99; Sutton 2009: 37, 89–90). In places such as Alice Springs, the local hospital has reported increasing numbers of thigh spearings (Jacob *et al.* 2007), a type of injury which, in many cases, may be connected back to sorcery. While the liberal state has shown little interest in policing beliefs in sorcery, it has been concerned to prosecute violent crimes said to be associated with sorcery. Recent events among the Warlpiri in Yuendumu remind us of the significance of sorcery as a continuing rupture in settler law and settler policing, confounding courts and anthropologists since the nineteenth century. This chapter begins with an overview of the events at Yuendumu before examining other evidence of the complex relationship between sorcery and criminal law.

Trouble at Yuendumu

In March 2011, Dennis Nelson was committed to stand trial at the Northern Territory Supreme Court sitting at Alice Springs for the murder of Kwemenjaye Watson. The deceased was with his brother, Sebastian Watson, in Alice Springs in September 2010 when they were attacked by Dennis Nelson and others.

Kwemenjaye and Sebastian were stabbed in the thighs by their assailants. While Sebastian survived, his brother later died in hospital. All those involved in the incident, both victims and assailants, were Warlpiri men from Yuendumu, an Aboriginal community north-west of Alice Springs.

The hostilities are understood to have their roots in the death, from cancer, of an 18-year-old Yuendumu man two years previously. Some Yuendumu residents claim that the cancer resulted from sorcery; that a curse was placed on the youth by members of the Watson family and that the curse caused the cancer. The Alice Springs attack on the Watson brothers was reportedly carried out as payback for this earlier sorcery. According to Dave Price (long-time Yuendumu resident and the non-Aboriginal husband of Warlpiri elder, Bess Price):

> The belief in sorcery as the cause of premature death and life-threatening illness … is still at the heart of the belief system of all of the Aboriginal people I have regular dealings with, including the Christians amongst them. It is a major cause of inter-family conflict.
>
> (D. Price 2009)

Anthropologists report that indigenous people living on various communities in Australia continue to fear, and believe in, sorcery (Martin 2008; McKnight 2002: 91; McKnight 2005; Musharbash 2008a: 44; Pascoe 2011; Rose 1992: 158–61; Venbrux 1995: 17). The fact that Sebastian Watson and his deceased brother were stabbed in the thighs lends credence to the proposition that this stabbing was a payback killing in response to the perceived sorcery (Jacob *et al.* 2007: 931).

The Watson family responded in September 2010 with organized attacks on families they held accountable for the death of Kwemenjaye Watson. Up to 50 people were engaged in the ensuing fighting, involving sticks, iron bars, spears and nulla nullas; cars were set alight. Police reinforcements were sent to the town and a number of members of the Watson clan were subsequently charged with violent offences. In sentencing several members of the Watson family for the trouble that had played out in Yuendumu, Alice Springs Magistrate David Bamber recognized that the riots resulted from the Watson family being stopped by police from carrying out payback. Bamber warned the Warlpiri: 'The days of payback with violence should end.' He criticized the Watson elders, suggesting that they should be 'concerned with changing their law. They should be working out ways to deal with disputes without violence rather than feeling aggrieved with whitefella law preventing them from carrying out their old punishments' (Neill 2010c).

Despite police reinforcements, members of those families who were blamed by the Watsons for the stabbings in Alice Springs did not feel secure and fled to safety, initially to Alice Springs and then to Adelaide. The Watson family appeared to provide two alternatives to the exiles, permanent banishment in Adelaide or violent payback at home. Tommy Watson commented: 'we Aboriginal people

are spiritual people, and in our spiritual way we get upset … our laws teach us to carry out tribal punishment' (Neill 2010a). The Chief Minister of the Northern Territory, offering mediation, implored those in exile to return home. Harry Nelson, a Yuendumu elder and spokesman for the exiles, agreed to mediation but claimed that it was too dangerous for the exiles to return to Yuendumu, even with an increased police presence. Kwemenjaye Watson's uncle, Jimmy Watson, continued to call for the exiles to return to Yuendumu to face the Watsons, promising 'only the spear will go through their legs, both legs.' Without expressing her personal views about this payback, Bess Price, an Aboriginal elder from Yuendumu, agreed that controlled payback involving a spear to the leg would finish the problem (Everingham 2011).[2]

The events at Yuendumu provoked lively debate over two issues of jurisdiction and governance. One issue is, 'Who is authorized to punish?' the other: 'Can the law recognize sorcery as a mode of action?'

First, the state's response to the crisis rejected violence among Warlpiri but acknowledged the persistence of an alternative set of laws among them whether they were at Yuendumu or visiting Alice Springs. Judges, politicians and police in the Northern Territory generally appear to agree that the criminal law *must* exercise its jurisdiction in response to all violence amongst the Warlpiri – including customary punishment that takes the form of inflicting bodily injury. At the same time there appears to be pragmatic acceptance that – whether or not the spearers are prosecuted – another law will continue to legitimize such customary punishments as spearing and that white law has little ability to 'protect' Indigenous people from violent acts that Warlpiri perceive as integral to their law. Thus, while officials rejected the validity of violent payback, they requested that the communities find better ways to implement customary laws, including using state-sponsored mediation. In short, their ambivalent responses in Yuendumu echo Charles Cooper's question: is dealing with Indigenous offenders (those who punish perceived transgressors by spearing them) in local criminal courts 'a proper exercise of jurisdiction'?

Spearing-as-punishment is a challenge to settler jurisdiction, whatever the transgression to be punished. The assumption of the right to punish asserts Indigenous jurisdiction, displaces the state's historically shaped monopoly on punishment and repudiates the state's proscription of corporal punishment. When the behaviour that the Warlpiri wish to punish is one person using 'sorcery' against another, the difficulties of dealing with this assertion of Indigenous jurisdiction are compounded, for sorcery is a mode of action and belief that the colonists' law hesitates to recognize as 'real'.

In presenting their right and need to regulate themselves through the use of certain punishments, the Warlpiri assert that they are not yet wholly incorporated into the cultural forms and personal dispositions presumed by Australian criminal law. Here the Warlpiri take part in a long discussion of whether criminal law should apply to behaviour that is judged appropriate according to norms of the colonized (Douglas and Finnane 2012).

A discourse of sorcery

How have settler-colonial authorities understood sorcery and dealt with its effects? Public discourse about Australian sorcery has included generations of Australianist ethnography. Early colonists observed that, among Aborigines, sorcery was a common explanation of Aboriginal death, including those deaths by violence caused by the settlers (Carey and Roberts 2002; Nance 1981). Twentieth-century observers described a twofold process: an accusation that sorcery was responsible for the death of an otherwise healthy person, combined with an 'inquest' seeking to locate the person responsible. This inquest placed the identified sorcerer or their kin in jeopardy, and the resulting sanctions produced innumerable cases for criminal justice attention, though not always for prosecution (Elkin 1945: 203; Hogbin 1935; Lang 1847: 427; McKnight 1981: 40; Trigger 1992: 119; Woods 1879). When perpetrators of payback were prosecuted, the presentation of evidence of sorcery's role in the generation of violence amounted to the tacit recognition of sorcery – a 'reality' that prosecutors, judges, juries, policy makers and law reformers have found unsettling.

At the 1895 trial of Japardy for the killing of Bally, another Aboriginal man, in western Queensland, the colony's Chief Justice Sir Samuel Griffith admitted evidence about bone pointing and wondered about jurisdiction in hearing charges involving native custom. 'It was unfortunate,' said Griffith in summing up,

> that we who had settled in a new country found an ancient people, and were now asked to deal with a case relating to their customs. Nevertheless they were amenable to our laws, otherwise it would be impossible to carry on the Government of the country, making at the same time all due allowance for the weakness of human nature.
>
> (*Brisbane Courier* 1895)

In these remarks, amenability was not resolved as a matter of jurisdiction but linked rather to a problem of government. The customs at the heart of the case were those linked to sorcery – Japardy suspected Bally of pointing a bone at him and his Aboriginal wife. Griffith pondered the possibility of provocation, inviting the jury to make up its own mind about how long an act of provocation might have effect. The leap of imagination required by a white jury contemplating such evidence was also acknowledged by Griffith: 'it was difficult for the jury to place themselves in the position of the natives to say how this bone operated in their minds'. And later: 'Of course they knew the influence of the bone was nonsense, but it would be interesting if it were true'.

In the end Griffith virtually directed the jury to come back with a verdict of manslaughter rather than murder, on the basis that Japardy might have been frenzied by the effect of the bone pointing. After only 20 minutes deliberation, the jury duly obliged, adding a recommendation to mercy. As the foreman explained, 'we think there was provocation by the bone, the taking of the gin, and that the prisoner was the victim of circumstances'. In sentencing Japardy,

Griffith made clear his view that the application of the Queensland criminal law might not do justice among Australian Aborigines (*Brisbane Courier* 1895).

In 1929, the Commonwealth Government reaffirmed that the Crown should exercise criminal jurisdiction over murder among remote Aboriginal people. At Millingimbi Mission (Northern Territory) in 1929, four men killed Lanjera, who had been suspected of using magic to kill others. When the four men were arrested and brought to Darwin for trial, the Chief Protector of Aborigines objected that the matter was one of tribal custom and best dealt with by administrative banishment rather than by trial. Sir Robert Garran, Commonwealth Solicitor-General, advised instead that the men should be prosecuted. Garran later admitted that were he to have evidence from 'some expert on aboriginal customs and laws' that the murder was in accordance with custom then he might take a different view on prosecution. His advice was accepted by the Attorney-General who was emphatic on the need to try such cases, while acknowledging that 'the utmost leniency should be extended to the members of a subject race which can have little knowledge of our laws or language *and* has no citizen rights'.[3]

These moves in the policy domain towards a recognition of the customary context of offending were supported by intellectual advocacy outside government. Acknowledgment of the distinctive standing of Aboriginal people was at this time an important objective of an emergent Australian anthropology, especially in the activism of University of Sydney anthropologist, A.P. Elkin and his students (Elkin 1947; Gray 2007; Elkin 1934). In 1935, one of Elkin's students, W.E.H. Stanner, appeared as expert witness in a Darwin trial of three men charged with wounding with intent to murder. The evidence included allegations of sorcery, specifically bone pointing and retaliation for the harm done by the alleged sorcerer (*The Argus* 1935 'Blacks belief in "debil debil bone"'). In a lecture a few months later, Stanner reflected that native administration and the system of control seemed to 'proceed on the assumption that sorcery is not a complication in administration; or that if it does exist, then not much notice need be taken of it'. In his observation, fear of sorcery had led to 'tribal fights which have made it necessary for the administration to take action, apparently without suspecting the underlying cause, and seeing only the external fact of the fight'. Stanner then insisted that there was an important role for anthropology in the application of colonial rule. Uncovering the 'motives and beliefs' behind criminal actions would assist in the administration of a better justice:

> Unless we are careful to examine every fact in the social and psychological background of native crime, we cannot prevent the trials of native offenders from being only crudely efficient, entirely lacking in insight, guilty of no little harshness, and a great deal of entirely misplaced leniency.
>
> (Stanner 1936: 21)

Stanner's criticism of the prevailing indifference to sorcery was not a demand for its prosecution but rather a call to more judicious and informed acknowledgment of its role in Aboriginal life.

More recent observers have been troubled by the challenge posed by sorcery to the possibilities of nurturing self-governing subjects in a framework of assumptions of liberal governance. Influential public servant and advocate of Aboriginal self-determination, H.C. Coombs, noting that sorcery accusations occasioned conflict among the Aborigines of Arnhem Land, recommended education and post-mortems to displace the explanation of death by sorcery (Coombs 1978: 137; Rowse 2002: 346–47). However, such an approach threatened traditional authority, according to Reid (1983), who argued that sorcery accusations were 'part of the idiom of a distinct Yolngu jurisdiction.' Medical knowledge could explain cancer (the Yuendumu case being an example) but not why a particular individual might be afflicted – a gap in explanation which sorcery is ideally suited to supply. Indeed it is the very mutability of beliefs in sorcery that has enabled its survival even under conditions of Christianization. As Trigger (1992: 204) has observed, 'sorcery had its counterpart within Christian doctrine' and the Aboriginal people of Doomadgee (Queensland) could easily relate a traditional belief in sorcery to the Christian construct of the devil as the ever present but unseen agent of evil. When contemporary residents of Yuendumu name sorcery as a practice at the heart of recent violence they speak also of ways of thinking and living that have been remarkably resilient through all the transformations wrought on Aboriginal Australia by European settlement (Taylor 1988).

Sorcery, customary law and recognition

Over the last 30 years, the policy of self-determination has repeatedly raised the question: 'Can Australian law allow Aboriginal law to deal with violence incident on a persisting belief in sorcery?' The answers have consistently affirmed the importance of recognizing Indigenous contexts of offending while rejecting the possibility of an Aboriginal resolution of violence – that is, violent punishment involving personal injury or death. Australian law has not thereby escaped collaboration in the violence, since it cannot bring an end to ways of thinking that lie beyond the reach of a courtroom.[4] We explore briefly here the intimate connections between Australian law's unwillingness to criminalize sorcery and the persistence of Aboriginal law's normative force.

In 1977 the Australian Law Reform Commission (ALRC) received a reference to enquire into whether it would be desirable to apply Aboriginal customary law to Aboriginal people. The Commission's landmark report on customary law was delivered in 1986. In discussing the relationship between customary law and criminal liability, the ALRC accepted that practices of magic and sorcery exist in Aboriginal communities. It noted that death inflicted by sorcery was considered by many Aboriginal people to be a traditional punishment and that sorcery was sometimes the source of community disputes. The report also identified numerous cases where payback and tribal punishments were claimed to have taken place (although the Commission did not directly connect these cases to sorcery).

The Commission's view was that, as sorcery was rarely raised by parties in the courts, sorcery did not seem to have much impact in criminal cases.

Tentatively, the Commission suggested that 'adherence to tradition or to customary laws is not to be equated with superstition, but the two may be associated, and when they are legal problems of considerable difficulty arise' (ALRC 1986: [433]). This is perhaps the central dilemma for legal regulation of and legal responses to sorcery: how to deal with the 'superstition' that is belief in sorcery. The Commission recommended neither that sorcery be made an offence nor that a general customary law defence that could account for sorcery should be explicitly recognized by Australian law (ALRC 1986: [450]). Generally the Commission's view was that appropriate account of customary law could probably be taken under existing defences where a subjective state of mind or an objective standard was a relevant consideration. The Commission claimed that codification or direct enforcement were inappropriate to the task of recognizing Aboriginal customary laws and that exclusion of the general law, except in limited circumstances, was similarly inappropriate (ALRC 1986: [200]–[203]). In relation to sentencing, the ALRC recommended that customary law should be taken into account only where it did not offend against the general law (ALRC 1986: [511]–[513]). This approach was followed by subsequent enquiries in the Northern Territory and Western Australia that recommended variously a 'functional' or 'pragmatic' approach to recognition (Northern Territory Law Reform Committee 2003: [11]; Law Reform Commission of Western Australia 2006: 71–72). Each enquiry stopped short of allowing for serious criminal matters to be dealt with by Aboriginal law and each has held back from recommending that the general law should relinquish its jurisdiction over violence.

In their report on Northern Territory Aboriginal people's views of law for the Royal Commission into Aboriginal Deaths in Custody (1987–91), Marcia Langton and colleagues explained that to understand payback one must understand Aboriginal people's understanding of death and the cultural requirements that surround it (Langton *et al.* 1990: [2.3.4]). Their report explained that while death may be understood by Aboriginal people at one level as the intervention of a malevolent spirit or sorcery, at another level it will eventually be attributed to a person who will be considered responsible for the sorcery. When a death occurs, a ritual inquest seeks to identify the person who contributed to the death. Once the person is identified, corporal punishment, or payback, takes place. The process helps the community to understand the death and brings closure to the trouble. Langton and her colleagues observed that if this process does not take place the trouble remains unresolved and the community remains unsettled, often resulting in unnecessary deaths (Langton *et al.* 1990: [2.3.5]; Pascoe 2011: 296). Langton *et al.*'s account implies that authorities should allow scope for Aboriginal people to identify and punish transgressions among themselves. However, there are difficulties facing white legal authorities such as police in such a scenario: either they must arrest and remove a person considered by Aboriginal people to be responsible for the trouble or they must arrange or oversee payback spearing. Both

courses of action risk extending or even exacerbating the community unrest. By facilitating or overseeing payback spearings or other community dispute resolution approaches, 'whitefella' law may simply make things worse (Austin-Broos 1996: 17).

Langton *et al.*'s prescription rests on the assumption that in any Aboriginal community there is a clear and widely supported distinction between transgressive actions and actions through which the community punishes the transgressor. However, in his classic study of the Warlpiri, Meggitt (1962) suggested that among these people *every* death was a product of sorcery. Attempting to give an account of 'law', he constructed a record over time of 'unlawful offences' but noted the difficulty he had in distinguishing 'unauthorized homicide' and 'unauthorized sorcery'. Warlpiri dealt with death in the way familiar in other parts of Australia (and discussed by Langton *et al.* (1990)): by way of an inquest. Such inquests were likely to locate a culprit 'in another community, rather than in that of the deceased', suggesting a 'covert ethnocentrism' at play, although Meggitt also observed that the (Warlpiri) law's practical sanctioning tended 'to stop short at the borders of their territory' (Meggitt 1962: 256–57). Meggitt's observation thus suggests internal management of sorcery's impacts, avoiding an endless cycle of violence, which might in the end come to the notice and intervention of native welfare administration. How transparent such routines (death, inquest, Indigenous response or not, administrative intervention or not) were in any particular community is a matter for detailed inquiry. In the course of conducting fieldwork on the Tiwi Islands in the 1980s, Belgian anthropologist Eric Venbrux was prompted to study violence and its culture after his key informant was killed by another Islander. His inquiries drew him back to a disputation nearly 100 years earlier, reproduced between rivals over the generations since. Far from suppressing violence, increased enforcement of state law on the Tiwi Islands seemed to Venbrux to have enlarged the possibility of indirect killings via sorcery or 'poisonings', a seeming instance of whitefella law making things worse. Killings via sorcery were rarely detected by the law, since government authorities – dismissive of 'superstition' – were inclined to accept medical explanations in which death is not attributed to a malign agent. Moreover, cultural revival during the era of self-determination (with its accompanying reduction in the daily control of people's lives) in turn contributed to an increase in killing by 'indirect' means (Venbrux 1995: 17–19). But for Venbrux there was another consequence of long-term intervention in the practices of social ordering, including the suppression of Indigenous dispute settlement. The killing of his informant in 'what at first sight seemed to have been an ordinary fight that got out of hand or a drunken brawl might in fact have been an execution' (Venbrux 1995: 81). The available means of dealing with a wrongdoer (such as spear-throwing) had been suppressed by colonial governance, leaving only interpersonal violence, which yet had a 'moral' (that is, collectively sanctioned) dimension (Venbrux 1995: 78–79; cf Sansom 1980: 106). Venbrux's research suggests, in short, that the disordering impact of whitefella law in Australia (as in the Tiwi Islands) has resulted in a displacement of Indigenous sanction, leading to more violent (indeed fatal) outcomes.

The degree to which culturally sanctioned responses to death remain at the heart of everyday indigenous conflict producing injury and even subsequent mortality has been strikingly evident in the cycle of violence that beset Yuendumu in 2010. The experience of mortality in Aboriginal communities has enhanced the opportunities for perpetuating fighting and retaliation without end. In discussing mortality rituals, Yuendumu's most recent anthropologist Yasmine Musharbash has commented on the fact that anthropologists working from the 1950s to 1970s had never witnessed a mortality ritual because a death never occurred while they were conducting their fieldwork (Musharbash 2008b: 22). By contrast, a catastrophic number of deaths occurred during Musharbash's fieldwork from the late 1990s and Yuendumu everyday life was dominated by sorry business. Like Meggitt 50 years earlier, Musharbash found in contemporary Yuendumu a way of thinking about death that privileges sorcery: 'Warlpiri people do not believe in natural causes of death, and every death for which sorry is performed must be avenged' (Musharbash 2008b: 26). The elaborate rituals that constitute sorry business bring the entire community together into close proximity, if not greater intimacy, including those bereaved and those likely to be considered blameworthy. After ritualistic preparations for fighting and self-wounding carried out by women's and men's groups separately, the groups dissolve and the business of settling accounts for the death begins. As Musharbash (2008b: 26) describes it:

> The mother's brothers are the ones to avenge the deceased's death and the women's action urges them to do so … Around them, depending upon circumstances people either leave the sorry ground peacefully – or (and more commonly) violence flares up and people from different families start making accusations and counter-accusations, hitting each other over the head and otherwise attacking each other, while screaming and ducking away from boomerangs flying from all directions. Such fights might be isolated to the particular death or, depending upon the circumstances of death and relationships between families at the time, they might broaden out and incorporate into them expressions of anger and aggression relating to other fights. Eventually, with the latest occurring at nightfall, fights quieten down for the day and people leave for home or the sorry camp. More often than not, however, the fights flare up again during the remainder of sorry, and in other circumstances, often for years to come.

Conclusion

Beliefs about sorcery have endured in many Australian Aboriginal communities and in other colonized and now 'post-colonial' countries. The prosecution of *wendigo* (sorcery) killings was an important test of Canadian law's authority over Native Americans at the turn of the twentieth century but it did not terminate their incidence or eradicate belief in the malevolent force of such spirits assuming human flesh (Friedland 2009; Harring 1998: 217–37).

Governments cannot prudently ignore people's belief that sorcery is a powerful and effective mode of action; but this does not commit governments themselves to such beliefs (Chanock 1985: 86, 97). Such beliefs are at odds with the reasoning associated with Australian criminal investigation and adjudication. While criminal legal responses have targeted the violence arising from the Yuendumu events (evident in increased policing and prosecutions of some on charges of riot and unlawful killing) it is not clear how the criminal law should respond to the protagonists' belief that the deaths of people and the responses to those deaths are best understood through an intellectual framework that takes sorcery to be a real and effective mode of action. The task of criminal law, a relatively modern one, is to police crime rather than culture, to target violence rather than beliefs. Indeed one threshold of law's modernity was its withdrawal from prosecuting beliefs associated with heresy and witchcraft to a more limited concern with physical harms that could be dealt with as assault or murder.[5]

How can the persistence of sorcery be explained? Some ethnographic studies propose that sorcery provides a mode of explanation of a social order undergoing significant change and stress. In the South African context, Comaroff and Comaroff (2004a: 534) suggest that when Indigenous people seek to police magic by cultural means, it can be seen as both a reclaiming of the ways and means of the African past and also a way of accounting for the transformation of the world; a transformation that is out of their control. In a similar vein Geschiere (1997: 5, 214), reporting on contemporary Cameroon, suggests that witchcraft can be understood as a levelling force that in part opposes new forms of domination but also accounts for transformation. In the Australian context, Akerman (2005: 62) has argued that there is clear evidence that Aboriginal people resorted to sorcery from the early contact phase in an effort to correct situations over which they had little tangible control – he draws attention to the material evidence for this in the motifs associated with sorcery in the rock art galleries of Arnhem Land which have been dated to the *post*-contact era. The flexibility of sorcery makes it a means to comprehend the changing world (McKnight 1981; McKnight 2005).

However, because of the sanction that it gives to retaliatory violence, the persistence of sorcery aggravates colonized peoples' sense of insecurity. Even though many of those involved in the disputes in Yuendumu were charged with criminal offences and even though the town gained an increased police presence, peoples' fears of other Warlpiri persisted. Many evacuated to the safety of Adelaide almost two thousand kilometres by road away from Yuendumu. Such a response points to the (perceived) inability of government to 'make good on its mandate to safeguard its citizens' (Comaroff and Comaroff 2004a: 541). Belief in sorcery contributes to doubts about the state's capacity to assure security.

We return to our original question: was dealing with the Yuendumu offenders in local criminal courts a proper exercise of jurisdiction? Threaded through the media coverage of the Yuendumu events is an assumption that the criminal law must intervene to punish violence. However, at the same time, it is widely conceded that another law continues deeply to affect relationships within the

community. The events at Yuendumu highlight the limited reach of 'Western law' in Australian conditions, underlining the continuing demands of other legal orders in the space between settler and indigenous governance.

Notes

1 For comments and suggestions in the drafting of this chapter we are grateful to Lisa Ford, Tim Rowse, Ian Hunter, David Saunders, Diane Austin-Broos and Janna Promislow, as well as participants in the 'Between Settler and Indigenous Governance: history and possibilities workshop'.

2 Elsewhere Price has commented on the need to change the old violent ways (Bullock 2011; B. Price 2009).

3 NAA: Prosecution of Natives – North Australia – *The King v. Blumbury and Riola*, A432, 1933/1958 (Garran to Brennan, 28 Mar 1930, Brennan minute 5 April 1930, emphasis in original).

4 See also Morrow (1995: 68–70) for discussion of Canadian examples.

5 We are grateful to Ian Hunter for this point (see Hunter 2007: 145–50). See also Saunders (2006) who observes in his exploration of the jurist Matthew Hale's work that the neutrality of the law towards matters deemed religious is a relatively modern development.

Chapter 7

Vanished theocracies

Christianity, war and politics in colonial New Zealand 1830–80

Richard Boast[1]

Introduction

In this chapter, using the operation of Anglican CMS missionaries in south-eastern Waikato as a case study, I trace the complex interconnections between missionary activity and Māori politics in the middle of the nineteenth century. In this region, Christian conversion played an important role in the emerging King Movement and in the land wars of the 1860s. The fraught and multifaceted relationships between CMS missionaries and Māori leaders proved, at times, to be creative, radicalizing, disappointing and frustrating. They serve as a poignant reminder that Christian missionaries in New Zealand did not operate as simple extensions of the colonial state.

While I tell this story through the Anglican CMS, the dominant missionary force in New Zealand in the nineteenth century, Māori also became Wesleyans, Lutherans or Catholics, in a period of intense Māori religious *experimentation*. Confessional division among missionaries may, in part, explain why, under the pressures of war and political and economic change, Māori invented new forms of Christianity for themselves (see generally Lange 2000).[2]

Christian missions in the south-east Waikato and Taupo 1833–60

The principal tribes of the south-eastern Waikato today are Ngati Haua, based around Matamata, and Ngati Raukawa, who live further south in a wide area north of Lake Taupo. Ngati Raukawa consists of two roughly equal sections, one in their traditional homeland and the other in the Cook Strait region. It is a large descent group, with about 40 *marae* (ceremonial centres) and about 10,000 members. A large section of Ngati Raukawa migrated south in the late 1820s at the invitation of their allies and relatives, Ngati Toa, who, led by their famous chiefs Te Pehi, Te Rauparaha and Te Rangihaeata, had also migrated south and established a powerful new polity based on both sides of Cook Strait. In this chapter, I am concerned primarily with the northern section, itself divided into large *hapu* (subtribes) such as Ngati Whaita, Ngati Waerangi, Ngati Te Kohera and other descent groups.

In 1833, Anglican missionaries, led by Henry Williams from the CMS base far to the North in the Bay of Islands, visited Ngati Haua's large village at Matamata in the south-eastern Waikato. With him were the CMS missionaries Alfred Nesbitt Brown and John Morgan. To get to Matamata they sailed from Kororareka (Russell) in the Bay of Islands to the Firth of Thames and then went by boat up the Waihou River to the village of Waiharakeke and then were carried by Māori bearers through great swamps to Matamata. There they found the famous warrior chief of Ngati Haua, Te Waharoa, who, wrote Williams, 'was sitting in state in the midst of his nobles' (Vennell *et al.* 1951: 13). He welcomed the CMS party graciously and the first divine service in the region was then held on 15 November 1833. Williams and Brown returned the following year, meeting up with John Morgan at Matamata; the party then travelled via the Waikato upriver to Maungatautari, a prominent mountain of the south-eastern Waikato, where a service was held on 31 August 1834 (Vennell *et al.* 1951: 13).

The CMS mission was formally established at Matamata in 1835, headed by Brown and his wife Charlotte. The mission was built on land near Te Waharoa'svillage but it lasted for barely a year before being forced to close on account of intertribal fighting between Ngati Haua and other sections of Waikato and their Ngaiterangi allies of Tauranga on the Bay of Plenty coast on the one hand, and the Te Arawa tribes of Rotorua and their Hauraki allies on the other. These bloody conflicts, a part of the so-called 'musket wars', engulfed the region in 1835. Ngati Haua launched attacks on Maketu and on Rotorua, and missionaries fled before the tribes could retaliate. Brown re-established the CMS mission at Tauranga.

Despite moving the mission, Brown maintained close links with Ngati Haua and with Matamata. One of his notable converts from the Matamata area was Katu (Wiremu Tamihana Tarapipipi), Te Waharoa's son. Wiremu Tamihana became the CMS teacher at Matamata but Brown travelled back and forth from Tauranga frequently. The Anglican chapel at Matamata 'was thought to be the largest Māori building in the North Island at that time (1843–44); it was about twenty-five metres by fourteen metres, and was built entirely by the local Māori men' (Hogan 1994: 85). Wiremu Tamihana was a baptismal name ('William Thompson') and he went on to become one the great leaders and the most important constitutional theorist of the Māori King Movement. He also played an important role in Waikato resistance when their homelands were invaded by the British army in 1863 (see Stokes 2002).

As in other areas, the CMS did not have the Matamata area to themselves. In August 1841, a Marist Catholic mission was established at Matamata under Father Seon but Ngati Haua remained loyal to their Anglican chief and to the CMS, and the Catholic mission was soon moved to Rangiaowhia, about 50 km away from Matamata. Seon was one of a number of Catholic missionaries active in the Waikato and Bay of Plenty region at this time, along with Philippe Viard at Otumoetai and Jean Lampila at Whakatane. While not much is known of the Catholic missionary enterprise in the Waikato, it would be unwise to assume that

the CMS was dominant and that the Catholic presence was peripheral. Despite the setbacks at Matamata, both Protestant and Catholic Christianity grew rapidly in the Waikato and the Bay of Plenty in the later 1830s and early 1840s (Breward 2001: 50). By the 1840s Christianity was well-entrenched amongst all descent groups of the south-east Waikato presumably because of their proximity to Matamata and their links with Wiremu Tamihana, chief of Ngati Haua and mission teacher. In 1847, Dr John Johnson, on his way across the remote Patetere plateau, stayed at a poor and remote Raukawa village and found himself to his surprise in what he described as a 'partially Christianized' community, with its own chapel (Johnson 1846–47: 147): this village is likely to have been an example of Māori self-Christianization.

The Māori King Movement

Christianity – particularly Anglicanism – played an important role in the Māori King Movement, which is still a vital force in Māori politics to this day. Prominent early proponents of a Māori King, Matene Te Whiwhi and Tamihana Te Rauparaha (Katu), were Christian chiefs linked to the southern section of Ngati Raukawa in the Cook Strait region and were close friends of Octavius Hadfield, the independent-minded CMS missionary at Otaki, north of Wellington. After the death of the great chief, Ngati Toa chief Te Rauparaha, these men, with another devoutly Christian chief named Rawiri Puaha, largely assumed leadership of the Ngati Toa tribe. However, Rawiri Puaha was not Anglican but Wesleyan – he had been brought up in the northern South Island and had been baptized by the Reverend Samuel Ironside, the Methodist missionary based in the Cloudy Bay region of the Marlborough Sounds.

Matene and Tamihana were deeply enmeshed in Anglican missionary networks. Both missed the battle of the Wairau in 1843, when Ngati Toa easily wiped out a party of special constables and militia from the New Zealand Company town of Nelson. They were away on a long missionary journey amongst the former bitter enemies, Ngai Tahu of Murihiku – where their somewhat overzealous Anglicanism annoyed the local Methodist missionary, James Watkin (McLintock 1949: 123). Their visit to Otago was in fact '[t]he earliest Anglican activity in Otago to which we can assign a date' (Booth 1993: 3). In other words, Anglicanism was first taken to the far south of New Zealand by two young Māori chiefs, descended from mortal enemies of the southern Māori people. Both men were married on the same day, 11 September 1843, Tamihana to Te Kapu, daughter of Tawhiri (who was Raukawa) and Matene to Pipi Te Ihurape, with Hadfield officiating. The two lived as Christian gentlemen and adopted European styles of dress and aspects of European material culture. In November 1845, William Williams, another member of the great CMS missionary family, was invited to visit Tamihana's house, finding it to be 'neat with 4 glass windows and is intended to be divided into four rooms' (Porter 1974: 355). Matene Te Whiwhi and Tamihana Te Rauparaha both spent some time at St John's Theological College in

Auckland. Along with Te Rauparaha himself they acted as donors (via the Crown) of a 500-acre block at Whitireia to the Church of England for the establishment of a college in 1848.[3]

Those networks had important ramifications for Māori politics. Tamihana Te Rauparaha travelled to England with William and Jane Williams and other members of the CMS mission cousinage in 1851–52. On 30 June 1852, he was presented to Queen Victoria.[4] Tamihana Te Rauparaha was impressed with the British monarchy and began to develop the idea that Māori should have a monarchy of their own. He discussed this with his cousin Matene on his return and the two made a number of journeys around the North Island arguing for a Māori monarchy and for ending the sale of land to the government. Matene Te Whiwhi was a prominent supporter of the building of the great house Taiporohenui – a meeting place to discuss land issues and a symbol of organized resistance to land sales (Oliver 1990: 528–29). These hopes and dreams in no way derogated from Tamihana Te Rauparaha's and Matene Te Whiwhi's perceptions of themselves as prominent Māori aristocrats and well-connected Anglican gentlemen. Nor was the King Movement initially oppositional to the British Crown. In 1858, after a long process of discussion and debate, the Waikato Māori chief, Te Wherowhero, was chosen at a great meeting of the tribes as the first Māori King, taking the name of Potatau. Potatau was replaced by his son Tawhiao, who became King in 1860. Thus began the Kingitanga, the Māori King Movement.

War, the missions and the colonial state

The drift to war in the 1850s caused a religious as well as a political and military crisis in the North Island, as Māori converts played important roles in both spheres. The identification between Christianity and the Crown, between God's law and the Queen's law, was placed under severe strain when the British army and Christian Māori people started shooting at each other in Taranaki in 1860. The strain reached breaking point during the invasion of the Waikato in 1863.

The New Zealand wars were not the inevitable outcome of conflict between 'settlers' and 'Māori' over land; they were the consequence of a political breakdown in one pivotal province, Taranaki. The main events were: an early and bloody phase of Māori tribal conflict in the region in the early nineteenth century; the establishment of a New Zealand Company settlement at New Plymouth in 1841; Governor Fitzroy's decision to refuse to the settler community an extensive Crown grant in North Taranaki in 1844; the return of Taranaki Māori exiles from other parts of the country in the following decades; constant settler pressure for land; and a pivotal decision by W.E. Gladstone in 1846 directing Governor George Grey to take measures for the relief of the Taranaki settlers. Added to the volatile mix in Taranaki itself was a violent struggle within the Puketapu hapu of the Te Ati Awa people of North Taranaki, Te Ati Awa being the immediate neighbours of the colonial town of New Plymouth. This 'Puketapu feud' – considerably more than a 'feud' – may not have begun over the core

issue of land but it came to be perceived that way because one party was seen to be willing to sell land to the Crown and the other was resolutely opposed to it.

Taranaki was, thus, a tinderbox ready to explode at the slightest mismanagement. That came in 1859, when the Governor, Thomas Gore Browne, accepted the offer of a chief named Te Teira to sell to the Crown the Waitara block in North Taranaki, Waitara. A fertile river valley immediately to the north of New Plymouth, the block was ardently desired by the New Plymouth settlers as the key to their colony's expansion and prosperity. Teira was prominently linked to one side of the Puketapu feud; the leading *rangatira* (chief) of Te Ati Awa, Wiremu Kingi Te Rangitaheke – an Anglican, as it happens – to the other. Gore Browne not only accepted the purchase but enforced it by sending in survey parties; Wiremu Kingi's peaceful resistance to the survey was followed by Browne's proclamation of martial law. This was perceived by Māori as a declaration of war on them by the Crown. Māori from other regions were amazed when they learned that the government had launched a military attack on Wiremu Kingi and his people in north Taranaki: he was widely known as a Christian and as friendly to Pakeha settlers. Thus commenced the first phase (1860–61) of the New Zealand wars, this being the first of three Taranaki wars.

There were many political meetings to discuss the war and what should be done about it. In areas such as Hawke's Bay, Māori tried to ensure that the war did not spread to their own districts. Other groups petitioned the Crown seeking to have Governor Browne replaced and the war ended. In July–August 1860, many chiefs met at a major *hui* (gathering) at Kohimarama, at which the government tried to explain its actions in Taranaki (see especially Paterson 2006: 153–64). The main topics discussed were the Kingitanga and the Waitara war. Tamihana Te Rauparaha and Matene Te Whiwhi, prominent in these discussions, disavowed the proposal to set up a Māori king. They were likely alarmed by the direction of events: certainly they wanted to avoid an interracial war. The Raukawa chief, Parakaia Te Pouepa of Raukawa, another committed Anglican, was also present. He was scathingly critical of the government's handling of the Waitara crisis, blaming it for escalating matters by sending soldiers to Taranaki (Paterson 2006: 158).

In March 1861, the fighting in Taranaki came to a temporary end. Some sections of Waikato had assisted the Te Ati Awa (of Taranaki) chief, Wiremu Kingi, against the British forces and in June Governor Browne sent a proclamation to Tawhiao's capital at Ngaruawahia insisting on their submission to the authority of the Queen, their acceptance of roads and bridges being built throughout the Waikato and an end to 'combinations' against selling land to the Crown. A large *runanga* (assembly) gathered at Ngaruawahia which neither accepted nor rejected Browne's terms (see McCan 2001: 38).

In September 1861, George Grey returned to New Zealand for his second governorship and with a new plan. His so-called 'new institutions' would divide New Zealand into 20 districts, each with a civil commissioner. In December 1861, Grey met the lower Waikato chiefs at Kohanga and Taupari, near Waikato

Heads (McCan 2001: 39–40; Paterson 2006: 174–75).[5] The discussions were lengthy and robust. Grey asked the Kingitanga leadership how it would deal with *iwi* who were opposed to it and a rangatira named Te Whi Panakawa stated, perhaps reluctantly, that the movement would not threaten those who opposed it. Grey remarked: 'I shall have twenty kings in New Zealand before long.' (*Te Karere Maori* 1862, 5–6, cited in Paterson 2006: 238). In October 1862, Wiremu Tamihana hosted a 'great King meeting' at Peria (near Matamata) at which the primary subject for discussion was the maintenance of Māori independence under the King. Bishop Selwyn, the very High Church bishop of New Zealand, was also present at the meeting which discussed the government's plan to construct a road from the Mangatawhiri to Raglan. During 1862, support for the Kingitanga was also spreading to Raukawa people at Otaki, Raukawa's main base in the Cook Strait region and, in March 1862, a Kingitanga flag known as Tainui, a gift from the King, was flown at Otaki for the first time following an elaborate ceremony (Ramsden 1951: 238).

The Waikato War

In 1862 the New Zealand wars had abated, though not ceased, and it seemed as if the worse of it might be over. 1863, however, brought about renewed conflict. On 9 July 1863 the government, having resolved to subjugate the Māori King Movement, issued an order that all Māori living in the Manukau district north of the Mangatawhiri had to either take an oath of allegiance to the Crown and give up their weapons or move into the Waikato. Those who refused to comply would be forcibly removed (reprinted in Ramsden 1951: 251–52). This imposed a cruel choice on Māori groups living around the Manukau and South Auckland. The proclamation was soon followed by the invasion of the Waikato by the British army and by the great battles at Rangiriri, Orakau and Gate Pa in 1863–64. Waikato and the Kingitanga resisted valiantly but were defeated. King Tawhiao withdrew deep into the interior, taking refuge amongst the Ngati Maniapoto of the region still known as the 'King Country'. There he lived in exile until returning home to Waikato in 1881.

The New Zealand wars shattered the bonds between the Māori people of the Waikato and the Anglican missionaries of the Church Missionary Society. Missionaries themselves, especially English missionaries, were plunged into the most acute difficulties by the outbreak of the war. As Octavius Hadfield, CMS missionary at Otaki, had noted:

> Early in 1860 several intelligent natives warned me that this war would prove a sad trial for the faith of the Maori; that they had carefully examined the New Testament from beginning to end, and nothing contained in it could be interpreted to sanction or justify such a war: that either the English nation as represented by its Government was not Christian in the Gospel sense, or Christianity was not true: there was no alternative.
>
> (Murray 1992: 129)

CMS missionaries mostly found themselves to be Englishmen first and Christians second. Perhaps it is asking a lot of an Anglican clergyman to denounce Crown policy from the pulpit but Octavius Hadfield did and Henry Williams, when writing to Hadfield in 1864, saw 'Brown, Stafford, Richmond and co' as being 'under the guidance of the Prince of Darkness' (Benfell 1992: 109). For Māori Christians the crisis was devastating. Missionaries had not only withdrawn during the wars, leaving Māori people in many areas without the missionary clergy to which they had become accustomed. Most of the CMS missionaries, John Morgan prominent among them, had more or less openly supported the invasion of the Waikato (Howe 1983: 94–120). Bishop Selwyn, used to Māori esteem and respect, had become disenchanted with the Māori King Movement and what he saw as its retrograde policy of Māori nationalism and he had felt personally affronted by his inability to make Māori see his point of view at Kingitanga *hui*. While Selwyn had been critical of the Taranaki war, he now supported the government (Howe 1983: 107). Moreover, Māori Christians felt betrayed when Bishop Selwyn, for the best of reasons, made the unwise decision to accompany the British army during its invasion of the Waikato. Tellingly, at the time of the wars, many of the Crown's leading opponents in the Waikato, including Wiremu Tamihana, were actually Anglicans, a truly heartbreaking conflict of culture and allegiance. Another example is Henare Wiremu (i.e. Henry Williams) Taratoa, who had been educated at St John's College in Auckland. Henare grew up on Matakana Island near Tauranga, was taught and baptized by Henry Williams of the CMS, may have attended Octavius Hadfield's school at Otaki, and attended St John's College. Henare Taratoa had worked as an Anglican missionary in the Pacific, travelling around the Pacific with Bishop Selwyn in 1852. He also served with the CMS missionary, William Nihill, on the island of Mare in the Loyalty Group. In 1858, Henare Taratoa became native school teacher and lay reader at the CMS mission at Otaki, working among his Raukawa kin (Ramsden 1951: 248). He ended up fighting and dying on the Kingitanga side in the campaigns around Tauranga in 1864.

War, the CMS and Pai Marire

The disenchantment of Anglican converts goes some way to explaining the receptivity of Māori to adjustment cults, if that is a justifiable term to use, such as Pai Marire, Ringatu and Tariao during and after the period of the New Zealand wars. In August 1864, Tawhiao, now in exile after the end of the Waikato war, went with a large party of Waikato and Maniapoto people to Taranaki to meet a Taranaki prophet named Te Ua Haumene. Te Ua met the King, baptized him and gave him the name Tawhiao ('Encircle the Earth'). Until this time his name had been Matutaera.[6] Te Ua was the prophet and leader of a new Māori religious movement, Pai Marire. Māori religious history in the Waikato had moved on to a new phase.

Paul Clark, author of the main study of the subject, sees Pai Marire as an 'adjustment cult', with parallels elsewhere in the world amongst indigenous groups battered by the forces of change and colonization in the nineteenth century (see generally Clark 1975). There is a large literature on 'adjustment cults' of this kind, which took many forms in various colonial societies – though this history has yet to be told comparatively. In north-eastern Brazil in the sixteenth century, for example, arose the *santidade* movement amongst the Indians of Ilhéus and Bahía (Schwartz 1985: 47–50). Like Pai Marire, *santidade* was a religious protest movement which mixed Christian and indigenous elements; it was forcibly suppressed, with considerable difficulty, by the Portuguese authorities. In North America examples of the same phenomenon include the Longhouse Religion founded by Handsome Lake amongst the Iroquois, Quanah Parker's Peyote Road Movement, John Slocum's Indian Shaker Church and, most famously, the Ghost Dance religion founded by the prophet Wovoka (the Ghost Dancers believed, like Pai Marire adherents, that they were immune to bullets). Peter Webster's biography of Rua Kenana suggests the importance of relative deprivation and 'anomie' (which he understands as a kind of collective depression and frustration) to adjustment cults (Webster 1979: 43–72). He notes that 'all my informants who had been followers of Rua stated that he had offered them hope at a time when they had been without anything to look forward to in their lives'; and perhaps this is true of Waikato and Raukawa in the immediate aftermath of war and confiscation.[7] In contrast, Māori ministers of the contemporary Ratana church reject the use of the term 'adjustment cult' to describe Pai Marire. They have little doubt that Te Ua Haumene and Tawhiao would have seen themselves simply as Christians, albeit belonging to a new and specifically Māori variant of Christianity.

Pai Marire had an impact on the Ngati Raukawa. As supporters of the Kingitanga, and given King Tawhiao's formal acceptance of the new faith, many of Raukawa switched their allegiance from the CMS, departing from the Waikato, to Pai Marire. Details of the movement are sketchy given the disruptions caused by the wars but one distinctive aspect of Pai Marire ceremony was the use of the *niu* pole, a tall wooden pillar set upright on the marae which formed a centre point of religious ritual. Few of these now remain but one which does is in Raukawa territory on the site of an abandoned village on the slopes of the Kaimai range. This *niu* has been evocatively described by Evelyn Stokes:

> At Kuranui, the site of an abandoned kainga on the slopes leading to the rugged, bush-covered ridges at the eastern end of the Kaimai ranges, there stands a *niu*, a substantial totara pole with a carved figure near the base. Nearby is an old house and shed, the dwelling of the last guardian of the niu, Motai Te Pakuru, but unoccupied and abandoned since his death in 1968.
>
> (Stokes 1980: 1)

There is a strong local tradition that Wiremu Tamihana was present when the *niu* pole was raised in 1865, but Stokes has suggested that this is unlikely and that people may confuse him with a certain Te Tiu Tamihana, a known Pai Marire tohunga and prophet at this time. Whether or not this is so, the details provided by Stokes are certainly suggestive and interesting in their own right, testifying to the expansion of Pai Marire in the Raukawa area in the mid-1860s (Stokes 1980: 45).

The colonial government of the day, however, did not see Pai Marire as a benign Christian sect. Following the murder of the Reverend Carl Volkner at Opotiki on 2 March 1865, Grey issued a proclamation against Pai Marire on 29 April which referred to 'a fanatical sect, commonly called Paimarire, or Hau Hau', which was 'engaged in practices subversive of all order and morality', specifically 'murder, the public parades of cooked heads of their victims, in cannibalism, and other revolting acts'.[8] Grey proclaimed the government's intention to:

> resist and suppress, by the force of arms if necessary, and by every other means in my power, fanatical doctrines, rites and practices of the aforesaid character; and I will cause to be punished all persons, whenever they might be apprehended, who may be convicted of instigating, or participating in, such atrocities and crimes.[9]

The Governor called on 'all well-disposed persons, whether Native or European' to assist the government in suppressing the movement. Grey's action may have served further to politicize what was, arguably, essentially a religious movement but it failed to prevent its spread in any significant way.

The King and the prophets

In February 1868, a large meeting took place at Tokangamutu, Tawhiao's community near Te Kuiti, at which it seems Hape (a Kingite Raukawa rangatira based at Otaki) made a bid for power or unity within the Kingitanga (*Daily Southern Cross* 1868 'The great native meeting', 3 February). Tawhiao and the Kingitanga leadership were trying to keep their political movement from foundering in the wake of the New Zealand wars. They had to deal with a number of self-styled radical prophets who wished to push the movement in a more extremist direction. Hape seems to have been one of these prophets. Te Kooti was another, the most audacious, a radical and a visionary who had become dissatisfied with the caution and moderation of the leading Kingites. The political difficulties faced by Kingitanga leaders such Rewi Maniapoto, Tamati Ngapora and Tawhiao were challenging because, on the one hand, they had to assert authority over the radical prophets like Hape, Te Kooti, and Hakaraia; on the other, they wanted to prevent key *iwi* such as Tuwharetoa and Raukawa from removing their lands from the mana of the king altogether – they feared that

these *iwi* would return to an engagement with the Pakeha world generally and with road-building and the Native Land Court specifically. Such a defection of these powerful *iwi* would significantly weaken the movement. To manage this complex situation required great political finesse. The Kingitanga chiefs neutralized the radical prophets to their left but were unable to prevent Raukawa and Tuwharetoa from going their own way. Later, however, ties were successfully re-established between the King and Raukawa.

Warfare broke out again on the North Island frontiers in 1868. In south Taranaki, Titikowaru and his followers inflicted a sequence of defeats on the government forces and advanced to the outskirts of the colonial town of Whanganui. Also in 1868 the Rongowhakaata leader and prophet Te Kooti and his *whakarau* (exiles) escaped from the Chatham Islands – used as a penal colony for 'rebels' from the East Coast – and conflict reignited in the region (see generally Binney 1995). Then in January 1869 Te Kooti escaped at the last minute with some of his supporters from Ngatapa, a hilltop fortress between Turanga and Te Urewera (Binney 1995: 132–47). After attacking Whakatane and Opotiki in March and Mohaka in April, Te Kooti set out for Lake Taupo, where he based himself at Tauranga-o-Taupo on the lake's south-eastern side for a time. He then met with the Tuwharetoa chief, Horonuku Te Heuheu, and seems to have taken him prisoner. On 7 July, Te Kooti and a large group of armed supporters arrived at Kaiwha, near Titiraupenga, where he seems to have forced Raukawa's chief, Hitiri Te Paerata, and others of Ngati Raukawa to accompany him to Tokangamutu, King Tawhiao's residence near Te Kuiti. Te Kooti reached Te Kuiti on 10 July, intending either to challenge Tawhiao or to induce Tawhiao to make common cause with him (Binney 1995: 177). Tawhiao refused to see Te Kooti, telling him, through an intermediary, to go away. After being defeated at a number of battles in the southern Taupo area by government forces and the Crown's Māori allies, Te Kooti crossed Raukawa territory, meeting with, and gaining the support of, a number of Raukawa people. Te Kooti's new religious covenant may have appealed to many who had become disillusioned with the apparent failure of the Kingitanga and of Pai Marire. In any case, Te Kooti did not stay in the area long enough to consolidate local support.

Nevertheless, Te Kooti's lasting imprint on the Raukawa people was his own brand of religious faith, Te Hahi Ringatu. From 1872–83, Te Kooti had to live as an exile in the King Country. After being pardoned by John Bryce, Native Minister, Te Kooti moved to Otewa in 1883, on the banks of the Waipa near Otorohanga, which became a centre of Te Kooti's new faith. 'Here', wrote James Cowan, 'the ex-guerilla chief lived a peaceful life, and inculcated in his followers the virtues of industry and religious observances' (Cowan 1901: 519). In 1889, the community at Otewa was described as follows:

> Since his pardon at Mangaorongo in 1884, Te Kooti has been living quietly at his settlement, Otewa, on the Waipa river, some twenty miles beyond the 'frontier' township of Kihikihi. Otewa is, perhaps, without exception the

> fairest sample of what discipline and good management will effect amongst the Maoris. The whares are well-built and clean, the fertile soil is under careful and systematic cultivation, the people observe very regular habits daily in their domestic duties and their *karakia*, and go about the labours of their *kainga* with commendable industry. At the settlement the greatest hospitality is shown to European visitors, and those in outlying districts near Otewa have many acts of kindness for which to thank the erstwhile outlaw on whose head a heavy price had more than once been set. Te Kooti is a remarkably clever and intelligent man, and a thorough organiser. No 'loafer' can live at Otewa, as every man, woman and child has to do eight hours' labor each day, while two hours a-day are spent in prayer after their own religion, which is partly Hauhau and partly a compilation of Karakias by Te Kooti himself.
>
> (*Marlborough Express* 1889: 3)

Otewa was not far from Raukawa territory, and Ringatu began to have an impact in the south Waikato. Otewa must have seemed like something of a model community and a beacon of sobriety and order compared with the chaos, disruption and realities of the Native Land Court town of Cambridge at the time. In the 1880s, the Native Land Court turned its attention to the south-eastern Waikato and many large land blocks that affected Ngati Raukawa, Ngati Haua and their neighbours were dealt with by the Court from 1879–86. The Native Land Court process created new pressures to sell land to private purchasers and led to a very abrasive encounter with modernity and the cash economy: the order and calm of Otewa must have seemed a welcome contrast.

I have been informed by Raukawa *kaumatua* that a number of Raukawa families turned to Ringatu at this time and remained so until T.W. Ratana's new political and religious message reached Raukawa in the 1920s, leading to the rise of the Ratana Church. Unlike Te Kooti's Old-Testament based Ringatu Church, the Ratana church was a self-consciously modernizing political movement allied to the Labour Party. The leading Māori politician, Sir Apirana Ngata, who came from the East Coast region, was politically opposed to Ratana and his own parliamentary connections were not with Labour but with the Liberal party, which fused with the more right-wing Reform party to create the National Party during the 1930s. To affiliate with Ratana was thus a political step of real significance, linking religious affiliation with the socialism of the Labour Party and with affiliation to working class organisations such as the Timberworkers' Union. The politicization of such a change in allegiance was especially acute if it put groups at odds with their sitting Māori electorate Member of Parliament, who was a vital spokesperson on land grievances and political matters. The shift from Ringatu to Ratana seems to have caused debate and anxiety.

Today Ngati Raukawa and Ngati Haua share in the rich picture of Māori religious affiliation mentioned earlier. New religious movements such as Mormonism have also come to the Waikato (the Mormon Church's main base in New Zealand is in the Waikato, located just outside the city of Hamilton). The Māori King

Movement retains its vitality and Ngati Raukawa and Ngati Haua are both closely affiliated with it. The national Catholic Māori marae is based at the town of Tokoroa, now the main urban area with Ngati Raukawa's traditional tribal territory in the Waikato.

Some conclusions

In this paper, I have described some of the complex Māori entanglements with Christianity. Regional studies of Māori responses to missionaries might provide a window into wider processes of Māori transformation and response to settlement from first contact through to the present day. The 'social impact' research commissioned for the Waitangi process has not concentrated on religious change but rather on land tenure, health and the articulation and resolution of political grievances. While these issues are important, religious orientation was also an important dimension of Māori life.

The story told in this chapter makes clear that we should not equate Christian expansion in New Zealand with the expansion of the colonial state. Wiremu Tamihana did not imbibe from his mission education and his committed Christianity any sense of political subservience to the colonial authorities. This brief exploration of Waikato history shows that Māori engagement with Christianity was deep and multifaceted. The land wars broke the nexus between the missionary bodies and Māori Christianity in this region. Māori remained as Christians, but experimented with new forms of religious authentication of their own devising. Thus, as has happened in so many times and places, engagement with Christianity and the Bible set in train transformations which no one could predict or control.

Notes

1 Professor, Faculty of Law, Victoria University of Wellington, New Zealand.
2 For a brief analysis of the CMS in New Zealand see Davidson (2000). The New Zealand literature on missions and missionaries is very extensive, including numerous biographies of individual missionaries and scholarly editions of missionary correspondence.
3 See Boast (2009) on the legal history of Whitireia, which includes the well-known decisions in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 and *Wallis v Solicitor-General* [1903] AC 173.
4 Tamihana Te Rauparaha was in London from 30 April 1851 to 22 July 1852. A detailed, if somewhat outdated account, is in Ramsden (1951: 172–93). The audience with Queen Victoria was arranged by the CMS, which had influence at Court (Ramsden 1951: 177).
5 *Speeches of Governor Sir George Grey and Native Chiefs at Meetings in Waikato*, December 1861, Appendix to the Journals of the House of Representatives, 1862 Session I, E-08. The debates were also printed in *Te Karere Maori*, 5 February 1862 (a.k.a *The Maori Messenger*). It is unclear whether Raukawa were present. Some Raukawa were certainly present at the meeting with Fox later in the month.
6 On Tawhiao's visit to Taranaki see the report by John White in *Speeches of Governor Sir George Grey and Native Chiefs at Meetings in Waikato*, December 1861: 12–13.

7 I am wary of 'anomie' and other such presumed psychological states as a useful category of historical analysis generally or as helpful in understanding the Māori predicament in nineteenth-century New Zealand specifically (Boast 2008: 257–58).
8 *New Zealand Gazette* 1865 No 14, 29 April.
9 Ibid.

Chapter 8

When settlers went to war against Christianity

Norman Etherington

Introduction

Missionary Christianity has too often been assumed to be the unproblematic partner of the colonial state. At different times and places it found itself at loggerheads with authority when its defence of indigenous aspirations to autonomy and self-governance clashed with official agendas. The most bitter confrontations occurred where white settlers seized the levers of power. Natal, South Africa provides a striking illustration of a settler war on Christian evangelism at the turn of the last century, provoked by fears of self-governing indigenous churches led by educated black clergy.

Such clashes were replicated throughout European colonial empires, although with variations that reflected local contingencies. The civilizing mission was very much a metropolitan project. It resonated most powerfully among elites at the imperial centre and, to a lesser degree, in the great cities of the dominions. It never generated much enthusiasm among officials, plantation owners, farmers or mining companies. As settler regimes at the periphery threw off the trammels of imperial authority, they adopted postures ranging from indifference to outright hostility towards groups committed to Christianizing and civilizing indigenous populations. Allocation of land, support for missions and provisions for governance varied widely according to the economic, ideological and administrative objectives of the state.

Where land for settlers was the priority, the state moved to expel indigenous populations, ignoring the protestations of local missionaries. Under United States President Andrew Jackson, the government attempted the wholesale removal of all Native Americans to wastelands west of the Mississippi River, in the episode remembered as the Trail of Tears (Jahoda 1995). When, in 1889, another United States government decided that the designated Indian territory of Oklahoma should be opened for white settlement, it crowded the remains of many former Indian nations into small reservations (Strickland 1980: 31–68). Such brutal measures proved impractical where indigenous populations could resist land grabs. Governor George Grey's attempt to seize Waikato during New Zealand's Māori Wars of the 1860s was abandoned in the face of a determined armed struggle (Belich 1986: 119–200). Much land coveted by white farmers remained in

Māori hands, government authority was exercised lightly and white missionaries were largely excluded from those lands by Māori who resented their failure to stand up for justice.

Learning from this debacle, in the 1870s, Governor Arthur Gordon resisted the demands of planters in newly annexed Fiji who hoped that land alienation and taxes would drive the indigenous population out to work for them. Leaving Fijians in possession of most of their patrimony, he solved the plantation labour problem by importing indentured labourers from the Indian subcontinent. Chiefs continued to play a major role in local governance, while Methodist missions prospered, partly because of their stout defence of Fijian land rights (Newbury 2010). In the sprawling, complex colony of Western Australia, a clash of competing interests produced a patchwork of conflicting policies. Britain resisted settler demands for 'responsible government' partly on the ground that the small white population would pursue unjust policies towards the Aboriginal population, and partly because they feared that in the northern regions of the colony, irresponsible settlers might provoke the numerically superior indigenous people to armed resistance. Responsible government was conceded on the condition that the government spend one per cent of annual revenue, or no less than £5,000 per annum, on the welfare and advancement of the Aboriginal population (*Constitution Act 1889* (WA) section 70). Famously, the new regime made repeal of section 70 an immediate policy objective. Having succeeded in 1897, it instituted regimes suited to the demands of regional settler constituencies (Etherington 2009). In the south, it expelled Aboriginal people from farms and towns, confining some to virtually penal conditions at Moore River Native Settlement, without mission involvement until the 1950s (Haebich 1988). In the northern parts of the state, it contrived reserves that were just large enough to sustain a traditional lifestyle but small enough to induce people to work on pastoral properties. Missions were allowed access to the reserves, partly in the hope that they would save the government some of the expense associated with the ration system.

Missions, land and governance in Natal

In Natal, South Africa, some aspects of all these colonial policies were implemented at various times during the period 1840–60. Boer (Afrikaner) settlers established the first white regime named the Republic of Natalia. They were frankly hostile to missionaries, blaming them for opposition to slavery and defence of African land rights in the Cape Colony during the 1820s and 1830s. They recognized no indigenous land rights and the Republic's constitution banned missionaries. In 1842, Britain annexed the territory, while guaranteeing Boer titles to land parcelled out as farms. Natal's first Secretary for Native Affairs, Theophilus Shepstone, took a very different view of land and religion. The son of a Methodist missionary, Shepstone confronted the problem of regulating an estimated black population of 100,000 with a skeleton staff of magistrates at a time when settlers numbered less than one tenth of that figure. When a shortage of funds thwarted his plans for an

extensive programme of civilization and surveillance, he initiated a partnership with missionaries. Large African Locations were mapped out in the late 1840s, subject to communal land tenure, where chiefs assumed responsibility for local affairs. In addition, the government assigned small Mission Reserves to several different denominations which undertook the civilizing and Christianizing work that the government had shirked. Under South African High Commissioner George Grey (the same who served in South Australia in 1841–45 and New Zealand in 1845–54), the government initiated a scheme of grants for African schools which flowed overwhelmingly to the missions.

As settlers increased in number and were granted representation in the Legislative Council, they agitated for reductions in the size of Locations and for increased taxation of Africans, hoping to open more land for white farms and to drive blacks into wage labour. Although they viewed low-paid work as the essence of civilization, settler representatives painted it as part of a larger programme of betterment which would include suppression of polygamy, witchcraft and other 'savage customs'. Shepstone countered by arguing that alienation of land, high taxes and attacks on venerable customs would drive the militarily formidable tribes into rebellion (Etherington 1989).

Over time, the settlers discovered unsuspected virtues in what came to be known as the 'Shepstone system'. Confining blacks to large Locations not only kept the peace but proved a convenient means of regulating the flow of labour to white mines and farms. Retention of customary law was used as a justification for the despotic rule of most of the African population on the ground that their former kings had accustomed them to absolute monarchy. Only by applying for exemption from Native Law could Africans win the right to vote. Precious few certificates of exemption were issued, despite the attempts of missions and converts to formalize their 'civilized' status. To compensate Africans for being deprived of their normal rights as British subjects, in 1865 the government set aside a reserve fund of £5,000 per annum to be spent on the welfare advancement of Africans (the template for the similar provision later implemented in Western Australia). A significant portion of this fund underwrote schools. However, with Africans safely excluded from the political process, settler representatives determined what kind of education would be funded. They insisted with increasing vehemence that grants be directed to very basic vocational training, so as to inhibit competition with white workers. A complaint frequently voiced by white employers was that 'a Native Christianized and educated' was 'a Native spoiled'. In the racial parlance of the time, 'Raw Kaffirs made the best servants'.

In 1893, Britain's grant of full responsible government to Natal completed the triumph of white supremacy. The Governor retained his weird status as Supreme Chief of the African population but acted only on the advice of his Prime Minister. The Secretary for Native Affairs became a permanent Undersecretary, subject to direction by a Cabinet minister. The new government wasted little time in moving to tighten their control over their black subjects. Missions, religion and the Reserves soon came under close supervision.

The Ethiopian menace

Reflecting on the changes wrought over the last few years, the Undersecretary for Native Affairs remarked with satisfaction in 1901 that:

> The tribal system has been gradually brought under statutory control. It is a despotic form of government taken over from the natives themselves, and is peculiarly suitable to their condition and … carries with it mutual responsibility or suretyship, and implicit obedience to authority; it possesses a ready means of communication and control beginning with the Supreme Chief and extending to the individual native in his kraal; but the exercise of the franchise is unknown to it, and it should be so maintained.[1]

There could hardly have been a franker admission that the colony had renounced the civilizing mission as understood in the Victorian era. Abandonment of Christianization proceeded less directly.

Natal in the late nineteenth century was one of the most heavily evangelized regions in the world. Agents of more than a dozen societies from several nations spread themselves across the land. All of the Protestant missions subscribed to the dominant strategy of the time, as articulated by Henry Venn in Britain and Rufus Anderson in the United States (Porter 2005: 53; Williams 1990). Realising that their limited resources would never suffice to effect the conversion of the world, they would need to enrol local evangelists, ordain them, put them in charge of churches and imbue them with the missionary spirit. 'Self-supporting, self-governing, self-propagating missions' became the watchword of the worldwide Protestant movement. Natal's onslaught on black Christianity struck at the heart of the strategy.

The missions inadvertently opened the way for an attack on their operations by invoking the aid of the state in an effort to curb declarations of ecclesiastical independence by their black clergy. From the late 1880s, the American Board mission (Congregational and Presbyterian) and Methodists in Natal had been troubled by local evangelists and congregations which demanded more say in the conduct of church affairs. In the 1890s, some had formally split from their parent missions and set up their own churches. From one point of view this was precisely the denouement these particular missions professed to desire – the creation of self-sustaining evangelical churches (Porter 2005: 53). On the other hand the rebel congregations had occupied churches built with mission funds on land granted by the government. Privileging property and ecclesiastical authority over evangelical theory, mission authorities asked for government assistance in removing the dissidents.

The missions' plea unfortunately coincided with an official panic about independent African preachers. In the neighbouring territories of the Transvaal and the Cape Colony, a variety of black evangelists proclaimed themselves to be Ethiopians, pointing to the Biblical prophecy that 'Ethiopia shall soon stretch out her hands unto God'. An ordained minister from Natal coined that name for the church he founded after breaking with the Methodists in 1892. In 1896,

the Ethiopian Church joined itself to the African Methodist Episcopal Church of the United States, a large and venerable black church which seized this opportunity to launch missions to Africa (Campbell 1995: 1–2). Soon colonial officials were applying the term 'Ethiopian' to practically all African religious initiatives, including informal preaching in city streets. Although none of the so-called 'Ethiopians' engaged in overt acts of crime or rebellion, their sermons could be construed as subversive, especially when they invoked the catchcry 'Africa for the Africans'. Like everything else about the independent churches, the slogan could be interpreted in a number of ways. To black preachers it meant that they, rather than missionaries, must carry out the work of converting the continent to Christianity. To missionaries it appeared to challenge their authority and to demand their departure. To panicked politicians it suggested the displacement of white supremacy with black supremacy.

The case of Simungu Bafazini, also known as Isimungu Shibe, who set up an independent church at Table Mountain near Natal's capital of Pietermaritzburg, illustrates this contention of meanings. Concerned that he was drawing members from their nearby church, the American Board missionary, F.B. Bridgman, wrote to S.O. Samuelson, Undersecretary for Native Affairs in 1901, to ask whether Bafazini was recognized by the government as a marriage officer.

> I have it on what seems reliable authority that Shibe [Bafazini] is … representing himself of course to the ignorant natives as a properly qualified clergyman. If he is so acting and is breaking the law it would doubtless be a wholesome lesson and help to suppress the schismatic tendencies shown by the natives in some quarters of late years, were he caught and convicted.[2]

Even though a search of the records returned no instance of a marriage performed by Bafazini, Samuelson encouraged the missionary to supply 'evidence which would lead to his conviction'. An inspector of education reported later that same year that he had heard that the preacher frequently voiced seditious sentiments along the lines of:

> You people come and join us, today we are weak, if you all join us we shall be strong, and after a few years we shall get back the old law the land will be ours, the natives will be at the top, the English at the bottom, then let the English go their own way, where they please.[3]

According to another report, the preacher had said that 'he believed the Boers would win' the war they were currently waging against the English – a statement considered sufficiently treasonable to warrant police surveillance. Called before a magistrate, Nqumba Nyawose testified that he had 'never heard him say anything against the Government'; however:

> he has severed his connection with the American Mission of which body I belong. He has called his denomination the Zulu Congregation and

> recognizes no higher authority in his Church than himself, that is, he will not be subject to any white minister.[4]

The police maintained that the only reason more convincing evidence of sedition could not be obtained was that 'Natives who listen to the seditious preaching are bound to secrecy.' The Minister for Native Affairs, F.R. Moor, considered this sufficient reason to suggest that the governor should classify Bafazini 'as an undesirable. Such conduct as his should not be allowed to pass unnoticed.'[5]

Bafazini's case came up again in 1902 during an interview between the Minister and American missionaries, Bridgman and H.D. Goodenough, who hoped that independent black preachers would not be allowed to officiate at marriages. Moor replied that legislation would be required and that he would ask for advice from the Attorney General. He continued in a vein less likely to please the missionaries, saying that the Attorney General 'was not in favour of giving any authority to native preachers at all … missionary work amongst the natives should be confined to Europeans: natives were not fitted for it, and would not be in a hundred years' time'.[6] Moor went on to foreshadow legislation to restrict the rights of all black evangelists to conduct marriage ceremonies.

> [He] did not consider that such power should be given to natives as they were not yet fit for it. He did not see how they were going to draw the line as native ministers were setting up for themselves and would claim that they were ordained according to the rites of their respective churches.[7]

When the two missionaries asked why there was a delay in giving permission for one of their ordained ministers to occupy a chapel on one of the Locations, Moor told them he would be advising the Natal Native Trust not to allow any native preachers in Locations. In fact 'he did not think that black men should be ordained as Ministers'. As for the Mission Reserves, he ruled out granting individual titles to Africans residing there, something explicitly provided for in the original deeds of trust. 'There were', he said, 'great difficulties with this':

> Firstly there was that of control. If they once gave individual title to the land the tribal control would be done for because each man having his own piece of land he could defy everybody. Secondly, individual title with consequent devolution of the property is contrary altogether to the institution and laws of the people concerned.[8]

Missionaries lacked the absolute control over Africans on their Reserves exercised by private land owners. When Reverend Goodenough asked 'Why do you not give us absolute control?' the Minister exploded: 'What, to make these preachers? No, never.' Finally he turned to an essential item on the civilizing agenda, education. Moor condemned the missionaries for doing too much: 'Natives only wanted to be taught trades; other education was wasted on them.'[9]

The missionaries came away forewarned that the whole Shepstone project of promoting civilization and Christianity through a partnership with missions was about to

be picked apart piece by piece. The Locations would be barred to missionaries unless they guaranteed close supervision of black preachers. Most black preachers would be denied licences as marriage celebrants. The government would take over the administration of Mission Reserves. Grants for education beyond basic training in reading, arithmetic and manual skills would be curtailed. Without resort to legislation, the legal provision for Africans to apply for exemption from 'Native Law' would be circumvented by an informal administrative direction that no more funds for education be granted. The government justified these measures as necessary to combat the Ethiopian menace. Throughout changes of governments and Cabinet reshuffles, all leading settler politicians agreed on the main points of this policy.

The war on Christianity

Some of the programme could be implemented by administrative fiat. Exemption from Native Law had never been extended to more than a few score individuals, mostly Christians. The granting of exemptions rested entirely on the discretion of the Secretary for Native Affairs. The Undersecretary in 1901 commented that 'exemptions from the operation of Native Law have been sparingly granted, and then only in special cases. The Law under which they are granted is, however, a blot on our Statute Book, and should never have been enacted.' Henceforward, virtually all Christian Africans would be trapped within a separate legal system based on the assumption that they owed unquestioned obedience to chiefs right up to the Supreme Chief (the Governor of Natal), who acted on the advice of his white ministers.

Restricting the right to perform legal marriages was tackled both administratively and through legislation. Missionaries themselves had requested it as a means of discouraging secessions from their churches. Presbyterian minister John Fernie of Pietermaritzburg wrote to the department of Native Affairs in May 1902 suggesting that the government license only those marriages at which a European minister was willing to officiate.[10] Moor immediately implemented that suggestion in a circular to magistrates on 4 June 1902. The following year he went further, introducing legislation requiring all ministers, white and black, to register as marriage officers (*An Act to Amend the Law Relating to Marriages of Bantu by Christian Rites 1903* (44), 1903). Like exemptions from Native Law, registration was left to the discretion of colonial officials who refused the vast majority of applications from African preachers while approving almost all of those from white missionaries. Naturally this lessened the prestige and effectiveness of black ministers. It made public officials, rather than missionaries, the arbiters of their fitness for the task.

The government moved on several fronts to curtail black preaching of Christianity in the Locations, relying on the absolute authority vested in the Natal Native Trust. Although this body had been originally set up with missionary involvement to safeguard African rights and to advance the civilizing mission, since the grant of responsible government it had become virtually synonymous with the Cabinet. When a missionary enquired as to the difference between the Trust and the government, the Secretary for Native Affairs informed him that 'It is a

distinction without a difference. The Government consists of the Ministry with the Governor in Council; the Natal native Trust is practically the same body. It is composed of the Ministry of the day and the Governor.'[11] As principal adviser to the Trust, the Secretary for Native Affairs could generally count on its backing for any of his edicts concerning Locations. On his own authority he told the magistrate of Alfred Division in October 1901, 'I strongly disapprove of Native Preachers who are not under the control of a white missionary. Are there any such in your Division? If so what are their names and addresses?'[12]

The Secretary for Native Affairs also had the power to grant and revoke passes to Africans seeking to enter the colony. He stopped black evangelists at the border and expelled those suspected of preaching without authority. Accusing a preacher named Solani of fomenting rebellion, Moor asked the Chief Commissioner of Police to observe his meetings. According to a sub-inspector of police

> The preaching of the Sect, calling themselves Amakutshe (Ethiopians) has had the attention of the Police for the last 18 months. About June 1900 a report was made … that one Solani, a Native from Pondoland was causing unrest amongst our natives by preaching sedition under the cloak of religion. … I sent two Native detectives to Ekwezi, but they failed completely in their errand, having become known as government servants almost at once. Native Police were also sent out on Sundays … but nothing could be proved against him. Then 3 other Native preachers, followers of Solani, arrived … These 3 men omitted to take out the necessary inward pass. They were arrested, charged before the Magistrate, Harding, under the Pass Law and the heavy fine of £5 (each) was inflicted on [them?], with the alternative of 2 months H[ard]. L[abour].[13]

Although they found very little evidence of seditious sentiments, the sub-inspector's report indicates the lengths to which the government would go in police surveillance.

Missionaries were alarmed to learn in 1904 that the authority of the Natal Native Trust would be employed to bar all black preaching, unless conducted under the personal supervision of white clergy. On 12 May in an address to the annual meeting of the Anglican Maritzburg Missionary Association, Governor Henry McCallum announced that while the government,

> 'gave every opportunity and encouragement to the white missionaries they had made it an axiom now that black missionaries should not be allowed to practise on their own initiative. They had to get a white missionary in touch with them to supervise them … by this means, they would be able to keep in hands a movement they were determined to throttle, and which practically meant disloyalty.'
> (*Times of Natal* 1904)

Throttling in this case extended to physical destruction of churches. In July 1904, the Inspector of Location Lands reported that Europeans had left the church and school at Tabamhlope. The Secretary for Native Affairs immediately directed that police demolish the buildings. After a spate of such incidents, a

deputation from the interdenominational Natal Missionary Conference told the new Secretary for Native Affairs, George Leuchars, that the new policy threatened the very foundations of missionaries' work.[14] There would never be enough white missionaries to supervise the army of black evangelists required for the conversion of the Zulu people. Their societies lacked the resources to pay for even a fraction of the potential cost. As Methodist W.J. Hacker explained:

> It is one of the fundamental principles with us that the Gospel must be carried to the Natives through their own people, and it has been our aim to raise up men and train them for the work, and to place men, in whom we have implicit confidence, in charge, under European supervision, of the various congregations in this Colony. You are in effect saying there can be no missionary work except where a White Minister can be. … we believe it is in opposition to the British Constitution … I believe that Mr. Bridgman, and others, have cases where buildings have been torn down. I have a case where a Headman destroyed one of my Churches and sold the windows. I wrote to the Magistrate of the District who replied that I had better drop the matter.[15]

The Minister simply reiterated:

> The policy … is, as you know, not to give permission for the erection of a Mission Station in a Location unless under the immediate supervision of an European Missionary. … it is not safe or right to allow Mission Stations to be run by Native Missionaries. Although they may be ostensibly under the control of the European Missionaries, we think that … unless the Missionary is resident on the Mission, he cannot exercise that control over the mission which the Government would like. I know that there are many Native Missionaries who are absolutely reliable and to be trusted, but on the other hand I know … that there are Native Ministers who one cannot altogether trust, and although a Mission Station may be nominally under the control of an European Missionary, and although that Missionary may visit the Station periodically, it is quite possible for teachings to go on there unknown to the Missionary.[16]

It was far more difficult for the government to move against the Mission Reserves, which had been granted to mission societies in perpetuity. Though not large in area, they were havens for African Christians and centres of secular and theological training. Their residents were exempt from the hut taxes imposed elsewhere and the missions charged rents below those prevailing on private farms. For some years the residents on American Mission Reserves had been pleading, with the support of their missionaries, for the issuance of individual titles. In July 1902, an influential group of Christian men submitted a petition to that effect, which the government met with prevarication, arguing that nothing could be done prior to the anticipated report of the Land Commission.[17] The report, which appeared early in 1903, recommended that all missionary trustees be removed and that the Natal Native Trust become the sole trustee of all the

Reserves.[18] The legislation required to accomplish this objective may have struck Britain's Crown Law Officers as a violation of established property rights. However, British officials did not have to decide; in the face of a determined settler regime, the missionaries agreed to cede 'complete control of the natives living on the Reserves' on three conditions.

(1) That suitable sites for schools and churches shall be leased at a nominal rent to the Mission Society named in the Deed of Grant.
(2) That the Reserves shall be kept for the sole occupation of natives and shall be administered in accordance with the intent of the Deed of Trust.
(3) That all the revenue derived from the Reserves shall be used for the benefit of the Natives living on the Reserves, one half of such revenue being turned over to the Mission Society named in the Deed of Grant for native education in accordance with rules framed by the Education Department.[19]

These terms, once embodied in draft legislation, killed the possibility of individual title, while saving the land from falling into the hands of white farmers. The third condition promised to free the missionaries from many educational expenses, but at what cost to the aspirations of African Christians? There could be no doubt that the Education Department would 'frame rules' directing the bulk of revenues to low-level vocational instruction.

Worse was to come. Before the legislation passed in 1903, white farmers lobbied successfully to have the annual rents charged to Africans living on the Reserves raised to £3 per household per year, the same rate African tenants paid to live on white farms. Black ministers complained that the missionaries had betrayed them; in turn their own congregations blamed them for not defending the people. Reverend John L. Dube, American-educated editor of the leading African newspaper, *Ilanga lase Natal*, explained that 'great trouble has arisen in the native mind on account of the rental of £3 a hut.' Even if the burden imposed on black families had only 'been ten shillings, or even five shillings, the trouble would remain.' The higher rents would so impoverish families that they would no longer be able to support their churches or pay school fees.

> The feeling which now prevails is that the work for which the Missionaries came here will perish, all will perish, even the schools will come to an end. … this is a [government] device to shatter the work for which the Missionaries have long been disparaged.[20]

Missionaries' acquiescence in the takeover in return for an educational subsidy showed the extent to which they had fallen into dependence on government grants. To their consternation they now faced a demand from their black congregations that they renounce their 50 per cent share of rent revenue. At a special meeting of the American mission, Dube noted that 'the people' were 'very, very angry' about their increased rental charges 'a great many would have liked to have killed you, if they would have had the power to do it. … What is this money, compared

with the confidence of the people.'[21] Although there was no going back after government legislation, the missionaries did succeed – by including some African pastors in a delegation to meet the Secretary for Native Affairs – in convincing many that they had not deliberately sold their congregations down the river.

Whereas the missionaries had initially welcomed the assistance of government in curbing independent churches, they now sorrowfully concluded that the state had shown 'itself decidedly obstructive to the Christianizing of the natives', while operating under the cover of 'an exaggerated fear, we believe, of Ethiopianism'. For them, nothing could more dramatically illustrate the antipathy of the government, than the magistrate who recently had 'threatened to burn down a native church capable of seating 150, and which the people had built with their contributions of labor and money.'[22]

In truth, the missionaries need not have feared that the state's war on Christianity would succeed. As reports of the government's secret police amply demonstrated, the new religion had reached a takeoff point whose forward impetus could not be thwarted. Independent preachers were everywhere and unofficial evangelism had exploded. Natal's future as a Christian province was assured, even if missions would remain an object of official suspicion for decades.

Rebellion and beyond

When the government of Natal expanded its programme of African taxation in 1906 by imposing a poll tax on all black adults, the result was general consternation, including some open defiance of police and magistrates. In 1906, the government declared martial law to halt a movement it characterized as a rebellion (Guy 2005; Marks 1971; Redding 2006). Ignoring the provocation of the poll tax, officials insisted that the root cause of discontent was Ethiopianism, including the teaching of the established mission churches. The official history of the rebellion enshrined that interpretation.

> The Christians … having been accorded certain liberties by the highest legal authority, were not slow in assuming a more complete independence … they became what are commonly known as Ethiopians, that is a class whose church organization, like their social life, is wholly free from European control. … Is it surprising, then, that a group of barbarians with the merest veneer ples of European civilization to ordinary heathen life, without regard to after-effects, is one of the most subtle dangers to which Natal, in common with all other countries in which there are lower races subject to Christian government, has constantly been exposed.
>
> (Stuart 1913: 128–29)

Had Natal remained an independent colony, there is no telling how far the campaign against missions might have been carried. However, the Union of South Africa in 1910 subsumed the province in a larger state that was constitutionally committed to freedom of religion. This rendered open attacks on

Christian preaching unlawful, on and off the Reserves. The suspicion of mission education as a subversive force lingered, however, into the era of Apartheid. The *Bantu Education Act 1953* (South Africa) forced all schools for Africans to teach the curriculum imposed by the Department of Bantu Education. Rather than conform to these dictates, most missions closed their schools, and gave over their buildings to the government.

Relations between missions and the colonial state, rarely congenial, turned openly hostile when the missionary program of developing an educated indigenous pastorate clashed with settler determination to maintain white supremacy. This was most likely to happen when settlers were heavily outnumbered and unhindered by metropolitan administrations in Europe. Natal provides a particularly instructive example because the aspirations of the indigenous pastorate and their congregations are so clearly articulated in the archival record. It was no accident that many of the first leaders of the African National Congress in 1912 emerged from the Christianized population of Natal.

Notes

1 S.O. Samuelson, Undersecretary for Native Affairs (USNA) Memorandum to Secretary for Native Affairs, 'Memorandum on the Legislative Policy of the Government in regard to the Native Population since 1894', September 1901, Secretary for Native Affairs Papers, Natal Archives (henceforth SNA), SNA 1/1/293.
2 F.B. Bridgman, Letter to USNA, 8 October 1901, SNA 1/1/294.
3 R. Plant Report, 26 November 1901, SNA 2772, 1/1/294.
4 N. Nyawose, Statement, 17 January 1901, SNA 2772, 1/1/294.
5 F.R. Moor, Minute, 7 February 1902, SNA 2772, 1/1/294.
6 F.R. Moor, Notes of interview with Bridgman and Goodenough, 8 April 1902 SNA, 1380, 1/1/296.
7 Ibid.
8 Ibid.
9 Ibid.
10 J. Fernie, Letter to USNA, 7 May 1902, SNA 1484, 1/1/296.
11 S.O. Samuelson, Report of Conference, 12 February 1903, SNA 723, 1/1/300.
12 F.R. Moor, Letter to Magistrate Alfred Divn, 10 October 1901, SNA 2271, 1/1/293.
13 C. Meiners, Report, 16 October 1901, SNA 2271, 1/1/293.
14 S.O. Samuelson 1904, Notes on meeting with deputation of the Natal Missionary Conference, 16 December 1904, SNA 2569, 1/1/315.
15 Ibid.
16 Ibid.
17 N. Dhludhla, Petition with 766 others, 1902, SNA 834, 1/1/295.
18 S.O. Samuelson, Report of Conference, 12 February 1903, SNA 723, 1/1/300.
19 Ibid.
20 J.L. Dube, Article in *Ilanga lase Natal*, 11 November, as translated in the SNA office, 1904, SNA 2426, 1/1/314.
21 J.L. Dube, Report of the Discussion regarding the Disposal of Mission Reserve Funds, accruing under the Mission Reserves Law of 1903 (received at ABCFM headquarters May 28 1906), ABC 15.4, vol. 22, Archives of the American Board of Commissioners for Foreign Missions, Houghton Library, Harvard University (henceforth ABC).
22 Annual Letter of the American Zulu Mission, June 29, 1905, ABC15.4, vol. 22, ABC.

Chapter 9

The identity of indigenous political thought

Tim Rowse[1]

The European colonization of the New World incited political discourse. In this chapter I examine the creative ways that four indigenous activists from North America and Australasia in the nineteenth and early twentieth centuries adopted settler discourse about society, history and race in defence of their people.

When identifying 'indigenous', 'native' or 'colonized' political thought, we can use authorial and/or intellectual criteria. The latter is a flawed method. Trying to identify the indigeneity of ideas suggests that there are criteria for judging ideas to be 'truly indigenous' based on their continuity with pre-contact traditions, their political intentions and effects. In this chapter I will illustrate the benefits of identifying texts by the self-proclaimed indigeneity of their authors. To delimit 'indigenous thought' in this way sets no boundary to its intellectual variety and the ideas expressed by 'indigenous' authors may violate preconceptions of 'indigenous ideas'. The four writers studied in this chapter – Peter Jones, Charles Eastman, Apirana Ngata and William Cooper – lived in the Anglophone settler colonies of Canada, the United States of America, New Zealand and Australia, and flourished in the 1830s to 1930s. They presented themselves as Christians, as 'civilized' and even as 'white'. I do not claim that they are typical of their people. They are interesting because they connected the fortunes of their people to certain human universals of evidently Western provenance.

Some students and scholars react with dismay when I label the work of these four men as 'indigenous political discourse'. They have made the redemptive suggestion that (surely!), in writing within the discourse of Western universalism, these authors were being 'strategic'. Let us consider this protest: that the native intellectual in question *could have* expressed himself or herself in a way that remained true to his or her indigenous tradition or being, producing discourse uncompromised, un-strategic and untempted by 'mimesis'. This perspective assumes that there continues to exist, under colonized conditions, a fugitive and perhaps unexpressed world of 'indigenous' ideas, less changed by 'Western' influence, correlative to other indigenous survivals: sovereignty, jurisdiction. Historical studies of such life-worlds, relatively resistant to colonizing power – Dowd on Neolin (Dowd 1992) and Binney on Te Kooti (Binney 1995) – enthral us. With these intractable figures as our benchmark, hadn't we better characterize

the obviously Western-derived ideas of my four authors as strategically mimetic of non-indigenous thought?

How would we inscribe the agency of the strategically mimetic colonized intellectual? Let us examine, as a model, a passage by Elizabeth Elbourne about some indigenous men who began, in the 1830s, to participate in international networks concerned with the reform of British colonial policy, using 'international languages about rights and property ownership' (Elbourne 2005: 63). They:

> needed to present themselves in print or in person on the British stage as, to some extent, disembodied actors with the concomitant ability to move between different cultural worlds. They also often needed to be Christian, or at least to present themselves as such. They had to present themselves … in ways familiar to the British, while posing as exemplars of the universal man posited by early nineteenth-century liberalism.
>
> (Elbourne 2005: 61)

Elbourne presents native agency as layered: true to a resistant indigenous self but masking that self with a Western pose necessitated by a structure of domination.

R. Jovita Baber also presents this idea of native agency in her study of the Tlaxcala nobles who, in sixteenth-century petitions in 'New Spain', 'understood the political milieu in which they were operating, and … articulated their concerns in language that would bring success for their legal and political pursuits' (Baber 2012: 56). She counterposes words such as 'truth' and 'reality' to words such as 'strategy', 'rhetoric', 'legal argument' and 'artefacts'.

> Legal documents … reveal the legal strategies of native people more than they articulate native reality. … In distinguishing between rhetoric and reality, and in revealing native people's conscious and strategic use of Castilian rhetoric, this chapter attempts to draw a fine but crucial line between asserting that their arguments were dictated by the power relations of the empire, and that their legal arguments reflected an authentic native voice. … [R]ather than being evidence of native people's reality, legal documents reveal native people's ingenuity and agency.
>
> (Baber 2012: 56–57)

Baber upholds indigenous agency by suggesting that the terms of the Tlaxcalan self-representations were neither 'dictated by the power relations of the empire' nor their 'authentic native voice'; rather, their words creatively mediated the two. Would Baber be any less evocative of Tlaxcalan agency were she to allow that the documents addressed to Spanish authority *had* reflected 'authentic native voice'? Is it necessary – in order to substantiate agency – to suppose that native 'truth', 'reality' and authenticity are somewhere else than in the documents they produced? If an historian represented Tlaxcalan petitions as heartfelt expressions of Tlaxcalan self-understanding, would their actions be any less (worthy of respect as)

'agency'? It is not 'agency' that is at stake here. So what is the point of Baber's distinction between the artifice of legal discourse and the unrepresented (Tlaxcalan) reality which that discourse served politically? Is there any evidentiary base from which we can infer the truth/reality of Tlaxcalan existence at this time? Baber does not risk such an inference. After all, in the hermeneutic that she implies, any documentary evidence of Tlaxcalan 'reality' would be open to the same suspicion as the legal documents: that it was an authorial agent's strategic artifice, a representation, inadequate to 'reality' and truth. The metaphysic at work in Baber's antitheses, by implying Tlaxcalan-ness beyond what the documents attest, purchases our belief in Tlaxclan agency by genuflecting to the essentialism of identity politics.

In Frederick Cooper's work I discern a different conception of colonized agency: the native agent's adoption of elements of the colonizing culture may be a deeply felt reformation of self. Cooper is open to the colonial inception of unprecedented political subjects, of new persons making sense of themselves in the terms of what Elbourne (2005: 63) calls 'international languages about rights and property ownership'. Thus, reflecting on studies of twentieth-century colonies, Cooper presents 'citizenship' as a category aspired to and lived by the colonized person; a colonial category such as 'citizen' can be a felt identity that projects deeply appealing possibilities for the colonized person and his or her people (Cooper 2005).

Implicit in the plausibility of this conception of colonized agency are two related themes in Cooper's work. First, the mission of colonial history must be to trace the contingencies of imperial power: to explore 'a more dynamic view of the exercise of power, of the limits of power, and the contestation of power constitutes a fundamentally historical endeavour' (Cooper 2005: 409). That is, Cooper is sensitive to the risk to colonial authority of any hegemony that presents to the colonized certain political identities, such as 'the citizen'. Second, Cooper is vigilantly anti-essentialist in his presentation of modernity; he argues that the colonizing West brought political and social discourses whose implications were available not only to the colonizer but also to the colonized. For Cooper, the Enlightenment really was a struggle against arbitrary power; for colonizing authority to induct the colonized into this intellectual heritage was to place a potent weapon in their hands and to make available the terms of a radically new subjectivity. Thus, 'the Haitian Revolution of 1791 stands alongside the French in opening questions of slavery and citizenship, of cultural difference and universal rights, to wider debate' (Cooper 2005: 408). And, thus, the post-World War Two demands of French African trade unionists 'promised to turn the very premises of post-war imperial ideology into a series of expensive demands whose refusal would be ideologically as well as politically dangerous' (Cooper 2005: 411).

Cooper's notion of colonized agency highlights the political polyvalent ideas that are 'Western' in origin but not solely 'colonizing' in utility. Put simply, 'Western' ideas have rich anti-colonial possibilities. Our sense of what was anti-colonial thought need not oblige ahistorical models of a resistant indigeneity. We should hesitate to evoke an 'indigeneity' that stands beyond representation and

that deploys borrowed idioms to mask closely guarded (unrepresented) sovereign intentions. Thus we should hesitate to place conceptual limits on the anti-colonial qualities of texts by colonized intellectuals.

I will illustrate this approach by pointing to two conceptions of human universality that allowed indigenous intellectuals critical distance from the racial discourse that was prominent within colonial intellectual authority: the Christian notions that every soul is amenable to both sin and salvation and that no branch of humanity stands closer to God than others; and universal or stadial history – the theory that all human societies pass through four stages of development: savagery, barbarism, agriculture and polite society.

Drawing from this stock of ideas, these intellectuals pointed to weaknesses in 'civilization' as colonists practiced it, and/or they demanded colonists' adherence to standards of civilization that they invoked as universally binding on humanity.

Peter Jones 1802–53

Peter Jones, also known as Kahkewaquonaby, was born of a Mississauga mother and English father in 1802. He attended school and then converted to (Methodist) Christianity in 1823. Devoting himself to missionary work among his people at a time of rapid Indian depopulation and loss of land to settlers in Upper Canada, he became a leader and spokesperson of the Indian community that farmed on the Credit River. The Credit River community published its code of by-laws (reprinted in Graham 1975: 105–10); the community's achievements were recognized as proof that Indians could convert both to Christianity and to agriculture. Jones visited Britain in the 1830s to promote his peoples' successful adaptation and lobby the Colonial Office to reward them with security of tenure. He died in 1853. His admirers compiled his posthumously published book, *History of the Ojebway Indians: with especial reference to their conversion to Christianity* (1861). However, our understanding of him can begin with two narratives of his own conversion, delivered in Leeds in 1831.

Religious conviction, as Jones narrated it, was embedded in a whole way of life. While 'civilization' was Christian, for Jones it was no less a material achievement. Before conversion, 'Those gods we reverenced according to our necessities; when we got hungry, we prayed to the god of the deer; when we wished to catch fish, we prayed to the god of water'.[2] With Christianity came a change in economy and morality.

> Since my countrymen have found the Saviour in their hearts, they are beginning to plant potatoes, sow corn, &c. And there are now sixteen schools established among the Indians, where about 100 of our children are going to school and learning to read, though we had no book whatever before we converted to christianity in our language … My countrymen generally lived by hunting, by selling the skins and furs which they got in this way to the white people, in exchange for which they often received the fire-waters,

> which produced such bad effects among them. But when we became converted, we forsook these crooked ways; the great Spirit helped us to throw them all away from us.[3]

To become Christian was also to become healthier and materially more prosperous:

> We were very poor, very miserable before the gospel came among us; we had … no houses, no fields, no cattle, but we led a wandering life; we got our living by what we could get out of the woods; we were roving about from place to place; while we were in thus state we had no chapels, no houses, no Missionary's voice to be heard in the woods; we had been perishing one age after another, our numbers dwindling away on account of the fire-waters getting among us, and the diseases which were brought by the English settlers over the great waters, such as the small pox, the measles, & these things we never knew before we saw the white people.[4]

In his *History*, Jones attributed the decline in Indians' mortality from smallpox to Jenner's invention of a vaccine – a demographic benefit of civilization (Jones 1861: 240–41). While his entry into Christian faith was very much a transformation of the heart (his self-account includes much weeping), he was no less admiring of the science that the British brought to his people. Thus, he illustrated the pre-Christian 'darkness' of the Indian mind by narrating their difficulty in accepting the Missionaries' explanation of thunder.[5] For Jones, the civilized condition was more than the infusion of God's grace: it was a new cognitive and emotional order, bringing peace of mind.

> [T]he Indian in his natural state is not happy. He has his trials, afflictions and fears: the worst passions of the human mind bear uncontrolled sway, entailing misery and woe. 'There is no peace, saith my God, to the wicked.' A civilised state, *even without religion*, is far preferable to paganism.
>
> (Jones 1861: 93, emphasis added)

Jones also presented the terms of a political order. The petitions reprinted in his *History* were both acts of submission and declarations of the delegated autonomous collectivism of communities such as his within the King's realm (Jones 1861: 243–44). Jones did not dispute that Indians had conceded power to the British government. Here is how he described the colonial subordination of Indians on the south shore of Lake Superior.

> The British Government have taken them under their paternal care; they have been taught to look up with reverence to their great Father, the Governor and the Indian agents. As a consequence the chiefs have yielded their authority into the hands of more wise and powerful guardians.
>
> (Jones 1861: 110)

Jones' life span fell within the period (1790s–1840s) in which Upper Canada became a British project of settler migration, at first from the Thirteen Colonies and then from the British Isles. Before mass migration, the 'silver chain' of British–Indian friendship had made Indians allies, not subjects, of the Crown (Jones 1861: 216–17). Settlement on a massive scale then made Indians the Crown's children but Jones presented the desired attributes of Britain's 'guardianship': granting security of tenure (Jones 1861: 217, 242) and recognizing Indian capacity for self-government.

Jones' conception of 'civilization' was not merely Christian. Though it was fervently Christian, it was also economic, cognitive and governmental. As he and his people moved from conceiving of themselves as the Crown's treaty partners to considering themselves loyal subjects under the Crown's guardianship, Jones conceded nothing to racial theories of Indians' inherent inferiority. Jones's account of Indian children's classroom aptitude (Jones 1861: 238), and of his own and his people's self-improvement as converts to Christianity and agriculture, disputed any presumption of Indians' inherent limitations. Civilization, in all its dimensions, was Indians' entitlement.

Charles Eastman 1858–1939

Charles Eastman was a Sioux whose father converted to Christianity after being captured during the wars on the Plains in the early 1860s. Later reunited with his son, Eastman's father urged him to embrace Christianity and education. Following his father's word, he graduated in medicine, worked for the Bureau of Indian Affairs as a reservation doctor and served the Young Men's Christian Association. As an author, Eastman drew on his bicultural life experience to present Indian civilization in positive terms to non-Indian American readers. My account of his ideas draws on *The Indian To-day* (1915) and his autobiographies, *Indian Boyhood* (1902) and *From the Deep Woods to Civilization* (1916).

Eastman wrote that the United States of America, by military superiority over Indian tribes, had acquired civilizing responsibilities for Indians before it had civilized itself. In the United States' administration of the defeated Indians, the moral frailty of American civilization revealed itself. 'You are suffering from a civic disease, and we are affected by it. When you are cured, and not until then, we may hope to be thoroughly well men' (Eastman 1915: 106). Eastman measured American civilization against 'the greatness of Christian civilization, the ideal civilization' (Eastman 1916: 57). In *The Indian To-day*, Eastman recognized that humane government policies towards Indians had been grounded partly in Christian belief but he noted that 'Christian men and women came *tardily* to the conclusion that something more consistent with the claims of their religion must be shown these brave people who had lost everything in the face of the herculean advance of the dominant race' (Eastman 1915: 51, emphasis added). Moreover, under the resulting Bureau of Indian Affairs administration, while 'many Indians now believe sincerely in Christ's teachings as explained to them by their

missionaries … they find it impossible to believe that this Government is Christian, or the average official an honest man' (Eastman 1915: 42).

To be Christian was not, for Eastman, to deny one's Indian-ness. Eastman compared his youthful understanding of Christianity with his mature assessment: 'The Christ ideal might be radical, visionary, even impractical, as judged in the light of my later experiences; it still seemed to me logical, and in line with most of my Indian training' (Eastman 1916: 138). As a proselytizing member of the Young Men's Christian Association, he saw whites as practising 'a machine-made religion. It was supported by money, and more money could be asked for on the showing made; therefore too many of the workers were after quantity rather than quality of religious experience' (Eastman 1916: 141).

Aligning Indians' moral simplicity with uncorrupted Christianity, Eastman criticized contemporary American civilization for its shallowness, materialism and cruelty.

> I have not yet seen the meek inherit the earth, or the peacemakers receive high honour … Behind the material and intellectual splendour of our civilization, primitive savagery and cruelty and lust hold sway, undiminished, and as it seems, unheeded … When I reduce civilization to its lowest terms, it becomes a system of life based on trade.
>
> (Eastman 1916: 193)

That the Indian transition to agriculture was not prominent in Eastman's writing may reflect the nature of his own advancement: he was a doctor and public servant, not a farmer. He certainly thought the transition necessary. Recalling the hunting way of life, Eastman evoked Indians' former proximity to Nature as the remediable vulnerability of 'children'.

> When game was to be had and the sun shone, they easily forgot the bitter experiences of the winter before. Little preparation was made for the future. They are children of Nature, and occasionally she whips them with the lashes of experience, yet they are forgetful and careless. Much of their suffering might have been prevented by a little calculation.
>
> (Eastman 1902: 15)

Apirana Ngata 1874–1950

Apirana Ngata was a Māori of the Ngati Porou iwi, born in 1874. He was educated at Te Aute College by liberal Anglicans and then at Canterbury University College in Christchurch, where he studied political science. He added a law degree after studying in Auckland. In 1897, he helped to form the Young Māori Party, not a political party but an intellectual movement with a political and cultural program of Māori modernization. He won one of the four Māori seats in the New Zealand Parliament in 1905 and he remained in Parliament until 1943, serving in Cabinet in several governments. In retirement he contributed to revising the Māori translation of the Bible. He died in 1950. As early

as 1897, Ngata was urging his people to reform themselves – both morally (alcohol consumption, sexual behaviour) and hygienically (the design of villages and houses, domestic and personal cleanliness). He also criticized Māori credulity about traditional medicine.

Most of all, Ngata dedicated his career to making successful farmers of his people. To make a Māori transition to commercial agriculture (dairy, sheep, crops) – what he called 'the efficient occupation of lands by the Maori' (Ngata 1931: i) – his people needed new public policies on land tenure and rural credit, and they must adopt modern technologies and practices. His lengthy Ministerial Statement in 1931 about Māori agricultural development succinctly expresses his account of Māori past and future.

Reviewing public policy towards Māori, Ngata said that while New Zealand had preserved a much reduced Māori land base, policy had been too concerned with maintaining Māori ownership and not enough with improving Māori land use. The theme of Ngata's history was the gradual recognition by Pakeha that Māori could and should 'settle' the remnant Māori estate, as agriculturalists, paralleling the Pakeha settlement of their agricultural estate. The noun 'settlement' is on almost every page of his Ministerial Statement (Ngata 1931: i, ii, iii, iv, v, vi, vii).

While acknowledging Raymond Firth's achievement in the recently published *Primitive Economics of the New Zealand Maori* (1929), Ngata was critical of his account of Māori acculturation. Firth had presented four stages in the Māori response to Pakeha. To describe the third phase, 1860–80, he chose 'stagnation', 'reaction' including war, 'withdrawal', 'dejection', 'apathy' (as quoted by Ngata 1931: viii). Recovery was Firth's fourth and most recent phase and there Ngata criticized Firth for overstating Māori acculturation: Firth had not seen that 'beneath the surface Native characteristics may persist and racial influences continue their sway' (1931: ix).

Notwithstanding his tireless campaigns to stimulate Māori to change – to 'settle' as an agricultural 'race' – Ngata had a strong sense of Māori as a people with distinct and admirable traditions and character. In the 1920s, he facilitated the continuing vitality of the Māori arts of wood carving and marae construction and he was a lifelong collector of Māori songs (and was apt to perform them himself). As he told his friend Te Rangi Hiroa, 'the renaissance of Maori Art [was] an indication of the presence of the spiritual something that our people never lost though it flickered low in some areas after the wars' (Ngata to Buck 7 April 1931, in Sorrenson 1987: 132). In 1931, Ngata urged New Zealanders not to overlook the continuing relevance of chiefly leadership. Customary distinctions of rank and influence persisted among Māori, he argued, and wise administrators should note the usefulness of leaders who encouraged education and training. Another characteristic of 'the race' that would enable Māori agricultural 'settlement' was their innate mechanical ability – 'his racial endowment in the possession of a keen eye, a deft touch and a ready coordination of mind and muscle' (Ngata 1931: ix).

Ngata judged the Great Depression to be a crisis for Pakeha but an opportunity for Māori because Māori 'needs are simpler and more easily satisfied' (1931: xii). In

the project of agricultural settlement, Ngata saw the adaptive advantage of Māori in their 'smaller sense of the loss of the amenities of civilization, such as good houses, proper educational facilities, good communications, and proximity to towns; and a temperament that under firm leadership is cheerfully resigned to the strains of the pioneering life' (Ngata 1931: xii).

The Depression highlighted that Māori subsistence differed from Pakeha subsistence. Unlike urban Pakeha, Māori were still gathering 'relishes … from the beaches or the reefs, or the sea, or forest, lake and river; and he may supplement these with home grown pork or poultry, and even beef or mutton' (Ngata 1931: xii). Whereas Pakeha urbanity rendered them dependent on others for the necessities of life, Māori were a rural and more self-sufficient people. The Great Depression had made this difference more salient. In coping with the Depression, Pakeha were suffering from what Ngata privately termed their 'servile adoption of "home [i.e. British] standards"'. Fortunately, Māori 'had not gone far enough in the civilizing process to accept pakeha standards as inevitable in their economic outfit' (Ngata to Buck 11 January 1930, in Sorrenson 1987: 93). The Great Depression was thus a fortunate conjuncture in Māori history.

> The Maori will emerge from the present depression with definite results in the form of improved lands and small farm colonies, and above all a whetted taste for cultivation. The pakeha is showing antipathy to hard work on productive lines, preferring to regard the unemployment measures as palliatives to tide over to a return of pre-slump conditions. But these will not recur in as profitable a measure as formerly of the times.
>
> (Ngata to Buck 15 May 1931, in Sorrenson 1987: 148)

William Cooper 1861–1941

William Cooper was a Yorta Yorta man whose education in European ways came from Christian missionaries and from being a servant, as a boy, in the Melbourne household of the wealthy pastoralist whose livestock occupied his ancestral land. Cooper's career included the rural manual labouring trades at which many Aborigines made a living. In 1887, he and other Yorta Yorta had applied unsuccessfully for title to land on their ancestral country on which they could turn themselves into an economically independent farming people (Goodall 1996: 78, 84). As a member of the Australian Workers Union, he was well-read about the affairs of the wider world. Upon his retirement in 1931, Cooper returned to Melbourne. What we know of his political thought comes from letters, manifestoes and a petition to the British King that he produced in the last decade of his life, compiled in 2004.

Cooper saw himself as a member of (indeed a spokesman for) his 'race' (Attwood and Markus 2004: 39); and the organization that he founded in 1936, the Australian Aborigines' League, limited 'full membership' to persons 'with

Aboriginal blood in them' (Attwood and Markus 2004: 48). He was proud of his colour (Attwood and Markus 2004: 58) and he wanted whites to acknowledge that he and his people were not 'inferior clay' (Attwood and Markus 2004: 62). He was himself of mixed descent – 'I have European blood in my veins' (Attwood and Markus 2004: 127) – but his thinking about race in Australia tended to be dualist: there were Aborigines and there were whites, and 'the coloured person' 'feels more in common with the full blood than with the white' (Attwood and Markus 2004: 58).

Cooper was militantly opposed to racial determinism. When using racial terminology, he filled these categories with historical and ethical content. Whites could 'think black' if they made the effort (Attwood and Markus 2004: 109, 129). As a Christian, Cooper knew that all races were equally the creatures of God (Attwood and Markus 2004: 38). For Cooper, the important distinctions within the human race were cultural not racial but he was not a cultural relativist either. Rather, the differences that mattered to him were distinctions of advancement along a universal path of human improvement. 'Culture' was the term he used to refer to a plane of recognizable and rewardable achievement (Attwood and Markus 2004: 47). Thus, he thought of culture as something that one could lack and could acquire. He referred to 'those of our race who are as yet uncultured' (Attwood and Markus 2004: 67). He imagined a time 'when Aboriginal people are fully cultured' (Attwood and Markus 2004: 90). When they arose from their primitive condition, 'they would scarcely be recognised as the same people' (Attwood and Markus 2004: 68). Cooper found it encouraging that 'the Aboriginal loses his culture with the greatest facility. He as quickly acquires the culture of the superior race he meets' (Attwood and Markus 2004: 105). While the objects of the Australian Aborigines' League included conserving 'special features of Aboriginal culture' (Attwood and Markus 2004: 48), there is little in his writing to indicate what he thought was worth preserving, other than 'certain corroboree dances, in the ways the Old World peoples have retained their folk dances' (Attwood and Markus 2004: 52).

Cooper was dealing with a society in which talking, writing and legislating about Indigenous Australians abounded in the language of race, blood, descent and caste. He criticized policies that apportioned programs and rights according to distinctions such as 'half-cast' and 'full blood'. Though he used these terms, he insisted that all castes had 'full rights of British nationality' (Attwood and Markus 2004: 55) and that all people should be judged according to their proven capacities, not according to their descent. The eugenic program of 'breeding the half-caste white' struck him as 'a creature of the white mind' (Attwood and Markus 2004: 58).

In one respect, however, Cooper's race discourse owed much to the racially determinist views then circulating among white Australians. In the 1930s, white Australians worried that they still too thinly populated their vast continent; they wondered how to settle the remote regions more quickly and densely. In one view, people of British stock were poorly suited to colonizing those parts of

Australia with extremes of climate: much of Australia was too hot and humid for 'Nordic' people. Should Australia experiment with non-British immigration to fill the difficult north? Cooper addressed this strand of white Australian anxiety by suggesting that Aborigines were adapted to populating the north and centre of the continent (Attwood and Markus 2004: 57, 68, 69, 105–6). Were Australia to use Aborigines to fill the northern spaces, 'the dark race will prove an asset to Australia' (Attwood and Markus 2004: 75). Those who worried that Australia might have to compromise the 'White Australia Policy' and resort to populating the north with southern European migrants were assured by Cooper that 'for the purposes of this policy [i.e. using 'civilized Aborigines' to populate the north] the Aboriginal is white' (Attwood and Markus 2004: 90).

The remarkable claim that 'the Aboriginal is white' underlines that Cooper infused racial categories with historical and ethical content. His key civilizational term was 'British'. When Cooper mentioned Britain and the British realm, he was sometimes making an argument about rights – that Aborigines had been improperly denied their entitlements as 'subjects of the realm' by Australian governments (Attwood and Markus 2004: 39, 55). However, Cooper's use of the category 'British' went beyond this juridical sense. He saw 'Britain' as the best form of human civilization to which all Australians – Aborigines and whites – should aspire: 'We ask the right to be fully British' (Attwood and Markus 2004: 74). British civilization had shown how well it could deal with natives in the Pacific, giving rights to Māori and Fijians (Attwood and Markus 2004: 35, 41, 44, 80) and taking seriously the duty to improve subject peoples. Australians should live up to British ideals to which nominally they were committed. Civilized Aborigines such as himself were British – that is, they were members of a civilization: 'the Aboriginal is more British often than the white' (Attwood and Markus 2004: 69).

One reason that Cooper could call himself 'British' was that he saw himself as Christian: the two categories were, in his mind, closely identified. He once began a sentence: 'From the standpoint of an educated black who can read the Bible upon which British constitution and custom is founded' (Attwood and Markus 2004: 92). Just as the category 'Christian' embraced all races, so 'British' was, for Cooper, a non-racial category, a civilizational universal. When Cooper urged that the settlement of the Australian continent be 'British' (Attwood and Markus 2004: 57), he did not confine the category 'British' to white people; he meant people of a standard of civilization, regardless of race. It was Aborigines' right and destiny to be British and to help populate a difficult continent according to British ideals.

Conclusion

These four writers picked up ideas from an intellectual universe that included racial thought, Christianity and a theory of history which proposed agriculture as the destiny of every branch of humanity. From these materials, each wove a discourse of 'civilization' that allowed native peoples a future: 'civilization' was a

native destiny which colonial power must not prevent. In charting his people's progress, each writer had to come to critical terms with racial typologies that denied native potential. This racial way of thinking was elaborated and fortified among colonial intellectuals after 1859 when it combined with Darwin's evolutionary biology to give rise to a theory of human history, ably expressed by Benjamin Kidd in *Social Evolution* (1895). For Kidd, competition and selection were mechanisms of human progress. The dwindling native populations of North America and Australasia demonstrated that the colonists were more progressive than the colonized. Not only were the colonizing races better at fighting, they were also better at reproducing: 'the earlier marriages, the greater vitality, and the better chance of livelihood of the members of the superior race' (Kidd 1895: 52). Faced with such arguments, indigenous intellectuals had to turn to their people's demography for a reply. Jones, Eastman and Ngata sought to refute degenerative scenarios for their own 'race' by pointing not only to their own conversion to civilized ways but also to their peoples' demographic recovery and innate physical and mental prowess (Jones 1861: 240–41; Eastman 1915: 135–36, 165–66; Ngata 1931: iv). For William Cooper, the colonists' demographic pessimism could be refuted if one included the proliferating half-castes with the dwindling 'full-bloods' as the total Aboriginal population. Cooper's remarks on northern development also developed novel implications for racial science: opportunistically promoting the inherent potential of Aborigines as northern settlers, he described them as 'British' and 'white' in a way that voided these categories of racial content and made them signifiers of the best of human civilization.

Such playfulness illustrates the attraction of human 'universals' for peoples oppressed by others' particularistic schemata. Facing pessimistic and hierarchical theories of human diversity that flourished among the apologists of European colonization, some native intellectuals adopted ideas of human universality that they found empowering for at least two reasons: they needed to counter the negative particularism of racial thought; and they needed to relativize and evaluate the spurious universalism of their colonizers – that is, to reject the colonists' claim to be the arbiters of 'civilization'.

There were two persuasive idioms for thinking about human universality, both of 'Western' provenance. One was the idea that all humans had the capacity to become agricultural. This idea was particularly important for Jones as a leader of the Christian agricultural community at Credit River. It was muted in Eastman. Cooper also came from people with aspirations to be settled on the land as farmers, though colonial authority had denied his people the necessary land security and the finance to do so. That farming was his people's future was Apirana's signature political theme: Māori must advance from merely owning their remnant land base to 'settling' their land.

Christianity provided the other universalizing framework in which it was possible for indigenous intellectuals to think about their future as colonized people. To become Christian, as each of the four men did, was to be inducted into a potently universalist way of thinking about human diversity: all Christians are duty bound

to transform themselves and the world in the image of Christ. However, once these indigenous intellectuals had experienced Christianity's ennobling and enabling universalism, other, secular or non-confessional notions of universality soon became evident to them: for example, Jones' evident admiration for Western medicine and science, and Cooper's admiration for an idealized 'British-ness' as an inclusive and respectful civilization.

Were these intellectuals *strategically* adopting – from a standpoint of each man's untransformed indigeneity – the colonists' ways of speaking, writing and behaving? I find this model of their agency less plausible than the view that their acquired universalisms mattered deeply to them because they answered their existential needs. Their Christian, agricultural indigeneity was not a contradiction in terms but a coherent discursive framing of world, history and self. It responded to core questions facing indigenous intellectuals in the New World. The work of these four intellectuals suggest that these questions included:

1 What accounts for my people's colonization?
2 How true and how false is the colonists' characterization of my people?
3 What will secure a future for my people? (What can *we* do? What is the responsibility of the colonial authority?)
4 How will we live with the colonizing society/nation/civilization? What good will my people add to it?
5 What is the story of my survival and flourishing? Am I survival's prototype?

Answering these questions in autobiography, sermons, petitions, letters to politicians, to newspaper editors and to friends, short stories, essays, policy manifestoes, interviews with journalists, ethnological description and descriptions of landscape, these intellectuals created an intellectual tradition that must exercise our historical imagination as strenuously as the persistence of the question of indigenous 'sovereignty' exercises our political imagination.

Notes

1 I am grateful to my unpersuaded UWS students in the Doctorate in Political and Social Thought, to Paul Patton and Chris Hilliard for further scepticism, and to Lisa Ford for insisting that the argument be cogent.
2 Jones, P. (1831) *The sermon and speeches of the Rev. Peter Jones, alias Kah-ke-wa-quon-a-by, of the converted Indian chief: delivered on the occasion of the eighteenth anniversary of the Wesleyan Methodist Missionary Society, for the Leeds District: held in Brunswick and Albion Street Chapels, Leeds, September the 25th, 26th, and 27th, 1831* (microform National Library of Australia), 19 (hereafter 'The sermon and speeches of the Rev. Peter Jones').
3 'The sermon and speeches of the Rev. Peter Jones', 15.
4 Ibid, 20–21.
5 Ibid, 19–20.

Chapter 10

Economy, change and self-determination

A Central Australian case

Diane Austin-Broos

Introduction

This chapter suggests that accounts of self-determination should not focus on law and governance alone. Not only is economy a constituting element of culture, Indigenous hopes for self-determination commonly include improved material conditions along with legal and cultural rights. Some of this improvement can be achieved only by increasing economic opportunity. Yet, a tendency in the literature has been to treat greater employment or 'development' as assimilationist and, therefore, as something antithetical to the rights involved in self-determination. Alternatively, this dilemma is avoided by the assumption that only local forms of development based on land rights are appropriate for Indigenous peoples (Engle 2010). But is greater participation in an Australian economy inevitably assimilationist? And does an economy built on land rights obviate the need for remote Aboriginal people to engage more fully with the education that rural enterprise now requires? In order to address these questions, I examine two moments in the history of Western Arrernte people in central Australia:[1] their passage from hunter-gathering to a sedentary mission order and from this latter life to one embodied in an outstation system built on land rights. In each period, I look at economy in conjunction with law and governance. Using the Arrernte as a touchstone, I then return to assimilation, self-determination and land rights-based development. Thinking of economy in terms of ontology provides new perspectives on these issues.

The impact of invasion

Western Arrernte came into the Hermannsburg Lutheran Mission as pastoral leases were taken up between the 1870s and early 1900s to the south, east and north of the mission's own lease (Hartwig 1965). The mission was established in 1877 at a place called Ntaria and, in time, the mission would become a pastoral station itself. Though the mission 'block' was a haven for Arrernte escaping rapacious pastoralists, the two were component parts of a European invasion. Beyond initial physical violence incurred by fights over sites and cattle spearing,

two different effects of this invasion registered early. One was the impact on the Arrernte of European things and practices including new foods, animals and tools. The other was pastoralism's impact on a desert environment watered by periodic rains but also subject to periodic drought. In particular, a drought in the 1920s denuded the land and made a hunter-gatherer economy difficult to return to, especially in the context of settlement. These two impacts were mutually reinforcing; they redefined the Arrernte's experience and their sense of being in the world (Heidegger 1962: 67). In order to discuss these events, I move between ethnographic data collected in the past two decades and forms of earlier historical record.

In the 1990s, I talked with Western Arrernte women about the changes they thought the missionaries had brought. No one with whom I talked had witnessed 'first contact'. My aim was not to gather such accounts but, rather, to discern the logic in 'memories' shaped by generations of storytelling: what stood out now, and then, as these women reminisced. The list that they produced was a fairly standard one. Missionaries brought 'shade' or 'big shade', referring to a man-made environment that provided year-round and extendable protection in a desert environment. Another thing that missionaries brought was *pepe*, the Western Arrernte term not only for print media but also for the practices and ritual paraphernalia of Christianity. The missionaries drew the Arrernte's attention to this form of knowledge and its power, which the Arrernte connected with settlement life, and its material features. In addition to buildings and Christian knowledge, women gave a variable list of apparently lesser, but still vital, things. These included tea and flour; axes, knives and guns; beef or 'bullock'; hygiene endorsed by the Lutherans, along with blankets, garments and the practice of being clothed.

I was reminded of the pattern in these talks when, in 2002, Pastor Paul Albrecht published his translation of evangelist Moses Tjalkabota's account of the mission. This account had been transcribed in Arrernte some decades earlier by Albrecht's father, Friedrich (Tjalkabota 2002: 237–300). Tjalkabota was a boy when the missionaries arrived. Among much else he relates, Tjalkabota comments on the engagement of the missionaries and men from the nearby Ellery Creek area, part of which was his father's country. The missionaries constantly asked Tjalkabota's father and other men about their young and their wives, whom the men had kept 'a long way away' from the mission:

> Then one day we all went to the mission station, to Ntaria. When we came we saw buildings already standing, three of them. I couldn't imagine how they did this. What is this? My eyes were still all right. I felt the buildings with my hands, asking myself, 'How did they do this?'.
>
> (Tjalkabota 2002: 244)

Tjalkabota, who was blinded as a young adult, attended the mission's school as a child and periodically returned to his camp to be with relatives and receive ritual instruction. On one of these visits, one of the missionaries seemed to

reprimand him, 'Boy you are thin and covered with ashes. Come to me'. Tjalkabota continues his account:

> I thought, 'He is calling me to give me a hiding.' But he gave me clothing. … Then he also gave me some sheep meat. Then he also gave me a blanket. Taking all this I went back to the camp. I thought to myself, 'What a big present.' And I was very happy. I never gave another thought about a hiding. They also gave my father and mother a blanket. Then [the missionary] said, 'Boy, you should come to school.'
>
> And I did go. … First we learnt the commandments, and songs. The first song was Jesuai, nauna pitjai [Jesus come to us].
>
> (Tjalkabota 2002: 244)

Tjalkabota's account of the Lutherans and his role as an evangelist for the mission traverses most of his life. He does not minimize the tension and cultural clash that the missionaries' arrival brought, including his conflicting commitments to the mission and his father's way. Nonetheless, his story underlines two central aspects of change relevant to my argument. First, Tjalkabota's story demonstrates points that Rowse makes about Arrernte agency and the rationing employed by the mission (Rowse 1998: 13–46). Rowse observes that Aboriginal people could have interpreted rationing as 'trade' or direct exchange. Alternatively, they might have seen it as 'nurturance' or a case of authority and power exercised through largesse rather than through punishment. Rowse intends to demonstrate that both things and practices can be given new significance in new contexts. Consequently, they can be employed by indigenous and non-indigenous alike, sometimes to different ends. After Bourdieu, one might term these alternative 'strategies' deployed by the respective parties in their responses to each other (Bourdieu 1977: 9).

There is a second way, however, in which Tjalkabota's story bears on the issue of change. This concerns the wonder that Tjalkabota expressed as a child when he ran his hand along the wall: 'I felt the buildings with my hands' and asked 'How did they do this?' The indexing of that experience today comes in the women's reports about 'big shade'; places that were cool in summer, shelters from rain and wind, and which could be 'made (*mpareme*)' as camps, even on the plain. This was a different practice and, in Heidegger's sense, a different 'tool' (Heidegger 2002: 291). It was part of the milieu called 'settlement' that substantially changed a hunter-gatherer way of life, especially in the desert. Other things that settlement brought were meat and flour and water well construction, blankets and new songs; enough to underpin the disciplines of the mission that would come not only with literacy, new moralities and ritual, but with pastoralism, construction, gardening and respectabilities endorsed by the mission. The enforcement of these disciplines was, in turn, facilitated by new Western Arrernte desires including tobacco and tea. Together these new things which Arrernte 'did not know about' added up to sedentary life with a European twist.

This was the start of ontological change; change in people's cognitive, material and social constitution of the world; a large and meaningful process, some of which is captured in the notion of 'economy' (Marx 1976: 284). As Kessler remarks, such a process is not only 'world-making' in a material sense. It is also 'world-producing' in terms of newly forged socio-cultural relationships. The latter, he remarks, are 'just as real as and in a way even more intensely and immediately experienced than the natural world' (Kessler 1987: 41–42). Strategies and disciplines, forms of practice, are deployed to secure new things. Heidegger formulates this type of process when he writes of what it is for a thing to be 'invested with value'. Such things, which he calls 'equipment', are always embedded in a world of 'concernful dealings', practical activity that calls on an array of things and practices for their 'conduciveness, usability, manipulability' and the like (Heidegger 2002: 291–92). In short, a people changes with its world and sees that world differently.

This change did not occur in the instance that was Tjalkabota's childhood. It took many years of creeping colonization and some profound shocks, including Constable Willshire's murders of Aboriginal people in the late nineteenth century, the 1920s Central Desert drought, and the Coniston Massacre north of Ntaria in 1928 (Cribbin 1984). All of these events, as well as lesser ones, propelled people into the Hermannsburg Mission. Most important, though, major forms of material change brought by the mission and the pastoralists could not but be valued by the Arrernte – either in a positive or negative way. Western Arrernte were forced to locate this new equipment in their world. In sum, change of this world-making-and-producing type not only included brute force and the beginnings of paternalism; it also involved the workings of economy and law in concert with an enduring cultural effect (Austin-Broos 1996; Austin-Broos 2009: 77–128).

Fairly rapid change in some aspects of ritual life was a part of this process. Western Arrernte people had at least two central affiliations. One was an ancestral attachment inherited through fathers and the other was an attachment to an ancestral figure located at a conception site where a mother first felt the foetus shift in her womb. As Strehlow has pointed out, among patrifilially-related Arrernte, a person's conception site and story acted as a form of individuation among all those who shared a father's story (Strehlow 1947: 139). With the consolidation of the mission and surrounding pastoral settlements, genealogies show that the range of conception sites narrowed quickly. Many individuals, for example, came to have Ntaria and its story as their conception affiliation. Over time, this changed the distribution of ritual knowledge among the population, including its range, detail and depth. At different paces in different places, the process of settlement in central Australia undermined the scope of ritual knowledge (Peterson 2000). Through rations at the outset and then the growth of a domestic economy – the mission had to support itself – this ritual attenuation had its practical counterpart. The younger generations of Western Arrernte became less familiar with the range and location of species seasonally available to them. They walked less on old tracks because visiting patterns were rearranged by settlements. This attenuation was made worse by the impact of pastoralism itself

on a finely balanced desert environment. As Pastor Friedrich Albrecht (1931: 265) wrote, 'Wherever cattle go, the growth of bush-tucker is crippled.'

This process was intensified by a drought between 1926 and 1930, which was possibly made worse by pastoralism. Around the mission, Albrecht reported an infant mortality rate of 86 per cent during the drought (Albrecht 1961: 68). Adults died in excruciating ways, mainly of scurvy and beriberi (Henson 1992: 42–46). Albrecht wrote:

> One morning we found a young man, 18 years of age, whose teeth had fallen out during the night. Strong men and women were stricken and grew weaker and weaker, suffering from swollen joints and bleeding mouths so that they could not even swallow food.
>
> (Albrecht 1977: 46)

After rain in 1931, 'there were millions of grasshoppers about, making up the deficiency of meat' (Albrecht 1931: 264). Livestock, domesticated or not, would take years to replenish. The extremity of the situation led Albrecht to grumble about his fellow whites and note changes among Western Arrernte that had made them vulnerable: 'It is … tragic to see natives of the settled districts, being restricted from hunting in the old way, denied work, even jobs they easily could do' (Albrecht 1931: 265). Later he wrote:

> Because of the land having been taken up for grazing purposes [the natives'] hunting grounds, if there are any at all left for them, are limited. Moreover, natives who have been or are being employed, even if only occasionally, have lost their bushcraft and have at the same time developed a dislike for their old seeds, berries, roots etc.
>
> (Albrecht 1935: 376)

Albrecht decided to diversify the mission's domestic economy. His first priority was gardens to ensure against another round of scurvy. His plan involved the building of a pipeline to the mission from Kaporilya, which had permanent and plentiful groundwater. The role of Arrernte men in this complex building task became the stuff of legend. At their height in the 1940s, the gardens were impressively large (Albrecht 1977). Plots were assigned to groups of kin around the mission. Though the gardens are no longer, gardening was a prominent part of Arrernte imaginaries when, some 40 years later, leaders of outstation groups proposed projects for their youth. In order to secure the cattle herd, three dams were constructed on the mission lease. They are still in use today. A few bores were also sunk and, in the 1970s and 1980s, as technology improved and outstations proliferated, bore sinking and the construction of water tanks became successful Arrernte projects. This focus on water as a permanent resource showed the slow but inexorable shift towards the practices of sedentary life.

Beyond well-established forms of trade in sacred objects, dingo scalps and rabbit pelts, Ntaria became a manufacturing site. The mission developed a

tannery as an offshoot of pastoralism. Skins were treated and worked into various products – rugs, moccasins and the like – mainly by Arrernte women. Women were also subject to other disciplines; not only unpaid domestic labour but also, under the tutelage of missionary women, they produced various forms of fancy work for sale. Another aspect of this art and craft was the Hermannsburg watercolour movement initiated by the men whom Rex Batterbee taught in the 1930s (Hardy *et al.* 1992). The Hermannsburg potters of today claim both the earlier round of needlework production and the watercolour movement as part of the story of their enterprise (Isaacs 1999). And pastoralism brought other stories still. Mustering and herding cattle preceded their corralling for husbandry and slaughter at locations where there were either dams or bores. Slaughtered animals were brought to Hermannsburg by carts which travelled along roads and tracks constructed by men from the mission. Once a week, meat rations were distributed.

Finally, the Lutherans promoted a different type of discipline, evangelism. It came with stringent demands for literacy, ritual knowledge and subordination to the authority of white Lutheran pastors. The early evangelists, Moses Tjalkabota and Titus Rangkaraka, preceded the first Indigenous pastors who were confirmed in the 1960s. Although today the importance of Christian ritual has faded, being a Lutheran remains a central part of Western Arrernte identity.

The Lutherans believed implicitly that theirs was a superior way. However, their success was only partial. A significant range of mission practices did not survive the self-determination period. Moreover, enduring forms of relatedness, manifest in kinship networks, remained a part of the Arrernte's quotidian even as life became focused on Hermannsburg.

Nonetheless, the post-invasion passage of events changed the Western Arrernte in crucial ways. Ritual attenuation pointed to a fundamental change in the Arrernte's social and material environment. While pastoralism may have made the drought worse, other introduced practices and things seemed to offer protection from new threats. Consequently, the post-drought mission involved far more than Wolf's 'frontier mercantilism'. The Lutherans were more than merchants who 'used money and goods … to gain a lien on production' while they remained 'outside the process of production itself' (Wolf 1982: 305). Rather, they sought to transform the Western Arrernte just as the latter sought to learn new rites and ways of producing. Their experience of change brought new 'obstinacies' in the world, new things 'ready-to-hand', and new 'concernful dealings'. In sum, Lutheran paternalism came and went leaving a lingering trace. Beyond this regime, however, came an ontological change linked to pastoralism, the technologies of settlement, and their effects on the Arrernte. Ways of making the world had changed.

Secular governance

While the mission period brought ontological change among Western Arrernte, there was no simple breach with the past. Rather, the Arrernte's experience

produced conflicting regimes of value. One form of value sustained a sociality produced by the nurturing of kin relations; the other, socialities responsive to the hierarchy of the mission and its domestic economy. Neither regime could subdue the other entirely, not least because the Arrernte remained marginal to Australia's rural capitalist economy. Furthermore, the re-emphasis on locality and kin that accompanied land rights and an outstation movement – central components of self-determination – did not resolve these conflicts created by hunter-gathering's demise.

In the policy period of self-determination,[2] the counterparts to the mission's paternalism were land rights backed by law and an outstation movement backed by secular governance. From the 1970s, Commonwealth and state legislation resulted in the transfer of a great deal of central Australian land to Aboriginal people. Land rights enabled them, in turn, to move out of missions and other forms of settlement, back to their own country or 'estates'. The growth of secular governance in the form of Aboriginal corporations provided support for this outstation movement. For the Western Arrernte and others, these were massive advances in the process of denying hegemonies wrought by settler colonialism. Notwithstanding, just as major change among Western Arrernte was not secured by the mission alone, governance in the form of Aboriginal corporations could not alone deliver self-determination. In each period, the circumstances of the Western Arrernte also rested on economic life as it shaped experience. To support this contention further, I now sketch some aspects of the Western Arrernte homelands milieu in the course of the 1980s and 1990s. I note three different types of corporation that were integral to outstation life: the Tjuwanpa Outstation Resource Centre (TORC) for the Western Arrernte, the Papunya Regional Council in Alice Springs, and incorporated outstation groups geared to gain enterprise grants. I discuss some aspects of the *Realpolitik* in which these bodies became involved.[3] My aim is to show that dilemmas related to economy, apparent in mission times, persisted into the period of self-determination.

The Western Arrernte's outstation system had its roots in the early 1970s. It was an integral part of the land rights movement and calls for self-determination. Initially, the mission responded by instigating Hermannsburg 'self-government'. The mission's initiatives, however, produced torrid fights due to the fact that they overlooked forms of authority based on kin, ritual and regional ties. As the mission lost influence, there was also growing truculence among youth. In response to these conditions, some family groups began to move out of Hermannsburg (Sommerlad 1973). Concurrently, there were discussions about mining and natural gas exploration on Western Arrernte land. These discussions revealed an intense desire on the part of many Arrernte men to assume authority over their respective countries. In short, the will to return to country was not simply a response to settlement unrest but an embrace of the roots of Arrernte culture. The move was described at first as a 'Hermannsburg mission special project' funded by the Department of Aboriginal Affairs (DAA). Both DAA and some Lutheran mission staff gave the movement strong support. In 1973, Paul Albrecht of the Finke River Mission (FRM), based in Adelaide, recommended

that the Hermannsburg lease should be handed back to Arrernte people – a goal achieved by 'Schedule 1' listing of the land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*ALRA*) (Austin-Broos 2009: 185–93). The measure gave the Western Arrernte legal title to their land.

With the Act in place and with the outstation movement proceeding, changes in the local economy followed. Negotiations over the tannery between the mission and DAA continued through the 1970s. With the introduction of award wages, a business plan for the tannery could not be devised and it closed.[4] The mission sought to negotiate regionally and with Arrernte traditional owners for an integrated cattle company on the erstwhile mission lease. This effort also failed. Traditional owners wanted their own herds with distinguishing brands on their own land. As a consequence, through the late 1970s, mission staff with Arrernte leaders counted the mission herd by air. Some cattle were sold to cover mission debt and the remainder – the major part of the herd – was distributed among the five land trusts established under the *ALRA* (Albrecht 2002: 119–21).

In 1974, there were nine outstations engaged in some or all of pastoralism, gardening, artwork and occasional foraging. In addition to a DAA per capita payment, residents were paid three dollars each as a weekly living or 'food' allowance. Each week, a mission truck brought groceries and other items for purchase. The mission had organised a system of outstation schooling for basic primary education which continued until 1989. In the transition to a full cash economy, a limited regime of part-time employment for 24 persons began. Soon, however, the increasing availability of unemployment benefits had an impact. As outstations proliferated – there were 33 by 1983 – the few wage earners were pressured by relatives for cash. Traditional owners who were outstation leaders resorted to selling cattle in order to raise funds for their families, thus losing or reducing a form of domestic employment and production. DAA conceded that the majority of Western Arrernte outstation residents of working age would become welfare recipients (Austin-Broos 2009: 205–37).[5]

In the early 1980s, the outstation economy, therefore, presented as a series of domestic economies with some modest trade and small-scale pastoralism among a minority of groups. Gardens, cattle work and maintenance of bores, access tracks and dams were some of the activities. A trade in feral horses (brumbies) and camels possibly provided a counterpart to the earlier trade in rabbit and dingo skins. This order differed from the mission economy not only in terms of 'decentralization' but in other ways. Three major industries connected with the mission were either gone or much diminished: the tannery, large-scale pastoralism and service maintenance work on roads and a range of other settlement plants. Unemployment benefits had replaced mission cash-and-kind payments that had been well below Australian awards. In addition, there were royalties. Some traditional owners began to receive payment for the exploitation of natural gas on their land. Others were paid for the use of their land to pipe the gas across it. In sum, although outstations often appeared as tiny replicas of a formerly centralized mission economy, increasingly the Western Arrernte were included

in a cash economy but with a depleted range of local enterprises. Moreover, rather than having a domestic economy, the Arrernte were significantly reliant on modest royalties and welfare delivered via complex bureaucracies. The latter not only facilitated but challenged the small-scale and intimate milieu that Western Arrernte sought when they began an outstation movement.

It fell to local and regional institutions of governance to mediate this situation; organizations designed to respond both to Aboriginal ways and 'the demands of the wider legal system' (McHugh 2004: 55). In 1983, TORC was established under the *Companies Act 1981* (Cth). The president and management committee were drawn from outstation traditional owners. The manager of TORC was a white lay Lutheran and qualified builder who had worked at the mission since his teenage years. He was a fluent Western Arrernte speaker and an initiated man. TORC's business plan was to generate training and industry by servicing the outstation system. Via building, infrastructure repair and maintenance, and some local manufacturing, the management committee's aim was to replenish at least two of the three former sources of employment. TORC established a steelworks shop, a parts shop and a garage and service station to maintain vehicles provided to outstation heads. The steel shop made bedsteads, cabinets and fencing supplied to outstation sites. Later, in the 1990s, TORC was also the base for a grader operator and his team. It maintained local and regional roads; the latter under government contract (Austin-Broos 2001).

Resource pressures caused increasing problems, however. Youth on unemployment benefits were reportedly uninterested in voluntary outstation maintenance, or in training. Staffing at TORC was inadequate, so much so that in 1986 the president and management committee wrote a letter to Charles Perkins, Secretary of DAA, appealing for additional funds.[6] TORC resources were stretched between demands to service outstations[7] and demands to supervise training and youth employment. In addition, the scaling down and ultimate closure of the Lutheran school system, which had been geared to outstation life, meant that the foundations for vocational training deteriorated. In 1988, the TORC manager, in consultation with his committee, negotiated for inclusion in the scheme known as Community Development Employment Projects (CDEP) funded by the federal government. Initially, the role of the scheme was to fund part-time employment among remote Indigenous groups. It also offered some infrastructure support. The CDEP scheme was administered by the new Aboriginal and Torres Strait Islanders Commission (ATSIC), which succeeded DAA. ATSIC established a Papunya Regional Council in Alice Springs as its central Australian office. CDEP became operational at TORC in 1989, the same year in which most outstation schools closed.[8] Nonetheless, TORC management hoped that the scheme would stop their youth 'runnin round' to Alice Springs.

Between 1990 and 1995, CDEP recipients at TORC grew from 80 to over 300.[9] Moreover, local efforts in building and infrastructure were swamped by federal housing initiatives responding, not unreasonably, to the needs of outstation citizens.[10] With outstation participation in CDEP virtually unsupervised – staffing at

TORC simply did not allow it – enthusiasm for the metal shop and road-grading dwindled. Youth stayed at home or went to Alice Springs, their elders struggling to exert authority in a new cash milieu. The demands of kinship and bureaucratic governance tugged, forcefully, in different directions (Austin-Broos 2009: 151). In addition, key Western Arrernte with skills left TORC.[11] By the mid-1990s, there were 40 outstations. Overworked and beset by funding problems, TORC encouraged individual outstations to incorporate under the *Aboriginal Councils and Associations Act 1976* (Cth) so that they could apply for their own outstation grants. Some schemes endured, including feral horse mustering and alcohol and drug rehabilitation. Like other small programs though, initiatives were hampered by deficiencies of literacy, numeracy and basic financial management among Western Arrernte, not to mention issues of authority between kin of different generations. Grantmanship using paid or unpaid whites became a common strategy (cf Cornell and Kalt 2003: 196).

TORC and its CDEP were reviewed throughout the 1990s. ATSIC, via the Papunya Regional Council, placed the organization under administration twice. Clearly, the organization was caught between managing its responsibilities to government, via ATSIC, and responding to the expectations of Western Arrernte people. Moreover, the Papunya Regional Council, which became TORC's critic, was dealing with the growing demand for other CDEP schemes throughout the region. On more than one occasion, the Western Arrernte were described as 'spoilt' by ATSIC staff. Budgets were reduced accordingly (Austin-Broos 2009: 234–35).

There were positive developments in these decades. Land rights and the outstation movement facilitated a significant degree of Arrernte self-management. By the early 2000s, TORC administration was almost entirely in Arrernte hands. In addition, a successful ranger program has grown out of early contract work on feral plant and animal management. Surrounded by three large national parks, there is scope for land management and ranger work among at least a few Western Arrernte. Moreover, where other CDEP schemes did not survive the recent interventionist turn in policy, TORC's did, although TORC has been reconfigured as a service group rather than an employment hub (Altman *et al.* 2008; TORC with Kennedy 2008).

High rates of avoidable death have coincided with the Western Arrernte's faltering economy, marked by almost weekly funerals at Ntaria among a population of around 800. Tuesday is funeral day and this fact in itself reflects the toll of childhood malnutrition, ischaemic heart disease, diabetes, substance abuse, personal violence, kidney and liver disease. In the past 30 years, the Western Arrernte population has assumed the epidemiology of the Indigenous poor (Trovato 2001). Economic marginalization is a central component underlying much of this disease (Burbank 2011; Hunt 2011).[12] No Indigenous body, whether TORC and its CDEP, ATSIC's regional office, or unskilled outstation corporations could alone have averted this trajectory. Rather, this story of the self-determination policy period shows that law and governance without economy

could not equip the Western Arrernte for the changes they have had to face. Pastoralism pushed hunter-gathering aside and subsequently declined itself, leaving a clutch of disparate activities and deteriorating levels of mainstream literacy and numeracy. As yet, new environmental industries supply just a few jobs and, for their development, will require mainstream education. In the meantime, literacy deteriorates and Western Arrernte live on a small amount of waged employment, limited royalties and welfare.

Conclusion

One way to bring these materials together is to begin with Wolfe's remark that 'invasion is a structure not an event' (Wolfe 1999: 163). The fundamental point of this historical material is that pastoral settlement, intersecting with natural events, undermined an economy and significant other parts of Aboriginal hunter-gatherer life. It changed the Western Arrernte as a people. Though they retained a kin-based sociality, engagement with country and their indigenous language, they also had increasing engagement with another world – first, in the form of the mission and then in a regulated outstation movement. Following the mission's departure, the Arrernte's orientation was to relocate kin on country and to find employment in a contracting economy. The impasse that this situation produced gradually grew more acute and elicited bureaucratization.

It is useful to keep in mind that *these* were the people who received title to their lands under the *ALRA* and began an outstation movement (Austin-Broos 2009: 185–93). Then it is easier to see that, as mission paternalism and its domestic economy were to earlier generations, so Aboriginal governance in the form of TORC, family corporations and the Papunya Regional Council have been to an outstation system based on land rights. Mission paternalism and secular governance have been different legal-political modes in which the state and local agents have addressed invasion's legacies. Although land rights and other policies of self-determination were a significant advance on the mission order, they still left unresolved the socio-economic dilemmas of the Western Arrernte today. The hope that one might take a small, mission-like domestic economy back to country would always be frustrated by the simultaneous inclusion of Western Arrernte in a cash economy and a bureaucratic order geared to resource transfers, including welfare (see Peterson 2005). The impasse can be grasped in the fact that as scurvy was to the 1920s drought and the ravages of pastoralism, substance abuse and lifestyle disease are to the Arrernte's current unresolved situation.

In discussions about self-determination, non-legal issues are often addressed only in passing: the aim is to build an Indigenous sector, which will also need 'capital' (McHugh 2004: 429); 'nation-building' should precede development which in turn requires 'capabilities' (Cornell and Kalt 2003). These saving clauses occupy the space left vacant by the neglect of economy and its implications for social life. Perhaps this occurs because such issues compromise identity politics and its

'unrealistically coherent stories of culture' (Engle 2010: 12). These stories are designed to fit the law's demand for land rights bearers locked in a hunter-gatherer past. They foster a false opposition between assimilation and self-determination, including the idea that education and employment via labour markets undermine self-determination. To the contrary, I have suggested here that the pursuit of self-determination is more than a matter of law and governance. It is also a matter of economy and the forms of social-material life that a people start to address when their world is overturned.

I have used the notion of an 'ontological shift' to underline the magnitude of change in the Western Arrernte's world; change in the practices, things and ideas required to make a lived-in world for oneself and relatives. In a world of essentialisms, this notion of 'ontological shift' also underlines that the Western Arrernte are not culture traitors. Rather, their being is an historical affair, a demanding work in progress. Change began with the arrival of missionaries and pastoralists in Arrernte country. It quickened with the devastating drought of the 1920s. Land rights and self-management were a significant advance on Lutheran paternalism but they have also brought bureaucracy and welfare dependence, without providing a workable economy. The message from the Western Arrernte's experience suggests that without capacities relevant to economic life – be it specifically located or not – even royalties will not leaven their circumstance much. Where particular individuals are concerned, mainstream education and employment will lessen cultural dissonance for some and possibly make it worse for others. It is clear, however, that self-determination for the Western Arrernte, like other remote Aboriginal peoples, relies as much on economy as it does on law and governance.

Notes

1 The Western Arrernte are a dialect group of the central Australian Arrernte who became icons of 'the primitive' in European intellectual life due to the publications of early ethnographers (Austin-Broos 2009: 13–21).
2 I use the term 'self-determination' to designate a policy period, roughly from 1968 to 2008, rather than the achieved condition of Indigenous people.
3 For a more expansive account of issues canvassed here see Austin-Broos (2001; 2009: 179, 237).
4 See various correspondences, B.C. Byrne, J.L. Cavanagh, B. Dexter, M. Mackay, G. Stoll, Australian Archives, Northern Territory Branch, DAA&7-07-07; Finke River Mission.
5 See minute from R. Moroney, DAA senior project officer, Australian Archives, Northern Territory Branch, DAA&80/06007; Finke River Mission.
6 The letter was dated 17 January 1986 and located in loose files at TORC.
7 Service included house maintenance, energy and roads.
8 Just two outstation schools survive where once there were about 10.
9 Interview with Glen Auricht, former TORC manager, 11 February 1999.
10 It would have been brave elders who chose to train youth and go against the advice of their ATSIC representatives to accept federal housing.
11 This is not to deny the very long formal list of activities attached to Tjuwanpa applications for CDEP wages. The inability of TORC staff to supervise these putative

tasks meant that CDEP payments became little more than welfare (see Austin-Broos 2001). The decline in established forms of employment was confirmed in discussions with TORC personnel, 1995–2001.

12 These observations are based on my own case studies, one of which I describe with permission in Austin-Broos (2010: 140–41; see also Austin-Broos 2009, 2011). I supplement this material with aggregate data on avoidable death in remote Aboriginal communities; for example SCRGSP (2009: Pt 7, 31). Also see Brady (2004) and Langton (2010).

Chapter 11

Land rights and development in Australia

Caring for, benefiting from, governing the indigenous estate

Jon Altman[1]

Introduction

Australia is one of the world's richest countries, its current affluence largely driven by a commodities boom. That affluence is mainly enjoyed by the settler majority population, not by the nation's original inhabitants and their descendants, the Aboriginal and Torres Strait Islander peoples, or indigenous Australians. The national population of 22 million people inhabits a continent of 7.7 million square kilometres and shares a AUD $1.3 trillion economy as measured by gross domestic product. But according to all standard social indicators, there is a massive gap between indigenous and other Australians.

The colonisation of Australia extinguished the indigenous hunter-gatherer economy, rendering the surviving Aborigines and Torres Strait Islanders marginal figures in the imposed capitalist economy. While early colonisation denied indigenous rights in land, from the 1970s progressive laws and judicial findings returned large tracts of remote land to indigenous ownership. Groups of indigenous people who could demonstrate continuity in traditions, customs and physical connection to unalienated land could regain title to their ancestral homelands. An indigenous territorial estate has resulted, now covering more than 20 per cent of the continent. Almost all of this land is in parts of the continent considered 'remote', hence its former 'unalienated' status owing to low commercial value. While the indigenous estate is enormous, only about 20 per cent of the indigenous population has been able to meet the legal tests of customary ownership and thus regain ownership of their pre-colonial estates.

Indigenous people today live inter-culturally – that is, abiding by two sets of value systems and social norms, western and non-western, capitalist and non-capitalist, with livelihood aspirations that encompass aspects of both. This duality of orientation is especially evident in 'remote' and 'very remote' Australia, where 99 per cent of the indigenous estate is located. On the indigenous estate, the indigenous economy is hybrid: a customary or non-market sector articulates with both market and state sectors. Across the indigenous estate, the forms of both interculturality and economic hybridity are diverse.

It is widely acknowledged that access to economic resources is an important dimension of self-governance on the indigenous estate. But what are 'economic resources'? It depends on what is valued, on how value is expressed and on who has the right to realise value. In this chapter, I discuss tensions between indigenous economies and the changing value of the indigenous estate. While the value of the indigenous estate has been bolstered by the minerals boom and the countervailing rise in the conservation value of the indigenous estate, the capacity of indigenous people to realise that value is limited by the diverse property regimes that constitute the indigenous estate and by divisions among indigenous landowners interested in both conserving and profiting from their ancestral land holdings. At the same time, indigenous peoples are under increasing pressure to participate fully in Australia's settler, capitalist economy whose founding logic is resource exploitation. In this complex environment, I argue, indigenous self-determination requires stronger property rights in the indigenous estate and more widespread acknowledgement of the hybridity of the indigenous economy.

The emergence of an indigenous estate

The indigenous estate is comprised of several, very different land titles. The first of significance was created in 1976, when the Fraser (Liberal-Country Party) Government passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*ALRA*). The Act established the Aboriginal Land Commission to hear Aborigines' land claims in the Northern Territory in response to a number of well-publicised land claims, including the 'Gove Case' 1968–71 which had denied Aboriginal rights to land on the basis that the indigenous customary right to land had no standing in Australian law. The *ALRA* dealt only with land in the Northern Territory because it was remote, sparsely populated and under federal control. As such, the Territory was an ideal jurisdiction for political experimentation.

The *ALRA* created a special form of inalienable land title, 'Aboriginal freehold' that was held by land trusts on behalf of landowners and managed by statutory authorities called land councils. The *ALRA* impacted most immediately on Aboriginal people who until as recently as 1964 had been corralled on reserve lands as wards of the state; the *ALRA* effected the immediate transfer of all reserve lands to Aboriginal 'traditional owners'. Fifteen years after the deadline for lodgement of claims (1997), the still uncompleted claims process has vested 50 per cent of the Northern Territory in Aboriginal land trusts. Following this major reform, all States except Western Australia introduced forms of statutory land rights, none as extensive as those in the Northern Territory.

In 1992, after a 10-year legal battle, the High Court of Australia handed down the epochal *Mabo* judgment. In this legal action the late Eddie Mabo and others from Murray Island in the Torres Strait argued that their pre-colonial land tenure system remained intact and should be recognised by Australia's common law. The High Court agreed, belatedly recognising that a form of native title had existed before colonial settlement in 1788. In doing so, the High Court rejected the concept of *terra*

nullius – the legal fiction that land in Australia had belonged to no-one (or everyone) at the time of settlement in 1788 – though this doctrine had not been explicitly used by Australian courts to justify expropriation of land from indigenous landowners.

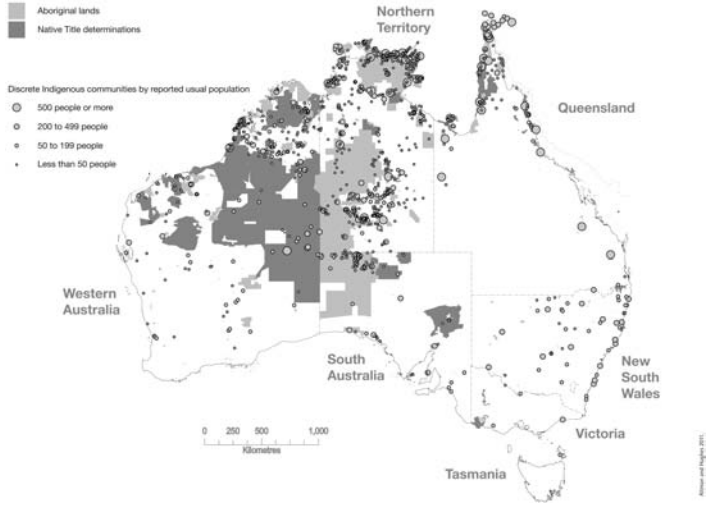
The *Mabo* judgment gave much weaker rights than the legislative regimes created after 1976. Native title was a right predicated on customary usage at the time of colonisation, a right that was attenuated by the historical attrition of Aborigines' customary usage. The court held that freehold title extinguished native title and that if this extinguishment occurred before passage of the *Racial Discrimination Act 1975* (Cth) no compensation was payable, irrespective of the injustice. Titles that post-dated this Act were in doubt, however. To extinguish native title validly, post-1975, compensation had to be paid to indigenous owners.

After *Mabo*, the federal *Native Title Act 1993* (Cth) (*NTA*) validated all existing (mainly non-indigenous) interests in land held under freehold title, while providing a process for native title to be asserted wherever it had not been extinguished. Those wishing to assert native title had to prove continuity of customs and traditions, and uninterrupted connection to the claimed lands and waters, back to initial colonisation which occurred at different times from 1788, as the settler frontier expanded across the continent.

The land rights and native title statutory processes have returned a growing share of the Australian continent to indigenous ownership and management. Both land rights and native title claims processes are ongoing and the size of 'the indigenous estate' is increasing. Pollack (2001) estimated that indigenous Australians own, control or exercise management arrangements over 16–18 per cent of the Australian continent. He suggests that the lower figure is based on reliable data whereas the higher figure is more speculative due to the fact that the aggregated area of thousands of small land holdings – nearly 6,000 in New South Wales alone – has never been quantified. In 2007, the indigenous estate was estimated to be 20 per cent of Australia (1.5 million square kilometres) (Altman *et al.* 2007); the increase reflects a growing number of native title determinations, most of which are for exclusive possession. Non-exclusive native title arises from the co-existence of the rights of other land users, most commonly pastoralists (the *Wik* judgment in 1996 confirmed that pastoral leases did not necessarily extinguish native title). As of 31 March 2011, it is estimated that the indigenous estate covers 1.7 million square kilometres or 22 per cent of the continent.

Map 11.1 demonstrates the extent of indigenous-held land using different shadings to indicate land rights and native title lands. There are three important features of this complex map. First, most indigenous land is in three jurisdictions, the Northern Territory, Western Australia and South Australia. There is clearly a high level of variability and territorial inequity both between and within State and Territory jurisdictions. The two States with the largest indigenous populations, New South Wales and Queensland (31.5 per cent and 28.4 per cent of the total indigenous population in the 2011 census) account for less than 5 per cent of land holdings.

Second, almost all indigenous-owned land is located in geographic regions that are termed 'remote' or 'very remote' in Australian census geography, with



Map 11.1 Indigenous-owned lands and discrete indigenous communities

less than 1 per cent by area being located in the more densely settled regions and major cities. Map 11.1 illustrates the distribution of what are termed discrete indigenous communities (although many also have non-indigenous residents) in order to demonstrate just how remote the indigenous estate is from population centres. There are about 1,200 such communities dotted across remote Australia with a total population of only about 100,000. Few of these communities have a population of over a thousand, and nearly 1,000 have a population of less than 100 each. The large communities are called townships; historically they had been colonial government settlements and missions. The small communities are called outstations, homelands, pastoral communities, living areas, homesteads or small dispersed communities. The remoteness of indigenous-owned land explains in large measure its availability for claim; historically this was land of low commercial value, mostly desert or tropical savannah. These lands today are extremely sparsely populated.

Third, land rights and native title laws have been enacted at different times and for different reasons: land rights laws responded to demands for social justice, while native title law was necessary to re-stabilise a land tenure system perturbed by the High Court's recognition of 'native title'. Consequently, there are myriad Commonwealth and state laws, and indigenous land holdings vary not only in size but also in property rights regimes.

Property rights and values on the indigenous estate

These varying property regimes serve both to hamper and to enhance the emerging contradictory values of the indigenous estate. Property regimes

hamper the value of the indigenous estate because land has been returned to indigenous people mainly in remote Australia under forms of community or restricted common property (Martinez-Alier 2002; Rose 2004) that exclude such commercially valuable resources as subsurface minerals. Consistent with most Australian property law, minerals rights remain vested in the Crown. However, for the state to own valuable resources such as minerals, fisheries and fresh water is not consistent with full native title (pre-colonial) rights.

When drawing up what was effectively a blueprint of the *ALRA* in 1973 and 1974, Justice Woodward had recommended that minerals and petroleum on Aboriginal land should remain the property of the Crown (Woodward 1974). However, he had noted that 'to deny Aborigines the right to prevent mining on their land is to deny the reality of land rights' (Woodward 1974: 108).

Woodward had thus recommended that the government legislate a 'right of consent' or 'right of veto', and this became a de facto property right in minerals for the recognised traditional owners of land in the Northern Territory. Although the *ALRA* also empowered the Australian government to override the Aboriginal owners' veto on the grounds of the 'national interest', the right of veto has been sufficiently strong to enable Aboriginal owners to negotiate some lucrative multi-year, multi-million dollar benefit sharing agreements in the Northern Territory. However, there is no guarantee that such benefits will be paid to landowners. In a complicated financial framework, only 30 per cent of the equivalents of statutory royalties are paid to people residing in areas affected by mining; these residents are not necessarily traditional owners.[2] The landowners who approve a project can benefit directly mainly in situations where additional negotiated payments are earmarked for their use. Although the veto provides leverage in the invariably lopsided negotiations between resource developers and landowners, this mechanism is still inferior to mineral ownership or de jure property rights.[3]

The property rights provided under what is termed 'the future acts regime' of the *NTA* are weaker still. The *NTA* does not give native title holders a right to refuse consent to mining; nor does it guarantee statutory royalty equivalents from mining on their land. Where native title groups enjoy exclusive possession, they have a right to negotiate with resource developers, but they must exercise this right within six months of notification of a proposed future act, after which arbitration is required; the arbitral process has proved to be generally unsympathetic to the wishes of native title groups (Corbett and O'Faircheallaigh 2006). In some situations the framework provides for expedited procedures for mineral exploration that can bypass negotiations; in others, native title groups have only a right to consultation. Lacking the right to veto mining on their land and possessing procedural rights to compensation that are little different from those available to other Australian landowners, native title holders find that state recognition of their traditions and customs confers no special rights. The High Court decision in *Western Australia v Ward* in 2002 confirmed the Crown's property in minerals – 'a political compromise' as Strelein (2009: 63) has pointed out.

Indigenous people's capacity to realise the minerals value of their estates is further hampered by the following shared characteristics of their various titles. First, in both land rights and native title regimes, indigenous landowners collectively negotiate and approve agreements. This emphasis on group entitlement does not live up to contemporary neoliberal rhetoric about the development powers of the market, private property and individualism. Second, the land rights and native title regimes differ in their distribution of benefits. With native title, landowners are incorporated as prescribed bodies corporate, and are recognised as principal beneficiaries in agreement making; under land rights, owners are obliged to share monetary and non-monetary benefits with non-owners.

There are currently an estimated 300 agreements between mining companies and indigenous groups, according to the peak mining advocacy group, the Minerals Council of Australia. The mining industry has no doubt that the indigenous estate is a highly prospective 'greenfield' for exploration and industrial resource extraction (Altman 2012).

In contrast, the *NTA*'s recognition of customary non-market property rights may hold more promise for indigenous people. That *NTA* section 211 guarantees the customary non-market property rights of native title groups was confirmed in an important test case in the High Court (*Yanner v Eaton* in 1999). The Court ruled that native title groups could take fauna (in this case estuarine crocodile) for domestic use in accord with custom, irrespective of state wildlife regulations (Strelein 2009: 44–48). In its decision, the High Court referred to spiritual, cultural and social connection to the land (it could have added 'economic').

The *Yanner v Eaton* judgment opens up other property rights possibilities. For example, using a Coasian property rights framework (Coase 1960), I have argued that if customary rights to fresh water are guaranteed to native title groups, the Crown may not be able to assert that it has exclusive rights in the commercial allocation of water emanating from the same source (Altman 2004). The Australian National Water Initiative, in paragraphs 52–54, formally requires that water planning processes take into account the possible existence of native title rights to water and that plans may need to allocate water to native title holders (Australian Government National Water Commission 2004: 9).

In addition, the legal recognition afforded to customary rights is being used increasingly to leverage commercial benefit in new resource frontiers such as carbon and biodiversity. The negative aspect of such opportunity is uncertainty: the scope of native title rights will occasion legal contestation, transactions costs and (possibly) inefficient allocation of scarce resources.

In 2006, I did something that fundamentally changed the way that I viewed the growing indigenous estate: I serendipitously overlaid a template of the indigenous estate on a series of resource atlas maps produced by the government research and development corporation, Land and Water Australia. The combination of these maps was subsequently refined (Altman *et al.* 2007), with visual analysis revealing that the indigenous estate contains large areas of high conservation value.

In particular, the indigenous estate includes a diversity of ecosystems spanning a continental-scale climatic gradient from the monsoonal tropics to the arid desert. Significant portions of the indigenous estate remain ecologically intact, having escaped the intense commercial development pressure experienced in more temperate parts of Australia. Much of the indigenous estate features vast areas of relatively undisturbed, connected and ecologically healthy environments. Accordingly, there is a high degree of species biodiversity on the indigenous estate, whereas elsewhere species have either declined or become regionally extinct. The remarkable conservation value of the indigenous estate is constantly compromised by a variety of threats including feral animals, invasive weeds, land disturbance (especially vegetation clearance), changed fire regimes, overgrazing and marine debris and pollution.

There is growing national recognition that the land which historically had low commercial value and low population density has high conservation and biodiversity values in the twenty-first century – especially given the environmental impacts of development pressure, increasing water scarcity and the projected impacts of climate change on species composition and distribution across the continent. Commercial agriculture (based on private property) and water over-allocation (based on open access) are prevalent threats to the environment of temperate south-east and south-west Australia, but they are not yet evident on the remote indigenous estate.

The conservation value of the indigenous estate is augmented by the very processes of recognition. In order to get title to their land, under both land rights and native title regimes, indigenous owners have had to generate and embrace a discourse of tradition, continuity and connection to country which encourages an associated indigenous discourse of conservation. Meanwhile – contra Hardin's *The Tragedy of the Commons* – collective ownership of indigenous land and sea, unlike private property, encourages conservation practices (Hardin 1968).

The growing salience of the conservation value of the indigenous estate is evident in the actions of environmental agencies and indigenous landowners. The former have responded by seeking to incorporate large tracts of the indigenous estate with high environmental values into the National Reserve System (the conservation estate). In 1996, the Howard Government established an Indigenous Protected Areas programme that allows traditional owners to enter into an agreement with the Australian Government to promote biodiversity and cultural resource conservation. In 2011, the Australian Government listed 50 Indigenous Protected Areas, covering 260,000 square kilometres and 24 per cent of Australia's Conservation Estate (Australian Government 2011). This figure has since grown dramatically to 360,000 square kilometres with the declaration of the South Tanami IPA in 2012.

Indigenous landowners have responded to the conservation significance of their land from the early 1990s with a community-based natural and cultural resource management movement, 'Caring for Country'. As people reoccupied their ancestral lands, they sought to address emerging environmental threats; those

living on the land and using it for livelihood often mobilised indigenous ecological knowledge to provide the critical baseline against which to identify new environmental threats. Since 1996, as more and more of the indigenous estate has become a part of the National Reserve System, the Australian government has financially supported such activity through its Indigenous Protected Areas and Working on Country programmes, the latter employing indigenous people as rangers.

Hybrid economies of the indigenous estate

The growing value of the mining industry and of biodiversity has produced important tensions in the management of the indigenous estate. The options facing the owners of the indigenous estate can be understood if we acknowledge the hybrid character of indigenous economies. 'The hybrid economy' combines customary, state and market sectors to deliver livelihoods based on non-market wildlife harvesting, production of art for global sale and public and private sector employment and enterprise development, alongside normal citizenship entitlements. This form of economy combines capitalist with non-capitalist relations of production and restricted common and private forms of property.

A diagrammatic and highly abstract model of the hybrid economy is provided in Figure 11.1. It has features that are sometimes poorly understood (see, for example, Austin-Broos 2011: 122–23, 143–45) that I will briefly rehearse here. The hybrid economy is dependent on the state sector for much of its cash income (welfare benefits, wages and salaries) and essential infrastructure, and yet it is also fully encapsulated in the global market economy, with opportunities to sell art and craft and to make commercial agreements for access to resources. In

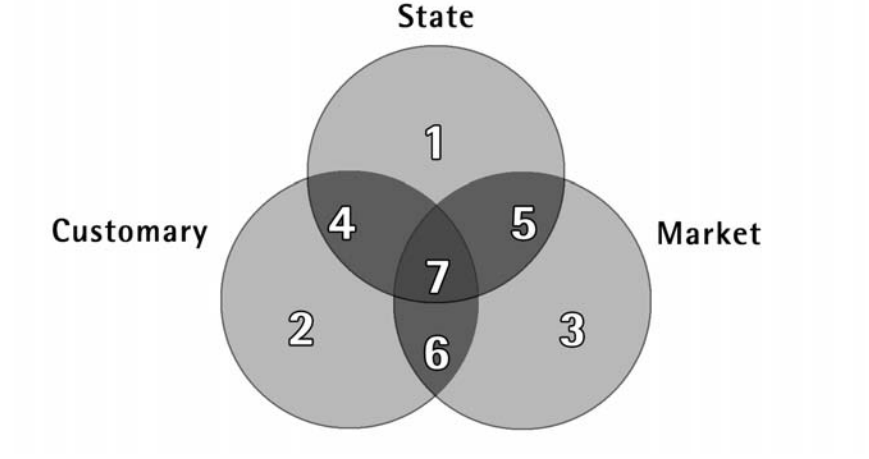


Figure 11.1 'The hybrid economy'

interacts with both state and market sectors. The model seeks to theorise evident interlinkages (the diagrammatic overlaps) between market, state and customary sectors of local and regional indigenous economies where most productive activity occurs. It is important to understand that customary productive activity may include using guaranteed native title property rights, most evident in the exploitation of wildlife for domestic consumption. The concept of economic hybridity makes sense of the empirical reality that indigenous people make their livelihoods both diversely and flexibly, depending on local opportunities and aspirations.

The Australian Bureau of Statistics, in the 2008 National Aboriginal and Torres Strait Islander Social Survey (NATSISS), has collected data about wildlife harvesting for use and about cultural production for market exchange (see Altman *et al.* 2012). While the NATSISS does not use the words 'indigenous estate', regression analysis shows a strong association between residing in remote Australia and recognising a homeland and participating in wildlife harvesting and in cultural production.

In the past, the potential of the indigenous estate has been underestimated to the extent that it has been characterised as remote and unsuited to commercial agriculture. Today there are new opportunities associated with both mineral development and conservation potential and so indigenous groups who have regained their ancestral lands, often after prolonged legal struggle, face new possibilities to participate in (or to allow) the land's commercial exploitation for minerals and/or participate in its conservation. Because they participate in hybrid economies, their productive engagement on the indigenous estate may take a variety of forms. That is, some owners and residents of the indigenous estate can negotiate the imperatives of the market sector from the relatively strong position of having substantial state and customary sectors in their hybrid economy. From this more resilient position, they are able to consider alternate forms of development. With these options come tensions.

Within the indigenous domain there are diverse responses to difficult development choices. Some argue for rights to exploit their lands commercially, to benefit from country, while others seek to conserve lands in accord with tradition and for future generations, to care for country. Indigenous landowners have resisted industrial development at such locations as Coronation Hill, Jabiluka and Century Mine. At the first two sites, indigenous owners blocked mining for the foreseeable future. Such campaigns, often in partnership with environmental, non-government organisations and civil society, have invariably faced opposition not just from mining companies, but also from the state.

Australia's growing dependence on mineral exports has stimulated recent political disputation in situations where landowners are in disagreement over development proposals. Indigenous perspectives are informed by their deep dissatisfaction with their limited control over commercial development on their land, by the weak regulation of environmental and social impacts, and by the record of limited benefit from mining for both landowners and members of indigenous communities adjacent to major mines (Altman 2012).

Contested scenarios for benefiting from country

In 2011, social media and new political alliances were mobilised in sophisticated campaigns to assert indigenous rights to control the nature of development on their lands. Let me provide three brief cases.

James Price Point

Woodside Energy Limited's proposal for a major gas hub precinct at James Price Point north of Broome in the Kimberley has met with considerable opposition from the Goolarabooloo and Jabirr Jabirr native title claimant groups concerned about potential negative environmental, cultural heritage and social impacts. Of special concern has been the potential negative impact on marine turtle and dugong, iconic species of considerable value in the customary sector of the economy (Buchanan *et al.* 2009). In its construction phase, the AUD $30 billion gas hub would attract 6,000 workers. The Western Australian government has ardently supported the project. While the claimant groups negotiated over the proposed development, represented by the Kimberley Land Council, the State government threatened to acquire compulsorily the gas hub precinct covering 1.5 per cent of the area under claim. In mid-2011, an agreement was announced, reputed to be worth AUD $1.3 billion over the life of the project. In a closed meeting, native title claimants voted 164 to 108 in favour of executing an agreement that will see benefits flow to both native title groups and indigenous communities in the region. The native title claimants do not have any right of veto, and the consent of the majority to this agreement was interpreted by many as pragmatic.

Solomon Hub

At Solomon Hub in the Pilbara region of Western Australia, the Yindjibarndi Aboriginal Corporation (YAC), representing native title claimants, has been in dispute with the Fortescue Metals Group (FMG) over a massive iron ore project. The project is reputed to have iron ore reserves of nearly 3 billion tons; a AUD $9 billion development would mine 160 million tons per annum. As native title holders, the Yindjibarndi are not able to veto the project. In April 2011, the YAC released a video on *YouTube* showing footage of an acrimonious meeting in Roebourne between members of YAC, members of a breakaway group called the Wirlu-Murra Yindjibarndi Aboriginal Corporation and staff of FMG including former chief executive officer, Andrew Forrest. The agreement proposed by FMG yields royalties that are low by current regional industry standards; it would provide benefits to the wider community in kind rather than cash. There are allegations that FMG has sponsored the Wirlu-Murra Yindjibarndi Aboriginal Corporation that is in favour of the FMG proposal. At the heart of this ongoing dispute are structural commercial issues about the relative bargaining

power of parties in negotiations; the vulnerability of native title groups to financial inducements and political fracturing; and cultural concerns about the destruction of heritage sites and the desecration of burial sites.

Wild Rivers

The Queensland Wild Rivers law passed in 2005 has divided the Aboriginal landowners on Cape York and in the Gulf of Carpentaria. This law allows the State to declare environmentally intact river systems as 'wild river regions'; they can be protected by totally disallowing commercial development in high preservation areas, although native title customary rights will be maintained.

The campaign against the Queensland law has been led by influential advocate Noel Pearson, the Cape York Land Council and the Balkanu Cape York Aboriginal Development Corporation. Their opposition is based on a conviction that wild river declarations dramatically reduce production possibilities on Aboriginal-owned land and so curtail commercial development. In seeking to overturn the Queensland law in the name of their unrestricted native entitlement, this campaign has been championed by the Leader of the Opposition in the Australian Parliament, Tony Abbott, who tabled two private members Bills in 2010 and 2011 to provide Aboriginal landowners with the rights to own, use, develop and control their land.[4]

Those who opposed the Abbott Bill and support Queensland's Wild Rivers law see greater economic opportunity in the conservation economy, customary utilisation of resources and ecotourism on Cape York in particular, and new possibilities in carbon farming via abatement of wild fires and sequestration. While this group of landowners is portrayed as anti-development and pro-conservation, it has nevertheless been successful to date in certain commercial uses of land, especially in the provision of environmental services and ecotourism ventures.

In these case studies, indigenous groups are facing a range of options for the use of their property rights: to combine conservation and mining; to take a commercial approach to conservation through the provision of environmental services for payment; and in commercial ecotourism. In the theory of the hybrid economy, the persistence of the state sector and of the customary sector is conceived to be a platform upon which residents and owners may consider in what ways to engage the market sector. They have the chance to distance themselves from development scenarios in which the imperatives of global markets are assumed to be both all-powerful and beneficial. The persistence of the hybrid economy demonstrates the expanded choices now available to landowners on the indigenous estate to combine and reconfigure the three productive sectors, while maintaining customary economy and restricted common property regimes. The theory also helps to account for tensions among indigenous people about the management of their estate: those who accept (pragmatically perhaps) the market driven opportunities presented by the mining industry are pitched against those who would draw on the strength of the state and customary

sectors in order to engage less with the market or to engage with the market in different ways.

A conflicted state

The Australian state is conflicted in its approach to the development on the indigenous estate. As Australia has become increasingly dependent on mineral exports, many think that mining is in the national interest. Cleary (2011: 5) has noted that the current mining boom is worth about AUD $190 billion per annum or 15 per cent of the national economy. Over 50 per cent of Australia's commodity exports are made up of mineral and energy resources, an export concentration that would place Australia firmly within the United Nations' criteria for a mineral dependent economy.

Thus, while a discourse of tradition and conservation ascribes new values to the indigenous estate, there is increasing pressure on indigenous communities to participate in the industrial extraction of minerals that could destroy the land's environmental values and extinguish land and native title rights. Mining companies want unrestricted access to the indigenous estate, which is how capital accumulation works, and, except in the Northern Territory, the property rights institutional framework gives landowners limited means to challenge this corporate and state sanctioned objective. There are growing pressures from the state, corporate interests and influential neoconservative forces for the owners of the indigenous estate to embrace the free market and globalisation as the pathway to development. Rose (2004: 276) has termed these pressures 'the internalising role of property' to encourage labour, investment and production.

Since 2008, this pressure has included the policy called 'Closing the Gap' which seeks socioeconomic equality between indigenous and other Australians irrespective of people's place of residence or aspirations. The policy pressures people who live at small isolated communities on the indigenous estate to move into larger townships, so that their access to citizenship services is less costly. Such relocations carry the risk of emptying the indigenous estate. At the same time, there have been political campaigns arguing that to enable 'development' common property regimes on the indigenous estate should be replaced by individual private property and associated options to alienate land.

Two issues arise for indigenous landowners. First, is there not a risk to title? If owners move from their ancestral lands, continuity of custom and tradition and ongoing connection might be broken, triggering section 13 of the *NTA* which provides for the variation or revocation of approved determination of native title. Second, what form of indigenous economic development is in the national interest? One conception of development would encourage extraction of minerals industrially and payment of mineral rents to the state, compensating indigenous owners with certain payments and with employment options, thus helping to close the income and employment 'gaps'. Meanwhile, social policy would recentralise indigenous people to deliver more cost-effectively the imagined normalising project

of improvement. A competing conception of development seeks to incorporate indigenous lands of high conservation value into the National Reserve System and to support landowners to work and live on country in what is arguably the national environmental interest.

These diverse approaches imply competing conceptions of the indigenous interest, between which indigenous Australians must now choose. Landowners, with their mixed and often limited property rights, are under political pressure as governments, corporations and well-wishers set new terms for indigenous control of the indigenous estate.

Governing territories of difference

Settler colonialism ignored indigenous property interests from 1788 until the 1960s. In the last 40 years, a series of land rights and native title laws have seen 22 per cent of the Australian continent returned to indigenous ownership, with almost all of this land in very remote regions and bestowed very inequitably among indigenous Australians. Indigenous lands have been vested in groups under restricted common property regimes. While native title guarantees access to customary resource, rights in commercially valuable resources have been excluded from these restitutions of land.

The lands considered economically marginal in the past that have not been alienated and thus have been available for claim, are now both mineral prospective and biodiversity rich. This opens up possibilities for diverse forms of development on the indigenous estate, including hybrid forms of development that allow significant choices about the nature of engagement with the market. The indigenous estate could be conceptualised as 'Territories of Difference' (after Escobar 2008) where alternate development and alternative modernities might be pursued.

The Australian state now seeks to 'close the gaps' between indigenous and other Australians. For either economic autonomy or economic equality to occur, indigenous landowners will need to have more clearly defined property rights to ensure better land management rights. Such legal reform will allow indigenous landowners to have development choices beyond embracing industrial capitalism. Notwithstanding the significant inequities in lands returned to them and the considerable variations in property rights by jurisdiction, indigenous landowners have been able to fashion hybrid economic engagements with the wider Australian society, consistent with their regional or place-based aspirations. In such engagements, indigenous people are embroiled in political contestation between custom and commerce. Should ancestral lands be conserved in accord with tradition and for future generations, or should indigenous landowners participate in its commercial development, including mineral extraction? This debate – which rages both among and about indigenous Australians – mirrors a debate in the wider society about the ways to combine commerce and conservation. At present, much political power is being exerted to promote the industrial extraction of minerals from the indigenous estate.

Australia belatedly supported the *United Nations Declaration on the Rights of Indigenous Peoples* in April 2009. Article 26 of the *Declaration* calls for signatory states to recognise the rights to lands, waters and resources that indigenous peoples have traditionally owned, occupied or otherwise used or acquired and to give such rights legal recognition and protection. Native title groups are invoking the words of the *Declaration* to make land rights and self-determination politically meaningful. Free prior informed consent rights are an important prerequisite if indigenous peoples are to exercise greater self-determination and governance on the indigenous estate.

Notes

1 I would like to thank participants at the 'Between Settler and Indigenous Governance: history and possibilities workshop' in Sydney in August 2011 for comments on an earlier draft, especially commentator Paul Patton as well as the editors of this volume and Melinda Hinkson. Thanks also to John Hughes for his collaborations on developing the map in this chapter.

2 The other 70 per cent is reserved for wider indigenous interests, including the cost of land council operations, and is tightly controlled by the Australian government.

3 Such full mineral rights are provided in New South Wales where under the *Aboriginal Land Rights Act 1983* (NSW) full mineral rights (except in gold, silver, coal and petroleum) are allocated to Aboriginal landowners.

4 The wording in the Abbott Bill is almost identical to Article 26(2) of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'.

Chapter 12

Indigenous land rights and self-government

Inseparable entitlements

Kent McNeil[1]

Claims to state sovereignty, whether historical or present-day, need to be broken down and examined from different angles: (1) *factual*, on the ground exercise of governmental authority; (2) the *legitimacy* of that exercise of authority; and (3) its *legality*. For present purposes, I accept the actual exercise today of governmental authority by, and thus the factual sovereignty of, the United States, Canada and Australia in their respective territories. In light, however, of the means by which it was acquired and the current lack of respect for indigenous self-determination, I do not accept the legitimacy of the sovereignty of these nation states. Moreover, although this sovereignty is generally recognized in international law and the domestic law of these nation states, it is not necessarily recognized in indigenous legal orders. Consequently, the legality of settler state sovereignty is a relative matter that depends on which legal orders are chosen to determine legality: settler legal orders or indigenous legal orders. Although since contact the former have been privileged over the latter, it is my contention that this privileging is the result of colonial attitudes that are still prevalent in settler societies today.

In other work, I am examining factual sovereignty in North America and the distinction between legitimacy and legality in that context. Here, my focus is on the domestic legal orders of the United States, Canada and Australia, mainly because they produce court decisions that impact significantly on indigenous people but also because I am more familiar with them. This is not to deny the relevance of indigenous and international law – the issues examined here can and should be examined from those perspectives as well. The point I want to emphasize is that, in discussions of indigenous peoples' rights, choices are being made regarding the applicable legal orders. As these choices determine what those rights are, they should be made explicit.

My examination of the connection between land rights and self-government will start with the United States because this matter first arose as a legal question there. I will then discuss the law that has emerged more recently in Canada and Australia. It will be seen that, despite their shared common law heritage, these three nation states have diverged significantly in their treatment of these matters. The concluding part will suggest a way of integrating land rights and self-government

so as to purge the law of a persistent colonial attitude that continues to impair indigenous peoples' aspirations to govern themselves.

The United States

The United States became a nation state as a result of a revolution that overthrew the sovereignty of the British Crown over the Thirteen Colonies. The 1776 Declaration of Independence boldly declared that 'these United Colonies are, and of Right ought to be, Free and Independent States' (Armitage 2007: 170–71). After seven years of war, these colonies forced the Crown to acknowledge their independence by the 1783 Treaty of Paris. But what entity or entities replaced the Crown as sovereign? Was sovereignty vested in each of the thirteen states, the people (of European heritage) of these states,[2] or in a new monolithic sovereign – the United States of America, whose authority was subsequently defined by the new Constitution in 1787? And what about the Indian nations whose territories were within the boundaries of the United States recognized by the Treaty of Paris? These questions bedeviled American political practice and discourse and were a major underlying issue in the Civil War. Although the Union's military victory, which prevented individual states from seceding, probably resolved the issue in favour of the national government at the external, international level, sovereignty continued to be divided internally. The British conception of undivided internal and external sovereignty vested in a single entity – the Crown – was thus rejected in the American Revolution and has never been reinstated.

The American conception of sovereignty as authority shared internally among various entities has influenced the legal understanding of the political authority of the Indian nations whose territories were incorporated into the United States. The two leading decisions on the political status and authority of the Indian nations are still Chief Justice Marshall's early judgments in *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1832).

In *Cherokee Nation v Georgia*, Marshall CJ decided that Indian nations within the geographical limits of the United States are not 'foreign states' for the purposes of the United States Constitution art III §2 and, therefore, the Supreme Court does not have original jurisdiction in a case brought by an Indian nation (the Cherokee) against a state (Georgia). Nonetheless, Marshall CJ had no difficulty concluding that the Cherokee Nation is a state:

> So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.
>
> (*Cherokee Nation v Georgia*: 16)

The more difficult question for Marshall CJ was whether the Cherokee are a 'foreign' state. He decided they are not, principally because 'they are considered as within the jurisdictional limits of the United States, subject to many of those

restraints which are imposed upon our own citizens', and '[t]hey acknowledge themselves in their treaties to be under the protection of the United States'. Describing the relations between the Indian nations and the United States as 'marked by peculiar and cardinal distinctions which exist nowhere else', he concluded that it is more accurate to denominate them as 'domestic dependent nations' than as foreign nations (*Cherokee Nation v Georgia*: 17).

Having determined that the Cherokee were not a foreign state, Marshall CJ was able to avoid the substantive issue of whether Georgia law applied within Cherokee territory. However, this issue came directly before the Court in *Worcester v Georgia*. In overturning the conviction of Samuel Worcester, a Vermont preacher who had been residing in Cherokee territory without the license required by Georgia law, Marshall CJ decided that Georgia law did not apply in Cherokee territory. His reasons have endured ever since as the definitive statement on the political status and authority of the Indian nations in the United States. Going back to the period before European colonization, he observed that:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.
>
> (*Worcester v Georgia*: 542–43)

In his view, 'discovery' of America necessitated European agreement on some principle to regulate acquisition of colonies and avoid conflict among the European powers. This principle, he said, was 'that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession' (*Worcester v Georgia*: 543–44).[3] However, while giving the discovering European power 'the sole right of acquiring the soil and of making settlements on it',

> this was an exclusive principle which shut out the right of competition among those who had agreed to it, not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession.
>
> (*Worcester v Georgia*: 544)

This vital passage, though often disregarded, reveals that Marshall CJ understood that a principle which the European powers established for themselves could not apply to the Indian nations or affect their rights. Accordingly, the European claims 'existed merely in theory … and remained dormant' until 'practically exerted' so as to 'exist in fact' (*Worcester v Georgia*: 544). Something more than mere discovery was required to diminish the independence and rights of the Indian nations. Actual possession had to be taken and jurisdictional authority had to be 'practically exerted' for the theoretical claims of the European powers

(and the United States as successor to Britain) to be effective. According to Marshall CJ, this could be accomplished either by treaty with the Indian nations or by conquest. For the Cherokee, it happened by treaties with the United States (*Worcester v Georgia*: 551–56).

What, then, was the effect of this practical exertion of authority by the United States government over the Cherokee and their territory? As Marshall CJ had concluded in *Cherokee Nation v Georgia*, they were brought under the protection of the United States as a 'domestic dependent nation'. They lost the capacity to treat with foreign nations and to alienate their lands, other than to the United States, but retained a right of occupancy and political authority over their territories and peoples, subject only to the overriding authority of the United States government (*Cherokee Nation v Georgia*: 17–18; *Worcester v Georgia*: 557–61). In *Worcester v Georgia*, Marshall CJ put it this way:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the Government of the United States.
> (*Worcester v Georgia*: 561)

Chief Justice Marshall's decisions in the two Cherokee cases thus established the unique position of the Indian nations in American law. Incorporation of these nations within United States territory resulted in loss of their external sovereignty as completely independent nations and subjected them to the will of Congress. They nonetheless retained their land rights and internal sovereignty to the extent that these were not ceded by treaty, diminished by conquest, or reduced by what later became known as the 'plenary power of Congress' (Clinton 2002; *United States v Kagama*; *Lone Wolf v Hitchcock*; see also Wilkins and Lomawaima 2001: 98–116). The Indian nations in the United States therefore have what might be called residual sovereignty, consisting of complete inherent jurisdiction minus whatever authority has been taken away from them (Newton *et al.* 2005: §4.01–04.02; *United States v Lara; United States v Wheeler*: 322–23).

What is the connection between the inherent residual sovereignty of the Indian nations and their land rights? From the *Worcester* decision, it is clear that the sovereign jurisdiction of the Indian nations is territorial as well as personal: it extends over the territory and members of the nation (see also *United States v Mazurie*: 557). Subject to more recent judicial limitations on tribal authority over non-members (discussed briefly below and in Jacob Levy's chapter in this book), the territorial jurisdiction encompasses all of the lands within the nation's territory. The extent of an Indian nation's territory prior to treaty or lawful taking by the United States was determined by occupation: the nation had original Indian title to all of the land occupied by it (Newton *et al.* 2005: §15.05[1]). Territorial

sovereignty and title to land thus went hand in hand: an Indian nation had both because of its occupation of a specific geographical area. In Chief Justice Marshall's words, '[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial' (*Worcester v Georgia*: 559). Therefore, Indian nations were – and continue to be – sovereign entities with political authority and territorial rights that include land rights.

Recent decisions of the United States Supreme Court, however, have been eroding the territorial jurisdiction of Indian governments by limiting their authority over persons who are not members of their tribes (Newton *et al*. 2005: §4.02[3]). In *Oliphant v Suquamish Indian Tribe*, the Court decided that Indian tribes do not have inherent criminal jurisdiction over non-members on their reservations because such authority would be inconsistent with the tribes' dependent status. This limitation on inherent sovereignty, which has been denominated 'implicit divestiture' by commentators (Duthu 1994; Frickey 1999; LaVelle 2006), has been extended to aspects of civil jurisdiction in certain contexts by subsequent decisions (e.g., *Montana v United States*; *Strate v A-1 Contractors*; *Nevada v Hicks*). Despite these limitations, the fundamental doctrine of inherent Indian sovereignty has been affirmed by the Supreme Court in other cases, such as *United States v Wheeler*, *Santa Clara Pueblo v Martinez* and *United States v Lara*.

Indian land rights vis-à-vis the United States are also idiosyncratic. Although an Indian nation had original Indian title to all lands occupied by it in accordance with its own mode of life (*Mitchel v United States*: 746), its interest has been described by the United States Supreme Court as a 'right of occupancy' that is not a private property right protected against taking 'without just compensation' by the Fifth Amendment to the United States Constitution (*Tee-Hit-Ton Indians v United States*).[4] The underlying fee simple interest in original Indian title land is held either by the United States government or by a state (*Fletcher v Peck*: 142–43). The manner by which the fee was acquired harks back to the doctrine of discovery: once discovery was given practical effect by the actual exercise of sovereign authority, the discovering European power acquired the 'absolute ultimate title … subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring' (*Johnson v M'Intosh*: 592). When the United States became independent, the underlying fee simple of the British Crown in the Thirteen Colonies vested in the original states of the Union.[5] Nonetheless, the United States government has the exclusive authority to acquire Indian title by purchase or lawful taking (*Buttz v Northern Pacific Railroad*: 65; *United States v Santa Fe Pacific Railroad*: 347; *Oneida Indian Nation v County of Oneida*).

As a matter of principle, it is difficult to reconcile the underlying fee that the Supreme Court has said was acquired through discovery with the Indian nations' residual sovereignty over their territories and their all-encompassing original Indian title.[6] The disjuncture was created by Marshall CJ for practical reasons, as lands had often been granted by the British Crown, colonial governments, and state governments without prior extinguishment of the Indian

title. Chief Justice Marshall did not want to invalidate these grants, as too many private property rights depended on them, but he also recoiled from concluding that the grants had extinguished Indian title. His solution, which has been called a 'brilliant compromise' (Newton 1980: 1223), was to uphold the grants but make the grantees' interests subject to the Indian right of occupancy so that those interests would vest in possession only upon extinguishment of the Indian title by the United States government (*Johnson v M'Intosh*: 574, 587–88; see also *Mitchel v United States*: 745–46; Cohen 1947: 47–49; McNeil 2001: 409–15). In order to reach this result, Marshall CJ apparently thought it necessary for the Crown and, hence, the states or the United States government, to have the underlying fee to original Indian title lands.

In sum, in American law possession of territory by an Indian nation entailed a right of self-government (residual sovereignty) and land rights in the form of original Indian title. One did not precede or give rise to the other; rather, both resulted simultaneously from possession of territory. This is because, in American law, Indian nations are regarded as sovereigns in the same way as European nations and the United States (*Worcester v Georgia*: 559–60). Prior to European colonization, the Indian nations were completely independent and had absolute title to lands within their territories. After effective colonization by a European nation or the United States, their sovereignty and land rights were diminished but not extinguished (*Johnson v M'Intosh*: 574). To the extent that these have not been modified by treaty or Act of Congress, they continue to be vested in the Indian nations as 'distinct, independent political communities' with territorial rights (*Worcester v Georgia*: 559).

Canada

Development of Canadian law in relation to Aboriginal peoples has been more recent and piecemeal than in the United States. Rather than regarding governance and land rights as arising together from the common source of possession of territory by independent nations, the Supreme Court of Canada (SCC) has treated these rights as distinct entitlements that have to be established in different ways. Even land rights have been bifurcated into resource-use rights, such as hunting and fishing rights, and Aboriginal title to land which is 'a *right to the land* itself' (*Delgamuukw v British Columbia*: [140], emphasis in original).

In summary, Aboriginal title arises from proof of exclusive occupation of specific lands by Aboriginal peoples at the time sovereignty was asserted by the British Crown (*Delgamuukw v British Columbia*: [140]). In *Delgamuukw v British Columbia* ([114], [147]–[148]), the SCC held that the requisite occupation can be established through either physical presence and use or application of Aboriginal law. By deciding that Aboriginal law is relevant to proof of Aboriginal title, the Court seems to have implied that land rights are territorial in nature because laws relating to land necessarily have territorial application. However, in *R v Marshall; R v Bernard*, the SCC appears to have stepped back from this implication. In her

majority judgment, McLachlin CJ barely mentioned Aboriginal law; instead, she emphasized that Aboriginal title depends on physical occupation and use of specific sites and rejected the notion that it can be established by proof of possession of a larger territory (see also *William v British Columbia*; cf LeBel J's concurring judgment *R v Marshall; R v Bernard*; McNeil 2006).

Resource-use rights, such as rights to hunt, fish, and harvest wood for domestic purposes, can be established without proving the exclusive occupation necessary for Aboriginal title (see *R v Adams*; *R v Côté*; *R v Sappier; R v Gray*). The requirements for proof of these rights were established by Lamer CJ in *R v Van der Peet* ([46]): 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.' Where First Nations and Esquimaux are concerned, the time for meeting this test is contact with Europeans (*R v Van der Peet*: [60]–[67]). Where the Métis are concerned, it is effective European control (*R v Powley*: [37]).

When dealing with Aboriginal title and resource-use rights, the SCC has not linked land rights and self-government. On the contrary, in *Delgamuukw v British Columbia* it treated them as distinct matters. Without deciding on the actual claims, the Court defined and laid down specific guidelines for proving Aboriginal title, but avoided the matter of self-government entirely, even though a right of self-government had been pleaded and considered in the lower courts (*Delgamuukw v British Columbia*: [170]–[171]).

In the one case where it did address a self-government claim directly, *R v Pamajewon*, the SCC similarly declined to acknowledge a connection between land rights and self-government. The appellants had argued that their right of self-government should be characterized as 'a broad right to manage the use of their reserve lands' (*R v Pamajewon*: [27]). Chief Justice Lamer rejected this approach, stating:

> To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.
>
> (*R v Pamajewon*: [27])

The correct approach, he said, was that laid down in *R v Van der Peet*:

> Assuming s. 35(1) [of the *Constitution Act, 1982*[7]] encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.
>
> (*R v Pamajewon*: [24]; see also McNeil 2007: 134–36)

As the appellants had not proven that gambling was integral to their distinctive culture and regulated by them at the time of European contact, the Court decided that their First Nations do not have a right of self-government in relation to high stakes gambling.

As far as I know, the one Canadian judgment that does make a direct connection between self-government and land rights is the British Columbia Supreme Court decision in *Campbell v British Columbia*. Justice Williamson concluded that the self-government provisions of the Nisga'a Final Agreement (1998) do not offend the Canadian Constitution because they do not create a third order of government. He found that the Nisga'a already had an inherent right of self-government that had not been extinguished by Crown acquisition of sovereignty or British Columbia's admission into Canada in 1871; therefore, the Agreement simply defined a pre-existing right and so did not entail an alteration of the federal division of powers. Williamson J relied in part on this passage from *Delgamuukw v British Columbia*:

> A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.
>
> (*Delgamuukw v British Columbia*: [115], emphasis in original, in *Campbell v British Columbia*: [136])

He concluded that this 'right for the community to decide to what uses the land encompassed by their Aboriginal title can be put' necessitates 'the right to have a political structure for making those decisions' (*Campbell v British Columbia*: [137]). In other words, for the communal property rights of Aboriginal peoples to be functional, Aboriginal communities must have a right of self-government so they can make collective decisions regarding land distribution and use (McNeil 2007: 139–43).

Justice Williamson's approach starts with land rights in the form of Aboriginal title and derives a right of self-government from that title's communal nature. Because the *Campbell* case did not involve a direct self-government claim, Williamson J was able to avoid the *Pamajewon* application of the *Van der Peet* test (cf *Delgamuukw v British Columbia*: [170]). Nonetheless, his approach still appears to treat self-government as an incidental right that owes its existence to other Aboriginal rights.[8] It is thus a far cry from the American approach originating in Chief Justice Marshall's judgments in the Cherokee cases, whereby the residual sovereignty and original Indian title of the Indian nations are both derived from their possession of territory as independent political entities.

In sum, the SCC has so far treated self-government and Aboriginal title as distinct entitlements that have to be proved separately through the application of different tests. In *Campbell v British Columbia*, Williamson J recognized that there is

a connection between self-government and title but seems to have made the former depend on the latter by deriving the right of self-government from the decision-making authority that Aboriginal peoples have over their communally held lands. Thus, in contrast to the United States, the theoretical and doctrinal bases for the right of self-government in Canadian law are presently uncertain. But at least Canadian courts have been willing to entertain the possibility of an inherent right of Aboriginal self-government, unlike the High Court of Australia.

Australia

As is well known, Australian law did not acknowledge that indigenous peoples have land rights apart from statute until the High Court's landmark 1992 decision in *Mabo v Queensland (No 2)*. That decision reversed two centuries of legal denial by holding that, upon British colonization, Indigenous Australians retained native title to lands occupied and used by them in accordance with their own laws and customs. In the influential words of Brennan J:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.
>
> (*Mabo v Queensland (No 2)*: 58 (Deane and Gaudron JJ))

One would think that this acknowledgment of the continuing application of indigenous laws and customs after British colonization would have resulted in a corresponding acknowledgment of a right of self-government, for the land laws of any society are never constant – they must adapt to changing environmental conditions and evolving social values and needs. Brennan J recognized this reality:

> Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as *currently* acknowledged and observed.
>
> (*Mabo v Queensland (No 2)*: 61, emphasis added; see also 110 (Deane and Gaudron JJ; 192 (Toohey J))

From this passage in particular, one would expect that indigenous communities with native title rights would have continuing authority to change the laws and customs governing those rights within their communities. While changes to observed customs might occur through modification of practices, changes to

acknowledged laws would depend on positive decisions made by the community through some form of collective action (see *Hineiti Rirerire Arani v Public Trustee*: 204–5). In other words, capacity to change laws entails political authority of the sort that Williamson J in *Campbell v British Columbia* equated with a right of self-government.

Despite the High Court's pronouncements in *Mabo v Queensland (No 2)* on the modifiability of Indigenous laws and customs, a right of self-government was denied when it was subsequently claimed directly (*Coe v Commonwealth*; *Walker v New South Wales*; *Thorpe v Commonwealth of Australia (No 3)*; Brennan *et al.* 2004: 322–28; Reynolds 1996). Nonetheless, a limited self-government right in relation to native title remained a possibility. In the High Court decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (*Yorta Yorta*), Gleeson CJ and Gummow and Hayne JJ commented as follows on native title rights and interests:

> It is important to recognise that the rights and interests concerned originate in a *normative* system, and to recognise some consequences that follow from the Crown's assertion of sovereignty. Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.
>
> (*Yorta Yorta*: [43], emphasis in original; see Brennan, Gunn and Williams 2004: 327–28)

They nonetheless went on to say that this does not mean that

> account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. Indeed, in this matter, both the claimants and respondents accepted that there could be 'significant adaptations'. But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty … Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that *find their origin* in pre-sovereignty law and custom.
>
> (*Yorta Yorta*: [44], emphasis added)

It therefore appears that, insofar as law-making authority is concerned, the continuing right of self-government is limited to modifying existing laws and customs; it cannot be used to create new laws resulting in rights or interests that did not exist at the time of Crown acquisition of sovereignty.

Australian law is, thus, firmly anchored in the British tradition of a single sovereign entity – the Crown – from which all law-making authority emanates. The law-making capacity of indigenous communities simply disappeared when the Crown acquired sovereignty, even though actual exercise of that sovereignty was delayed in parts of the Outback until the twentieth century. With respect, this judicial mindset fails to take account of the continuing existence of Aboriginal communities as social and political entities with capacity to make their own rules in accordance with their own values and needs (see the chapters by Altman and Austin-Broos in this book). It reflects the hierarchical structure of English society arising out of feudalism that was rejected in the American Revolution, namely that all political authority comes from the Crown and is exercised on the Crown's behalf. When applied to deny Indigenous Australians a right of self-government, this attitude is distinctly colonial.

Although Canada shares the same British legal traditions as Australia, the SCC envisaged the potential existence of an Aboriginal right of self-government in *R v Pamajewon* and *Delgamuukw v British Columbia* (see also *Mitchell v Minister of National Revenue*). Relying on *Delgamuukw v British Columbia*, Williamson J went even further in *Campbell v British Columbia*, holding that the Nisga'a Nation has an inherent right of self-government that has been defined in the Nisga'a Agreement as including legislative authority. Thus, even before the Agreement, the Nisga'a had authority to make laws in relation to their Aboriginal title. In my opinion, one reason why Canadian courts have been more open than the High Court of Australia to a right of self-government in relation to land is that the content of Aboriginal title, unlike native title in Australia, does not depend on indigenous laws and customs. Instead, Aboriginal title arises from exclusive occupation of land when the Crown asserted sovereignty; it is a generic right that does not vary from one Aboriginal nation to another, apart from an inherent limit that prevents the land from being used in ways incompatible with the uses relied upon to establish title (see *Delgamuukw v British Columbia*: [140]; Slattery 2000: 211–12). This means that Aboriginal nations can make laws that govern land holding and use within their communities, while their Aboriginal title vis-à-vis the rest of the world, including the Crown, remains the same. By contrast, in Australia where native title rights vis-à-vis the rest of the world are defined by indigenous laws and customs, substantial changes to the laws and customs could affect third party rights, including the Crown's. Thus, the High Court's reliance on indigenous laws and customs to determine the content of native title has probably had negative consequences for self-government claims in Australia (McNeil 2001: 416–63).

Conclusion

It is one thing to accept the factual reality of nation state sovereignty in the United States, Canada and Australia in the twenty-first century, but quite another to hold, as has the High Court of Australia, that acquisition of that sovereignty

virtually obliterated indigenous governance authority as a matter of law. As a practical matter, indigenous governance would have had to continue in many parts of North America and Australia because actual imposition of colonial authority often lagged far behind assertions of sovereignty. But more importantly, as a normative matter there is no reason why the governmental authority of indigenous peoples over their own communities and lands should not have continued under the overarching sovereignty of the nation states that colonized them. In the Cherokee cases, Marshall CJ acknowledged that this is what happened, both practically and legally, when the Crown established the Thirteen Colonies. After the United States became independent, the Indian nations retained their governmental authority as 'domestic dependent nations' under the ultimate authority of Congress. Thus, the governmental authority of the Indian nations in the United States does not depend on the American Revolution or the United States Constitution. Instead, there is continuity in the political status of the Indian nations from the British colonial era to the present day.

Although Canadian courts have been slower to acknowledge the continuance of indigenous governance authority, we have seen that recent jurisprudence is moving in that direction. In *Campbell v British Columbia*, Williamson J also found that Aboriginal land rights and self-government are closely linked: an Aboriginal nation's decision-making authority over its lands is necessarily governmental in nature. This insight can be used to shift our understanding of Aboriginal rights generally. Instead of treating land rights and self-government as distinct entitlements that have to be established separately, as the SCC did in *R v Pamajewon* and *Delgamuukw v British Columbia*, the two should be combined into a claim to territory that encompasses land rights and governmental authority (McNeil 2001: 95–101). In addition to being supported by Chief Justice Marshall's decisions in the Cherokee cases, such an approach is consistent with the reality of British colonization of North America, whereby indigenous territories were brought within the dominions of the Crown with little interference with the land rights or internal governance of the indigenous nations until much later, usually when land acquisition treaties were entered into or the *Indian Act*, originally SC 1976 c. 18, now RSC 1985, c. I-5, was imposed. Only strict adherence to the archaic feudal doctrine that all governmental authority emanates from the Crown prevents acknowledgement of the legal continuance of the governance authority of the indigenous nations.

Australia remains the single nation state examined here where courts cling to the historically unrealistic, and doctrinally unnecessary, dogma that all governmental authority comes from the Crown. In *Mabo v Queensland (No 2)*, the High Court rejected the racially discriminatory doctrine of *terra nullius* insofar as it had been applied to deny the land rights of Indigenous Australians. Nonetheless, indigenous law-making authority after Crown acquisition of sovereignty was explicitly rejected in *Yorta Yorta*. Land rights and self-government have thus been completely bifurcated in Australia, with consequent denial of the latter. Reconceptualization of the rights of indigenous peoples as rights to territory that

include inseparable land and governance rights provides a way to break loose from a legal mindset rooted in colonial attitudes that are no longer acceptable.

Notes

1 I would like to thank Kirsten Mikadze for her indispensable research assistance and Sean Brennan, Lisa Ford and Timothy Rowse for their very helpful comments. I am grateful as well to the Social Sciences and Humanities Research Council of Canada and the Killam Trusts for their generous financial support.
2 As implied in the Preamble to the United States Constitution: 'We the People of the United States' (1787). See *Chisholm v Georgia*: 471–72.
3 Here, Marshall CJ was quoting himself in *Johnson v M'Intosh*: 573.
4 To have constitutional protection, Indian title must receive United States government recognition: see Newton *et al.* 2005: §15.09[1][d].
5 Further west, the United States government generally has the fee: see Newton *et al.* 2005: §15.09[1][a].
6 This title is a right to exclusive possession and use that includes the entire beneficial interest in resources on and under the land: *United States v Shoshone Tribe of Indians*: 115–18; *United States v Klamath and Moadoc Tribes*: 122–23; *United States ex rel Chunie v Ringrose*: 642.
7 Schedule B to the *Canada Act 1982*, c. 11 (UK), s 35(1) provides: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'
8 His approach should be equally applicable to Aboriginal rights other than title, such as hunting and fishing rights and the right to harvest wood, as they are also communal: see *R v Sparrow*: 1112; *R v Sundown*: [36]; *R v Sappier; R v Gray*: [26], [31], [74].

Chapter 13

Three perversities of Indian law

Jacob T. Levy[1]

Introduction

Since the 1970s, Federal Indian law in the United States has developed in ways that erode the jurisdictional and economic viability of indigenous tribes. Defined by courts instead of legislation, this entire level of government has been assembled haphazardly and piecemeal. Jurisdictional rules have been crafted retrospectively rather than prospectively because courts have been more prone to ask whether non-Indians coming before them should have been subject to reservation rules than to ask what would follow in the future from subjecting non-Indians to, or exempting them from, tribal jurisdiction.

In this chapter, I trace out this perverse structure of contemporary Indian law. I argue that the limitation of Indian jurisdiction has been the result of jurisprudence grounded in flawed political theory and that it has discouraged reservation governments from pursuing the kinds of economic and institutional development that are central goals of post-1970 federal Indian policy. Restrictions on tribal jurisdiction, and the unwillingness to treat reservations as real territorial governments, have left reservation governments increasingly unable to protect their members against crime or tort as tribal economies develop. As a result, these governments are less able to govern as contact with outsiders increases; and they are driven to over-centralize reservation economies in tribal government's own hands.

While this has happened haphazardly, I do not mean to deny that there is, and has been, much ill intent in United States policy toward Indian tribes and tribal reservations. Racism and greed have tainted even relatively benevolent moments in federal policy, such as the post-1970 era favouring Indian self-determination, including some of the policies discussed below. But the perverse environment, as a whole, is no deliberate act of racism or greed; it is not somehow an inevitable result of the logic of the colonial settler state. The rights of Indian tribes to govern themselves have sometimes been attacked or restricted, sometimes defended and respected – but each advance and reversal leaves traces in the law. The current policy environment is in part the result of those various contradictory legacies. It also stems from Indian successes: success in pushing the shift to self-determination, success in institution-building within tribal governments and

success in approaching a margin at which tribal economies have some chance at significant development (see generally Levy 2000; Levy 2003).

More than 300 federally-recognized Indian tribes govern reservations in the lower 48 states of the United States, 'unique aggregations possessing attributes of sovereignty over both their members and their territory' (*United States v Mazurie*, 419 US 544 (1975)) comprising some 1.2 million members. Tribal and individually-owned Indian lands held in trust by the federal government amount to more than 50 million acres. Reservation boundaries encompass more land than this, a crucial point for the discussion that is to follow.

Tribal reservations are *sui generis* polities in the American legal order, and 'Indian Country' is governed by a *sui generis* body of law. According to the foundational cases of the 1830s (*Cherokee Nation v Georgia*; *Worcester v Georgia*), tribes are self-governing bodies with 'inherent sovereignty', limited only by their status as 'domestic dependent nations' and by express federal law. They hold their lands as a unique 'Indian title,' which entails neither complete sovereignty nor complete ownership; it can be alienated only to the federal government (or its designees) and exists at the sufferance of the federal government (*Johnson v M'Intosh*).[2] States lack regulatory power over tribes. The federal government, however, has 'plenary power' to legislate over Indian Country (*United States v Kagama*).

Law and policy about Indian Country have changed course several times since the late nineteenth century. The *General Allotment Act* (*or Dawes Act*) of 1887 broke up reservation lands and vested fixed amounts in each tribe member. This had the purpose and effect of opening up 'surplus' land for white homesteading. During the 'Reorganization era' (1930s–50s) the Roosevelt Administration refocused federal attention on tribal governments. In 1953, the federal government began terminating its trust relationship with many tribes, subjecting their reservations to state jurisdiction and auctioning off the land held under Indian title. 'Termination' gave way to policies favoring 'self-determination' in the 1970s. Policy reversals never return to the status quo ante; they leave behind new claims and invalidate old ones, creating complex patchworks of ownership and jurisdiction.

The current policy era of 'self-determination' ostensibly aims to enable tribal governments to govern effectively, to provide local public goods and to maintain tribal culture, in part through reservation-based economies that are sufficiently prosperous to lift tribe members out of poverty and unemployment. But contemporary law and policy, mainly judicially-created, undermine these goals. In criminal jurisdiction, civil jurisdiction and economic policy, the courts have put tribes in the position of having to trade off self-determination against economic development. Reservations face rules that mean that policies that promote development carry the risk of whittling away indigenous jurisdiction, rendering the tribes slowly but consistently less able to act as effective governing entities. The viability of tribes as polities is perversely jeopardized by economic growth and good government.

Criminal jurisdiction

Without express Congressional action, states have criminal jurisdiction within Indian Country only over crimes between non-Indians. From the late eighteenth century onward, the federal government's treaties with tribes also guaranteed its jurisdiction over crimes committed by non-Indians against Indians. The tribes' own judicial procedures were primarily rehabilitative and reconciliatory rather than punitive, and so they were generally content to allow the non-Indian government to punish non-Indian criminals.

Beginning in the Reorganization era, however, tribes increasingly adopted constitutional and legal systems that included formal judicial mechanisms of criminal law. By the late 1960s, tribal criminal justice systems were widespread enough to prompt calls for federal procedural guarantees (written into the *Indian Civil Rights Act)*. They became even more significant during the turn to self-determination. Some 30 reservations asserted criminal jurisdiction over crimes committed on their territory by non-Indians by the time the Court squarely faced the question of whether tribal governments could prosecute and punish non-Indians in 1978 in *Oliphant v Suquamish Indian Tribe* (*Oliphant*).

In *Oliphant*, the Court declared for the first time that it was an essential attribute of domestic dependency that tribes had not retained criminal jurisdiction over non-members. The Court argued in part from a federal interest in protecting non-Indians from trial at the hands of a racially and culturally alien community that:

> seeks to impose upon them the restraints of an external and unknown code … which judges them by a standard made by others and not for them … It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by … a different race, according to the law of a social state of which they have an imperfect conception
>
> (*Oliphant*: 210–11)[3]

The majority noted that the issue had not squarely arisen before because tribal governments had only recently developed formal adversarial judicial procedures and criminal codes. It referred to the older (and false) understanding of tribes as being 'without laws,' even while acknowledging the recent changes in tribal judicial systems (*Oliphant*: 197). The majority judgment failed to recognize that this history could cut either way. Assuming that the power to prosecute outsiders had once been an attribute of independent Indian sovereignty, the power's desuetude meant either that it had been forfeited as a condition of dependency – the Court's interpretation – or that it had remained a power *in potentia*, awaiting the development of mechanisms for its exercise. The latter interpretation is, arguably, more compatible with the developmental approach of self-determination as a policy; it looks to tribes gaining more de jure authority as they develop institutions and grow into their full potential sovereignty. In that counterfactual scenario, tribal sovereignty would be limited only by those

restrictions that are inherent in domestic dependency (the lack of international personality and powers of war and peace) or by such restrictions as have been explicitly acknowledged in the past (that is, the inability to alienate land) (*Cherokee Nation v Georgia*; *Worcester v Georgia*).

Oliphant has been subjected to sustained criticism as a piece of judicial reasoning. What concerns us here is the effects of the policy regime it created, which Congress could alter, but has not.[4] A key problem attributed to *Oliphant* is the prevalence of non-Indian crime against Indians: '[M]isdemeanor crime by non-Indians against Indians is perceived as being committed with impunity' (Reno 1995: 115). This implicit message of lack of accountability deters victims from reporting crimes, and police from making arrests because they know there will be no prosecution. This, in turn, encourages the spread of crime and ultimately, the commission of even more serious crime.

The *Oliphant* rule both encourages law-breaking among non-Indians already present on reservations and acts as a perverse selection mechanism to attract precisely those non-Indians who might want the opportunity to be lawless.[5] Probably as a result, Indians are more likely to be subject to interracial than intra-racial violent crime (Greenfield and Smith 1999) and they are victims of violent crime at a much higher rate than are members of any other racial group. The scarce time and resources of US Marshals, attorneys and federal trial courts are not much devoted to property crimes or assaults. Yet, in general only they have the authority to prosecute such crimes by non-Indians against Indians on reservations. Tribes are left powerless to provide one of the most basic of governmental functions: security for the life, limb and property of their constituents.

The severity of this problem depends on how many non-Indians live, work or travel on or near a reservation. As a tribe becomes more prosperous – as on-reservation businesses become more successful, for example – more outsiders will have reason to frequent the reservation more often. And the more that happens, the less able tribes will presumably be to preserve law and order on reservations. Economic development generates de facto lawlessness; it undermines the ability of tribal governments to act as governments that can protect the rights of their members. In contrast, the more autarkic a tribe is, the more economically closed off it is to the outside world, the poorer it is likely to be – but also the safer.

Civil jurisdiction

As late as 1980, the Supreme Court observed as a general proposition that 'Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest' (*Washington v Confederated Tribes of the Colville Indian Reservation*). However, that 'broad measure' was not comprehensive even then. In the first place, the presence of non-Indians was itself a factor in determining whether any given spot was 'on reservation lands' at all. The allotment era had envisioned an end to reservations without quite explicitly providing for it. When allotment ended,

many tribes retained treaties delineating old borders that had never been federally repudiated, but those borders now included large numbers of non-Indian freeholders. 'Unfortunately, the surplus land Acts themselves seldom detail whether opened [to non-Indian homesteading settlement] lands retained reservation status or were divested of all Indian interests' (*Solem v Bartlett*: 468; see Clinton 1976). The courts responded with a doctrine of implied or imputed diminution – in which Congressional intent to diminish reservation boundaries could be imputed in part on the basis of demographic changes after the fact (*Rosebud Sioux Tribe v Kneip*; *Solem v Bartlett*: 471). If large numbers of non-Indians had migrated in between allotment and a later court case, that migration was relevant to evaluating whether the reservation would be deemed to have shrunk at the time of allotment. Where diminution had occurred (or was held to have occurred), the tribe had no jurisdiction at all outside the shrunken boundaries.

Nonetheless, within reservation boundaries a default presumption of civil and regulatory jurisdiction persisted; non-Indian conduct when it was not on non-Indian fee land was subject to both regulation by tribal authorities and civil jurisdiction in tribal courts. In 1959, the court in *Williams v Lee* ruled against state jurisdiction and in favor of tribal jurisdiction in a suit between a non-Indian and an Indian when the cause of action arose on reservation land. 'Reservation Indians' have a right, in doctrinal language to which the Court has often since returned, 'to make their own laws and be ruled by them' (*Williams v Lee*: 220). Though this careful locution could mean that *only* Indians were to be ruled by Indian laws, it was not used in that way by the Court. Instead, the Court in *Williams v Lee* followed the fundamental precept of federal Indian law established by the Marshall Court in *Worcester v Georgia* (519), that state jurisdiction could not follow non-Indians onto Indian land. To allow state civil jurisdiction to follow outsiders onto reservation territory would 'infringe on the right of the Indians to govern themselves' (*Williams v Lee*: 222). So the non-Indian who claimed to have suffered a wrong from an Indian on reservation lands is also, in that dispute, governed by Indian laws.

In 1981, this longstanding presumption of civil jurisdiction over non-members was effectively reversed. *Montana v United States* (*Montana*) held that, on land owned by non-Indians within reservation boundaries, the 'exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations is inconsistent with dependent status of the tribes and cannot survive without express congressional delegation' (564, emphasis added). Drawing on and extending the logic of *Oliphant*, the Court concluded that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe,' with only two exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over

> the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
>
> (*Montana*: 5650)

The non-jurisdiction rule and the second *Montana* exception

The final sentence of this passage seems to leave open the possibility that non-Indian conduct could be regulated on a mere showing that it 'has some direct effect on the … health or welfare of the tribe.' This power of regulation would be less than a general police power but would constitute a general tribal regulatory and governing capacity. The appearance of breadth is misleading, however; '[a]lthough broadly framed, this exception is narrowly construed' (*Lewis v Allen*: 515). *Montana* itself began that trend when the Court held that hunting and fishing on tribal lands without tribal permission was immune from tribal regulation because it did not 'threaten the Tribe's political or economic security' or 'imperil [its] subsistence or welfare.' Of course, as per *Oliphant*, it is only non-criminal conduct that the tribe could even conceivably regulate; imperiling tribal welfare by murdering the tribe's members will not fall within tribal jurisdiction.

Subsequent cases, especially *Brendale v Confederated Tribes and Bands of Yakima Indian Nation* (*Brendale*) and *Strate v A-1 Contractors* (*Strate*), narrowed the *Montana* exception further. *Brendale*, in sharply limiting tribal zoning authority over land owned by non-Indians within reservation boundaries, held that the effect must be 'demonstrably serious and *must imperil* the political integrity, economic security, or the health and welfare of the tribe' (*Brendale*: 431, emphasis added). Mere 'direct effect' would not do. Moreover, the Court placed great emphasis on the conditional language used in Montana:

> We find it significant that the so-called second Montana exception is prefaced by the word 'may' […] This indicates to us that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances.
>
> (*Brendale*: 429)

Strate went further still, refusing to treat action that imperils individual health or welfare as subject to tribal jurisdiction, if it did not imperil the existence of the tribe itself (459). The case concerned a traffic accident on a road that ran through the reservation (which lay on land held in trust for the tribe). Justice Ginsburg decided that the tribe lacked jurisdiction over a non-Indian driver, stressing that the *Montana* test should not be 'read in isolation,' but rather in light of the 'necessary to protect tribal self-government' proviso. Borrowing language from *Williams v Lee* but transforming it from a sufficient to a necessary condition, Ginsburg J concluded that authority over accidents caused by non-Indian drivers

is not 'needed to preserve "the right of reservation Indians to make their own laws and be ruled by them"' (*Strate*: 459).

Most recently, in a pair of 2001 cases, *Nevada v Hicks* and *Atkinson Trading Co v Shirley* (*Atkinson Trading*), the Court explicitly equated the *Montana* rule plus its second exception with the *Montana* dictum rejecting jurisdiction over non-members 'beyond what is necessary to protect tribal self-government or to control internal relations' (*Atkinson Trading*: 650–51, quoting *Montana*: 564), effectively replacing the second exception. *Atkinson Trading* held that a hotel on land owned in fee by a non-Indian could not be subject to a tribal hotel occupancy tax, effectively removing businesses operated within reservation boundaries by non-Indians on non-tribal land from the reservation government's tax base and regulatory authority, even though the hotel was under the protection of the tribal ambulance, police, and fire departments, surrounded by tribal land, and operated by a licensed 'Indian trader.' Neither the trader nor the guests would be construed to have a consensual relationship with the tribe authorizing taxation. *Nevada v Hicks* was more radical still: torts allegedly committed by Nevada state police against a tribe member on tribal land in executing a search warrant related to a crime committed off the reservation could not be adjudicated by tribal courts. This was the first case to squarely hold that *Montana* governed regardless of whether the land was owned by the tribe or not, and that within the *Montana* analysis, the status of the land would be at best one factor to consider.

Those two cases have come close to whittling away tribal jurisdiction over non-members altogether – rejecting, for example, the apparent survival in *Montana* and *Brendale* of a decisive distinction between tribal and non-tribal land, and so undoing the traditional rule that the reservation's civil jurisdiction could at least run over Indian land. After 20 years of *Montana* progeny, the scope of Indian civil jurisdiction over non-Indians appears vanishingly small (see especially Frickey 1999; Krakoff 2001). No unified Supreme Court majority has ever agreed that *any* regulation fell into either one. Circuit courts have followed the same general rule. The second exception is interpreted without any 'aggregation analysis'; that is, the particular non-Indian's particular activity must imperil the tribe, and it will not suffice to show that many non-Indians repeatedly engaged in the activity would do so (*Yellowstone County v Pease*). As one District Court Judge asked rhetorically,

> What does it mean to have the 'ability to enact and be governed by its own laws' if the Navajo Nation cannot extend the scope of its own laws to protect the very lives of its own police officers on its own lands, and in its own courts? When does the exception for 'conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe' apply?
>
> (*MacArthur v San Juan County*: 984 n 135)[6]

The perversity of the post-*Montana* and *Strate* system operates in a few ways. First, as a tribe becomes relatively politically robust, it could actually lose

jurisdiction over non-members because it is less 'imperiled.' More importantly, however, one particular set of non-Indians engaged in one particular kind of conduct will rarely be the measurable difference between economic or political survival and collapse. Because courts will not engage in 'aggregation analysis', it may be that a particular, individual, non-Indian may never be subjected to jurisdiction because it cannot be shown that his or her particular conduct would imperil the tribe's political integrity or economic subsistence. But as non-Indian populations grow and own increasing shares of land nominally within reservation boundaries, the inability to regulate them or that land makes the tribe ever more irrelevant as a governing body, unable to do those things that local governments must be able to do.

Finally, diminution cases as recent as 1994 and 1998 used present local population counts as evidence of the diminution of reservation boundaries in the past (*Hagen v Utah*; *South Dakota v Yankton Sioux Tribe*). Not only does the in-migration of non-Indian residents attenuate the criminal and civil jurisdiction of tribal courts and tribal governments' regulatory authority; even today it plausibly might reduce the physical size of the reservation itself.

Rights-based objections

Even if the current system is perverse in the ways I am describing, perhaps there is some countervailing or trumping consideration that should prevent legislative reform. If non-Indians have a (moral or constitutional) right not to be governed by tribal jurisdictions, then they should not be so governed – or, depending on one's theory of rights, the case for jurisdiction at least becomes much harder to make. Although this argument lurks in the background of, for instance, Justice Souter's concurrence in *Nevada v Hicks*, Kennedy J has made it most forcefully and explicitly in *United States v Lara* (see Royster 2006):

> Lara [an Indian but an enrolled member of a different tribe], after all, is a citizen of the United States. To hold that Congress can subject him … to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State … Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.
>
> (*United States v Lara*: 211–14, citations omitted)

This is not particularly good political theory, though arguments from consent rarely are. All citizens of the United States are treated as having consented to

the whole of the constitutional order. The standards of Lockean *tacit* consent are applied to the federal government and the states. All tribally enrolled Indians are treated as having consented to the jurisdiction of their tribes but in a way that suggests a requirement of *express* consent – even though Indians may be born to a tribal identity and simply never renounce it, just as most American citizens are born to that citizenship and never renounce it. But somehow the absence of express consent is fatal to tribal jurisdiction over non-members, even though nothing is more common in the federal system than for a person to be subject to the criminal or civil jurisdiction of a state without express consent. Mere habitation from birth or mere physical presence while transiting through a state, are certainly sufficient for criminal jurisdiction and often for civil jurisdiction as well. As in Lockean tacit consent, 'passing through' is enough. In short, consent is either such an exacting standard that there is very little of it in the world, and so there are very few legitimate exercises of political power; or it is such a weak standard that it is implausibly everywhere, and constrains states almost not at all. In Justice Kennedy's hands it manages to be simultaneously exacting for tribes and unconstraining for non-tribal governments.

Justice Souter suggests that because tribal courts 'differ from other American courts … in their structure, in the substantive law they apply, and in the independence of their judges[,]' there is something approaching a right of non-Indians not to be subject to them (*Nevada v Hicks*: 384). Keeping non-Indians free from tribal civil jurisdiction 'squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be "protected … from unwarranted intrusions on their personal liberty."' 'Unwarranted' begs the question, but the underlying claim is important: non-tribe members have a *right* not to be subject to criminal jurisdiction or lawsuit or regulation *or* taxation by reservation governments. Justice Souter does not, as Kennedy J did, hint that this right might even trump Congressional legislation; he does not address the question. But, like Justice Kennedy's, Justice Souter's argument concerns the rights of non-members, not the meaning of domestic dependency or the boundaries of retained inherent sovereignty, implying a moral foundation for the results in *Oliphant* and *Montana* that those courts did not assert. And the implication is unusual. Rules of jurisdiction are not normally inferred from individual rights, and the same procedures are not normally thought of as compatible with some people's rights but not others'.

What could justify a right of non-Indians to be free from Indian courts? It seems to me that some combination of the following views underlie Justices Souter's and Kennedy's arguments:

1 Tribal law is properly personal law rather than territorial governance, regardless of how much a given reservation government tries to comport itself like a county or a state; it is improper to subject anyone to personal law to which he does not subscribe, rather like subjecting a non-believer to the jurisdiction of canon or rabbinical courts.

2 Tribal judicial systems and legal codes are and will remain so hopelessly inadequate, or at best so hopelessly opaque to outsiders, that they cannot be analogized to the systems and codes of states, counties, or municipalities.
3 Because reservation law is made by a government in which non-tribe members are not participants and cannot become participants, it violates basic democratic norms to subject them to it.

The first idea is a gross, albeit common, mistake about the legal status of Indian tribes. Non-believers have a right not to be sanctioned by religious courts, but religious courts in the United States are not allowed to impose criminal punishments on anyone. The only punishments at their disposal are intra-religious, for example, excommunication. The same is true for clubs, residential associations and universities: they may not sanction non-members at all but they may not sanction anyone with criminal penalties. As long as reservation governments are governments, with responsibility for maintaining peace and order in geographically defined territories and criminal authority over members, the analogy to voluntary associations or religions fails.

The inadequacy of some *particular* tribe's courts might ground a right not to be tried in them. Unjust substantive laws might ground a right not to be subject to them. Or there might be no initial right to immunity but a good claim to appeal outside the system if inadequacy could be shown. Justice Souter complained about the un-reviewability of reservation courts – but that calls for reviewability, not for gutting their initial jurisdiction.

If non-Indians have a legal right to be judged by a judiciary that is suitably independent and procedurally just, and some reservations do not meet the requisite threshold, then depriving all reservations of jurisdiction over all non-Indians is hardly the only possible response. The *ex ante* certification and preclearance of reservation judiciaries by some combination of the Bureau of Indian Affairs and the Department of Justice would provide them with an incentive to move toward an independent judiciary or to adopt similar procedural protections. Alternatively, *ex post* federal court review might be authorized on the particular question of the adequacy of a tribe's judicial institutions, though this would leave more uncertainty about which tribes could regulate or try non-members. The right not to be tried by inadequate courts simply fails to ground a right not to be tried by Indians.

Similarly, the right not to be tried by culturally alien laws[7] might justify imposing choice of law rules on tribal courts in civil disputes involving non-Indians, but it cannot ground a right to be free of those courts altogether, or a right to be free of rules that are culturally transparent, from zoning to liability in tort for reckless driving. The supposed cultural opacity of tribal law to outsiders has often been mentioned but no case has reached the Supreme Court involving non-Indians being subjected to culturally or religiously specific norms. Tribes are both territorial governments and cultural communities, and they must distinguish between those roles; they do not seem to have much difficulty doing so.

We are then left with the idea that because non-members cannot join tribes, they may not be governed by them. This surreptitiously slips from one consent-based justification to another. No other polity, including states or the federal government, is routinely prevented from exercising criminal jurisdiction over those within its boundaries, regardless of their citizenship. How democratic or ethnically-specific the legislating government is does not enter into the question. No court ever suggested that African-Americans in the Jim Crow and pre-Voting Rights Act South lacked the obligation to obey the general criminal law.

Economic policy

Recall the first *Montana* exception: 'a tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.' It has been construed narrowly, especially in *Atkinson Trading*, albeit not quite as narrowly as the second. It is not triggered unless there is a tight nexus between the consensual relationship and the regulation or tax at issue. It is not triggered by accepting protection from a reservation government's emergency personnel – whether the unknowing acceptance of police protection by driving through the reservation or the knowing acceptance of fire and police protection by operating a permanent hotel within reservation boundaries. One of the only cases that found jurisdiction under this exception concerned a private non-Indian operator of a tribally licensed bingo business (*United States ex rel Morongo Band of Mission Indians v Rose*). There seems, in the face of doctrinal uncertainty, to be reason to think that doing business with the tribe itself or under its aegis is more likely to trigger jurisdiction than are 'consensual dealings' with 'its members' severally.

As a result, reasonably risk-averse tribes, unsure how far their writs extend, will encourage tribally-owned enterprises. This brings us to the third perversity: the recurring incentive to concentrate whatever economic development does take place in the hands of the tribe and the firms that it owns. Tribes have been left with strong legal and policy incentives to engage primarily in government-led and government-owned development. Consider:

1 The first *Montana* exception means that tribes' civil jurisdiction over non-Indians is at its maximum in regulating those who enter into contractual relations with the tribe and its agencies.
2 Unlike privately-owned firms, tribes and tribally-owned enterprises are immune to federal corporate taxation, a substantial de facto subsidy.
3 Because of how *Montana* and its progeny limited taxing powers, economic growth that brings profits or increased property values to non-Indians does not generate increased tax revenue for the tribe. Reservation governments are stymied in any attempt to align economic growth with growth in public finance through taxation, because they would competitively disadvantage

Indians in the on-reservation economy. But tribally-owned firms operate as direct sources of tribal revenue.

4 Sovereign immunity limits both the legal liability of some tribally-owned firms and the enforcement tools available to states when trying to force them to collect sales taxes from non-Indians; for example, for the on-reservation purchase of cigarettes.

5 Finally, the casino economy that has come to dominate a few tribes' economic systems is always dominated by the reservation government. Under the *Indian Gaming Regulatory Act*, 25 USC § 2701 (1988), tribes themselves (not private actors) must negotiate with the states to authorize on-reservation gambling.

Within tribes as elsewhere, government-owned firms tend to be relatively inefficient, unproductive, and unresponsive to market signals. They are not allowed to fail. In order for the gap between on- and off-reservation economies to narrow over time, reservations need higher sustained, compounded growth than the rest of the American economy. Even slight disincentives to productivity growth compound over time to leave the laggards ever-farther behind. Tribally-dominated economies may also be politically undesirable. Tribes often own the reservation media or at least the firms that advertise, making it difficult to build or sustain an independent and critical press that will monitor reservation governments (see Ludtke 2005). Reservation political systems also tend to be highly patronage-intensive, sometimes with the attendant corruption (Cornell and Kalt 2007).[8]

Casino economies in particular may be prone to an analogue of the 'resource curse' that afflicts developing countries whose economies are dominated by certain natural resources. The resource curse is thought to slow economic growth and to stunt democratization and institutional maturation (see Ross 1999).[9] At least some explanations of the perverse effects of resource endowment emphasize features that match the political economy of casinos: a windfall source of cash for the state, independent of the condition of the society's economy, freeing it from both democratic accountability and from market discipline. Rent-seeking political activity dominates over productive economic activity because the gains to the former swamp those to the latter. Economic development suffers because productivity growth also fails to be rewarded. Political development suffers as well; making corruption and political violence common.

This casino analogy is speculative. But the same mechanisms seem to be in place. Some of the same effects are as well; failures of the rule of law, violence surrounding elections and corruption have all been widely noted on reservations over the past two decades or so. Even if the resource curse analogy fails, however, the other effects remain. Tribally-owned enterprises are de facto subsidized within reservation economies by policies outside the tribes' control, to the potential detriment of both the economic and the political development that self-determination as a policy professes to encourage.

Jurisdictions that will lose their territorial integrity, their ability to maintain law and order, and their public finance in the event of in-migration face a choice between welcoming migrants and spiralling into impotence, or retaining authority at the price of economic growth. This is the trade-off the federal judiciary has forced tribes to face. This outcome arises in part from unreasonable cultural assumptions about Indian law and government. Perversely, it also arises from ad hoc judicial interventions responding to the success of reservation governments since the 1960s in developing Anglo-style judicial institutions that *could* plausibly exercise general territorial jurisdiction. But perhaps most of all, this crisis has arisen from callous inattention to the strata of jurisdictional problems laid down in a century of often bad, and always unreliable, law and policy. Tribes have been left with the responsibility to govern patchwork and intermixed territories and populations without the capacity or the legal authority to do so effectively, seriously inhibiting their development and self-determination in the future.

Notes

1 Tomlinson Professor of Political Theory and Coordinator, Research Group on Constitutional Studies, McGill University. This chapter is an abridgement and adaptation of J.T. Levy (2008) 'Three perversities of Indian law', *Texas Review of Law and Politics*, 12(2): 329–68. Thanks to audiences at the 2006 New England Political Science Association, the University of Chicago Law School Works in Progress Workshop and the 2007 Faculty Conference of the Federalist Society. This essay is in part an outgrowth of my work at the University of Chicago Law School, 2004–5, for which I owe thanks to both the Mellon Foundation and the School. Thanks to Emily Nacol, Alexandra Chevalier, Sarah Wellen and Devon Cass for valuable research assistance; to Tom Schlosser and the editors of this volume for comments; and to Zoë Miller-Vedam for research assistance in condensing the article to its current form.

2 See the more substantial discussion of internal and external sovereignty and Indian title in Kent McNeil's chapter, and the discussion of *Johnson v M'Intosh* in Ian Hunter's chapter, in this volume.

3 The Court was quoting from, and relying on, *Ex parte Crow Dog*, which denied the federal government authority over intra-tribal crimes.

4 The *Oliphant* Court was clear on this point; the six-member majority stated that Congress could subject non-Indians to tribal jurisdiction (198, note 8), and the two-member minority held that they already were subject to such jurisdiction (212).

5 I owe the point about selection to Cass Sunstein.

6 Judge Jenkins felt constrained to write the following remarkable and arch passage defending his willingness to engage in good faith analysis of the *Montana* exceptions:

> Following the recent guidance of *Atkinson Trading Co. v. Shirley* and taking the Montana Court at its word – and, of course, there should be no reason to infer that the United States Supreme Court does not mean what it says – the two Montana 'exceptions' allowing for the exercise of inherent tribal sovereignty over non-Indians on non-Indian fee lands must be read to have some genuine substantive meaning and day-to-day practical significance in the lives of Native Americans and their tribes, bands and communities.
>
> (*MacArthur v San Juan County*: 953 n 90)

He added:

> This court has not yet grown so cynical as to infer that the Montana analysis was concocted merely as a device to be used to diminish Indian tribal sovereignty 'one case at a time,' though some argue quite convincingly that such has been its actual effect, intended or not.
>
> (*MacArthur v San Juan County*: 953)

7 In *Ex Parte Crow Dog*, the Court expressed concern about states trying Indians for intra-tribal crimes, seeing an alien community that 'seeks to impose upon them the restraints of an external and unknown code … which judges them by a standard made by others and not for them. … It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by … a different race, according to the law of a social state of which they have an imperfect conception'. The Court quoted and relied on this language almost a century later in *Oliphant* in insulating non-Indians from tribal jurisdiction.

8 The ongoing work of Cornell and Kalt, and of their Harvard Project on American Indian Economic Development, has been an important spur for my thinking on most of the issues addressed in this paper.

9 Whether there is a resource curse, and if so, when and why, is much-debated. For an overview of this literature, see Humphreys *et al.* (2007).

Chapter 14

Section 223 and the shape of native title

The limits of jurisdictional thinking

Shaunnagh Dorsett and Shaun McVeigh[1]

Introduction

In his 2007 essay, 'Public space', Paul Carter describes the encounter in the late 1780s between first fleet surveyor William Dawes and an Eora woman known as Patyegarang. According to Carter, Dawes transcribed Patyegarang's speech, eager to learn her language. For Carter, it is such encounters which underwrite or allow a meeting place, and relations between laws, to develop. One question, then, might be what law governs such meeting places between settlers and indigenous people? According to Carter, the meeting place is a kind of between – a place where their respective laws 'were put in parentheses, and new, provisional rules of exchange improvised' (Carter 2007: 430–31). In some ways, this echoes Pearson's formulation in the 1990s of native title as a recognition space. He explained that if native title is not 'of' the common law, neither is it 'of' aboriginal law:

> Native title is therefore the space between the two systems, where there is recognition. Native title is for want of a better formulation the recognition space between the common law and the Aboriginal law which forded recognition in particular circumstances.
>
> (Pearson 1997)

In many ways, Carter's formulation of a meeting place between laws is attractive. A between space suggests that, if only for a short time, there is a place in which one can negotiate or perhaps even escape law – the possibility of a place in which two laws can meet on (possibly) equal terms – even if that space between was only open briefly. But as common lawyers know, we do not easily suspend laws. Nor is the idea of a space between easily conceived by, or within, our juridical order. Nevertheless, the idea of the meeting place is valuable, even if it is difficult to conceptualize as a space between. The common law struggles to create an appropriate form of the meeting of laws and of the conduct of relations between itself and indigenous laws. In this chapter, we investigate the terms on which our common law jurisdiction engages with other jurisdictions. We can think about this in two registers: first, as a matter of legal doctrine and the jurisdiction it establishes within the common law; second, as a matter of a

jurisprudence which is concerned with the conduct of lawful relations between common law and indigenous jurisdictions.

When we talk about legal doctrine we often think of law as a system of rules which are then applied in specific circumstances. What we are interested in here are the ways in which the common law creates meetings with other laws. We phrase this in terms of jurisdiction. To think about native title as the product of jurisdictional engagement or practices (as a jurisprudence) is to think about what belongs to law and what is authorized through law (in this case the common law). When we think jurisdictionally it means we need to think of the doctrinal rules of native title as establishing the conditions of the meeting of laws. Ultimately, despite their vacillations, the significance of the doctrinalrules of native title (and whatever the rules or recognition are at any time) lies in the way in which the meeting point addresses and governs that limit. It is worth remembering that, for us, it is the jurisdictional practices of our common law which structure the meeting place. There may well be multiple meeting points within indigenous jurisdictions which have their own ways of engaging and structuring encounters with the common law.

One of the thematic concerns of this book is the exploration of the potential to recover spaces between indigenous and settler governance. In this chapter we emphasize the ways in which a space between laws> can be understood – however inadequately – in terms of the creation of a meeting place of laws. This is not so much a matter of finding a space outside of the common law but of taking responsibility for the creation of meeting places of law. This is so even if responsibility might mean no more than acknowledging the limits of what can be said through a common law jurisdiction.

A meeting of laws

Doctrinally, native title is an intersection point between the common law and multiple indigenous jurisdictions. In recognizing native title, the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo (No 2)*) created a relationship between two laws – those of the Meriam people and the common law of the Australian nation. The language of the High Court itself recognized this relationship, though it did not necessarily see it as an equal relationship. Nor was the High Court able to articulate precisely either the nature of the relationship between these laws or the manner in which they engage. According to Brennan J, '[n]ative title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory' (*Mabo (No 2)*: 58). Or, as stated in *Fejo v Northern Territory* (1998) 195 CLR 96, 'there is an intersection of traditional laws and customs with the common law' (128). While the High Court acknowledged an intersection between indigenous law and common law, these cases left open to question the form which that intersection might take.

The idea that native title is a meeting point – an intersection of jurisdictions – should be understood by both lawyers and historians who study the history of

indigenous engagement with English laws. It is in the colonial context, perhaps, that it is most easy to see the legal relations between indigenous and non-indigenous conducted as matters of jurisdiction. Much of the discussion of common law jurisdiction and indigenous peoples in recent years has taken place through an examination of the historical encounters between Indigenous Australians or Māori and the Crown (in its various guises) (Dorsett 2009; Ford 2010; McHugh 2004; Ward 2006). Such examinations have proceeded through both a consideration of common law jurisdictional practices, the consequent amenability of indigenous peoples to English law and the effect on such practices of the instantiation of modern understandings of territorial sovereignty. The instantiation of this mode of territorial sovereignty has been traced to a key period of the beginning of the nineteenth century. For those interested specifically in the relationship between territorial sovereignty and the 'recognition' of indigenous jurisdictions in the colony of New South Wales, the Supreme Court's decision in *R v Murrell* (1836) 1 Legge 72 (*Murrell*) has been of particular interest. For some this case marked a turning point, instantiating territorial sovereignty/jurisdiction. From this point, it is possible to see a diminution in the engagement of indigenous and common law. For others this is an over-reading and some form of pluralism continued (for example through the recognition of aboriginal customs in the context of sentencing practice, a topic discussed by Douglas and Finnane in this book).

One of the consequences, however, of thinking about relations between indigenous and non-indigenous law is that it abrogates any need to think about where the contemporary meeting point of laws might be. This is so either because we assume there is no meeting point (because of a demise of legal plurality) or because we accept that the meeting point is territory and that the meeting therefore takes place under Australian sovereignty and according to the common law. While territory might be considered a poor meeting place because it leaves no room for indigenous authority, it is a simple one: law bound to defined space leaves little room for the authority of any other law to be recognized.

Examined through a jurisdictional idiom, however, a slightly different reading of that 'key moment' in the 1830s emerges. The finding of the court in *Murrell* that Indigenous Australians were amenable to the common law did not end legal plurality; it simply changed the terms of jurisdictional engagement. The engagement of jurisdictions was an important matter pre-1836 and remained so post-1836. However, the shape or form of the engagement of laws changed. While there were still some pleas to the jurisdiction of the common law after 1836, by the middle of the nineteenth-century questions of jurisdiction and of the engagement of laws had largely disappeared.

In the modern context it is less easy to see legal relations between indigenous and non-indigenous as a matter of jurisdiction. Within legal doctrine there has been a shift in the traditional language of legal authority. Where once legal authority was articulated through the language of jurisdiction, that language has been supplanted by the language of sovereignty. The language of sovereignty can be seen in most High Court judgments of the early native title period. As

stated in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*), '[t]he assertion of sovereignty marked the imposition of a new source of authority over the land' (94). Further, since the United Kingdom's *Judicature Acts* of 1872–75, and the administrative joining of multiple jurisdictions as divisions of a single High Court, there has been a general slipping away in the use of jurisdiction as a way of thinking about our own legal ordering. Following *Mabo (No 2)*, and despite historical research into the colonial period, lawyers think little about this early history, or even of the place of jurisdiction in our legal system.

The doctrinal instantiation of sovereignty as the language of legal authority (to the extent that there was any doubt post-*Mabo (No 2)*) was completed in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Although the High Court in *Yorta Yorta* proceeded from an understanding that native title constitutes the point of intersection between two laws or, as the court put it, two 'normative systems' (441–42), it was made clear that interests created after this meeting by one system (aboriginal law) would not 'be given effect by the legal order of the new sovereign' (443) (the common law). The assertion of sovereignty by the British Crown 'necessarily entailed' that thereafter there could be 'no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and … that is not permissible' (444).

It might be thought, then, that, doctrinally speaking, *Yorta Yorta* finally cleared up any messy legal plurality which hung over from the colonial period and was not resolved by *Mabo (No 2)*. *Yorta Yorta* worked to erase the contingency of territorial sovereignty and to implement the association of nation-state (singular) to national law – an association which characterizes modern sovereignty. Unfortunately, the interpretation of native title doctrine in the last decade has taken place in the shadow of *Yorta Yorta*'s attempted erasure of plurality.

Two ways of engaging seem possible after *Yorta Yorta*. The decision insisted either that there is no Aboriginal law as such post-sovereignty, merely a 'normative system' which is less than law (maybe custom). In this case, no meeting point between laws is possible. Or *Yorta Yorta* might allow that there are Aboriginal laws but they run in parallel to the common law and, hence, never meet our laws unless a non-legal, ethical meeting point is built between them. The problem with the first view is that other laws do not just go away because we assert that they are not there or have never been there. At best, we can make a jurisdictional assertion that something no longer exists (or never did) for the purposes of our jurisdictional arrangements. The problem with the second view is that it obviates the need to take responsibility for the quality of the meeting between indigenous law and common law (Dorsett and McVeigh 2002; Dorsett and McVeigh 2005). The very existence of native title doctrine itself demonstrates both the continuation of indigenous law and its intersection – however partial – with common law. The question for us is not whether there is a meeting of laws but 'what is the quality of their encounter?'

The meeting place

If on one reading of the High Court's decisions, native title exists at the intersection of laws, the question to be asked is: 'where is the meeting place now located?' Of course, there may be more than one meeting point and the location of that place may (and will) change over time. One meeting place is s 223 of the *Native Title Act 1993* (Cth) (*NTA*).[2] Section 223 provides that:

> (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.

While s 223 is intended as a definitional, rather than 'operational', section, its interpretation over more than a decade, predominantly by the Federal Court, has had significant effects on native title doctrine. This section shapes the encounter of laws and hence the form of native title. In *Yorta Yorta* itself, the High Court mandated that after the enactment of the *NTA*, '[a]n application for determination of native title requires the location of that intersection [between common law and indigenous law and custom], and it requires that it be located by reference to the *Native Title Act*' (439; see also *Ward*: 65–66 [16], 69 [25]). According to Gleeson CJ, Gummow and Hayne JJ: '[i]t is necessary, as has now been said repeatedly, to begin consideration of a claim for determination of native title by examination and consideration of the provisions of the *Native Title Act*' (*Yorta Yorta*: 440 [32]). *Yorta Yorta* fundamentally changed the terms of engagement between laws, then, by giving primacy to interpretation of the statute.

As commentators such as Pearson (2009) and Strelein (2006) have pointed out, at a doctrinal level, that the judicial focus on s 223 has had a significantly restrictive effect on the scope of native title outcomes. However, our interest is in the jurisdictional quality of the encounter through s 223. Thinking about the ways in which laws meet, and the quality of their encounter as a jurisdictional matter, allows us to understand something of the shape of native title from within the form of law. Thinking jurisdictionally here provides a way of drawing out the limits of legal engagement that can be expressed within Australian common law.

As a result of the relocation of the meeting point to s 223, only rights and interests that can be characterized as falling within that section can be recognized as interests for the purposes of the *NTA*. Every key phrase in s 223 has been scrutinized by the Federal Court and has resulted in a body of (not always entirely consistent) case law which presents significant barriers for claimants. Key

phrases include 'communal, group or individual' (the so-called 'chapeau' to s 223); 'rights and interests … in relation to land and waters' (chapeau); 'traditional laws acknowledged'; 'traditional customs observed' (s 223(1)(a)); and 'connection' (223 (1)(b)). Problematically, none of these phrases are themselves defined in the Act, in accordance with the original intention that the section be a 'conduit' between the common law and the Act.[3] Over the last decade, the continual tightening of the interpretation of these words in s 223 has truncated recognition of Aboriginal relationships to country as native title (McHugh 2011). The case law has led to increasingly introverted and fragmented interpretation of s 223. The result is that a simple definitional/proof section has been transformed into a jurisdictional 'limitation point' and native title doctrine now incorporates an atomized view of selective parts of Indigenous law. This atomized view is accentuated by the requirement in s 225(b) that native title determinations should elaborate the 'nature and extent of the rights and interests'.

Here we take up one facet of s 223: 'rights and interests'. The requirement to prove native title in s 223 has been the subject of elaboration in a number of decisions. At the time of the decision in *Mabo (No 2)* one of the matters which received attention was whether native title was property or not. In that decision, Brennan J equivocated as to whether native title could be proprietary. Some standard land law texts still ask this question. The connection between questions of property and native title is maintained by two (related) matters: first, the early analogizing of native title to the dominant 'bundle of rights' metaphor of property (see *Yanner v Eaton* (1999) 201 CLR 351, [17]); and second, the use of the words 'rights and interests', 'in relation to' and 'land and waters'. Further, the definition of 'rights and interests' in s 223(2) includes, but is not limited to, 'hunting, gathering, fishing', thereby ensuring that these are seen as the paradigmatic examples of native title.

For doctrinal lawyers, one way of thinking about the content of native title is through the grid of existing legal categories. It is the category that shapes native title doctrine. In *Bulun Bulun v R and T Textiles Pty Ltd* [1998] FCA 1082 (*Bulun Bulun*), von Doussa J in the Federal Court held that native title could not include matters such as cultural knowledge (here designs used on a tea towel). To conceive of native title as including cultural knowledge would, according to Von Doussa J, 'fracture the skeleton of the common law' (*Bulun Bulun*: [9]). For Von Doussa J, native title is a matter of real property law, while cultural knowledge is a form of intellectual property. We tend to think of law through set legal categories, and native title has become a subset of real property as a result of the language of the Act ('rights', 'interests' 'in relation to … land waters', 'hunting', etc.). The problem is, of course, that indigenous relationship to country does not fit neatly into existing legal categories, including that of real property as demonstrated by *Bulun Bulun*. Hence, only those parts of that relationship which we think of as being about real property end up being recognized as part of a determination of native title. As will be seen, 'rights and interests' is a matter of describing 'social practices' or 'custom' to a sufficient level of proof for recognition. Thinking of native title through legal categories also results in us losing the sense in which native title is

a jurisdiction; rather, it focuses our attention on matters of substance or content as if the character of the meeting of laws had already been decided.

Another way of thinking about all of this might be to ask a different (jurisdictional) question. What kinds of relations are being addressed in s 223? This question turns ultimately to the substance or quality of the legal relations between laws and, hence, to the form of native title. One example of the problematic way in which 'rights and interests' in s 223 are interpreted is the difficulty faced in including what might be termed (in a kind of property language) as non-specific non-usufructuary claims within the ambit of s 223, for example the 'right to speak for country'. In *Lardil Peoples v Queensland* [2004] FCA 298 (*Lardil Peoples*), for example, the claim included the right to speak for an area offshore. Justice Olney noted that:

> to state the right as '*a right to speak for Country*' lacks the precision required by the Act. In fact it is the expression of a concept which embraces a '*bundle of rights*' varying in number and kind, which may or may not be capable of full or accurate expression as rights to control what others may or may not do with the land and waters: *Ward* at [95].
>
> (*Lardil Peoples*: [71])

Rather than recognizing a right of custodianship for country or a right to participate in decision-making with respect to the area, Olney J transformed the claim into a request for the right to access / right to control access to the claimed area. The judgment further atomized the reasons for which access would be allowed, most of which boiled down to hunting and fishing (for subsistence) and ceremonial purposes (*Lardil Peoples*: [7]).

Despite *Lardil Peoples*, claimants continue to assert rights such as 'a right to speak for country' although it is more generally now phrased as 'right to protect'. In the recent decision in *Akiba v Queensland (No 2)* [2010] FCA 643 (*Akiba*), the claimants claimed 'rights "to protect resources", "to protect the habitat of resources" and "to protect places of importance"' (*Akiba*: [512]). As in *Lardil Peoples* this was contentious for two reasons: first, how was this 'right to protect' to be understood as an issue of control and access; second, was it sufficiently precise to be a 'right'? For Finn J (and counsel for Akiba) 'protect' could not be separated from 'control'. According to Finn J:

> there is evidence that the Islanders have engaged, and do engage, in resource conservation measures and have an awareness of the inter-generational need for this. There equally is some evidence of lawful remonstration against outsiders and Islanders from more distant places, who were engaging in practices which were considered to be likely to deplete resources or to harm habitat.
>
> (*Akiba*: [532])

Despite this evidence, his Honour noted: 'I have difficulty in understanding what the "protect" rights actually comprehend in the marine context of Torres

Strait. The uninformative generality of the language of the rights exaggerates the difficulty' (*Akiba*: [534]). As a result, '[t]he rights, in short, claim an unelaborated entitlement to do whatever is appropriate in the circumstances to protect but which falls short of controlling the access and conduct of others' (*Akiba*: [535]). The claim failed, in part because of Justice Finn's assumption that one can only protect through control, and in part because the claimant had not atomized the claimed rights to the degree that Finn J thought was required by *NTA* s 223.

This is not to say that rights of this kind have never been recognized. However, they are generally assessed in light of the quality of control that is claimed. Low-level 'rights to protect' can be recognized where they are of a 'non-exclusive' nature. They may in that context involve actions of a 'physical character'. What is involved in 'protect' must also be itemized. In *Daniel v Western Australia* [2005] FCA 536 (*Daniel*) the determination included:

> a right to protect and care for sites and objects of significance (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm, but not including a right to control access or use of the land by others)
>
> (*Daniel*: [6])

This was one element of an order composed of upward of 20 precisely defined, low-level rights, most of which concerned matters of access; for example, a right to go into the native title area and take black, yellow, white and red ochre. Similarly, in *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*), Sundberg J included in the determination of native title a right to visit places and protect them from physical harm. He stated that:

> The evidence is that maintaining places of importance involves low impact activities such as visiting, checking for damage, smoking, speaking to the Wanjina [spirit ancestor] and repainting. … Protection is directed to the prevention of damage to sites. … This might involve Aboriginal presence when a busload of tourists visits a painting location, to ensure that the site is not damaged.
>
> (*Neowarra*: [484])

There is an obvious jurisdictional point to be made here about s 223: in these cases there is a simple or straightforward failure to acknowledge another law. What, after all, is a claim for recognition of a right to speak for country but a claim for a recognition of authority of law? The right to speak for, or to protect, is a claim based in another law, deriving from the authority (and obligations inherent in) another law. As jurisdictional practice, however, we deal with such claims from within the resources of our own law. If the relationship is merely one of proof, then all that happens is that physical activities derived from those

laws (and which most closely resemble our dominant understandings of property) are recognized as the 'social fact' of custom.[4]

One of the difficulties in finding a meeting of laws lies, then, within the conduct and resources of jurisdiction itself. If all s 223 does is require certain matters to be proved as fact (what was hunted and when, for example), then it might be that within our jurisdiction indigenous law is not more than evidence of social practices that are tolerated as not inconsistent with Australian law. Rather than recognize another law or meeting of laws, we see the treatment of issues of indigenous laws in terms of social management and government. This renders questions of authority expressible and answerable only within the civil authority of the state. Within this jurisdictional arrangement, an indigenous law that is understood as arising from the land is turned into a series of observed practices. Or perhaps, in the understanding of the common law, indigenous law becomes the taking of indigenous practices into account when a judge sentences in a criminal matter defined according to state law. A different example might be Sharia law courts currently operating in the United Kingdom. From the perspective of those who accept the court's jurisdiction and Sharia law, that court is the authoritative institution; it derives its authority from Sharia law. From the perspective of the state, submitting to the Sharia court is a tolerated (even encouraged) social practice but the determinations of the Sharia court will always be subject to oversight by the state. Often matters such as indigenous law or Sharia are considered 'custom', something less than law. Jurisdictionally, however, to construe indigenous law or Sharia law as less than law could be considered as the failure of a meeting of laws – where the only authority recognized is within the legal idiom of the law of Australia (in the first case) or the United Kingdom (in the second). Customs, therefore, can be thought of as social practices which we agree to recognize on our own terms.

Managing the meeting place

As a definitional provision in the way it was first conceived, s 223 need not have taken on the central position in native title doctrine that it has. The relocation of the meeting point of laws to s 223 has been transformative in a number of ways. First, s 223 has taken on what might be described as an active, rather than passive, role. Instead of being merely definitional, it has become, in a sense, operative, or at least has become treated as such. In order for an aspect of indigenous relationship to country to be recognized as native title, it must be in the form of native title as outlined in s 223. By relocating the meeting point of laws to the *NTA* in general, and to s 223 in particular, the High Court has transformed that section into a jurisdictional technology or device. A technology or device is something that is designed to, or able to, authorize or alter legal relations.

Jurisdiction functions through a series of devices or technologies. It is these that give jurisdiction an active, shaping role, rather than a merely passive role.

One obvious example of a jurisdictional device from the history of the common law is the writ of prohibition. This was a writ used by the common law to take jurisdiction from other jurisdictions. The example of the writ of prohibition, however, presupposes that the purpose of a jurisdictional device is to order relations between acknowledged and existing laws – to configure a meeting point. The writ of prohibition determined what was within the jurisdiction of the common law, and hence the shape or form of that law.

The *lex mercatoria* provides a simple example of this common law jurisdictional technique. Until the 1600s much of what might now be considered 'commercial law' was adjudicated by specialist courts administering the law merchant, rather than the common law. In the early 1600s, the common law courts began to appropriate the jurisdiction of the commercial courts. This was done by use of the writ of prohibition and by determining that matters covered by law merchant were 'custom', and therefore within the jurisdiction of the common law (*Sarsfield v Witherby* (1687) 90 ER 652; *Hawkins v Hardy* (1692) 90 ER 869). According to Blackstone, *lex mercatoria* was an example of a 'particular custom' and, as such, had to be proved 'as to existence' and the 'usual method of allowance' (Blackstone 2001: 56–58). Proof was according to the general rules for proving custom: continuance, reasonableness and so on. Thus, like native title now, the relationship between the common law and the law merchant was one of proof. In every action it was necessary to plead the law merchant as *secundum usum et consuetudinem Mercatorum*, and the jury would determine whether the custom existed and whether it applied on the facts. Similarly, s 223 is a jurisdictional device as it not only describes the encounter and what the claimant has to prove, but it also controls that encounter – it speaks to the quality or substance of the engagement of laws. This can be clearly seen in the way that the Australian courts understood the right to speak for, or to protect, country.

Paying attention, therefore, to jurisdiction allows us to think in terms of two laws and to recognize that there must be a meeting of law – however impoverished that meeting point be. Moreover, if we can recognize the active quality of jurisdiction, we can see more clearly the limits of jurisdictional thinking (at least from within the common law tradition) and hence the limits and possibilities of the shape of native title doctrine. To think this way reminds us that jurisdiction gives us the authority to determine the bounds of our law (or, in more mundane terms, to engage with the authorized limits of legal conduct).

Acknowledging the limits of jurisdictional practice directs our attention to the ways in which we have to work within our own legal resources to change the terms and quality of the engagement between laws. The amendments to the *NTA* proposed by the Greens in 2011 (*Native Title (Reform) Bill 2011* (Cth)) would change the quality of engagement.[5] The Bill proposed a number of new sections, most notably, ss 61AA, 61AB and 223A. However, the majority of the Senate Legal and Constitutional Affairs Legislation Committee (2011) has recommended that the Bill not be passed.

Section 61AA created a new presumption in relation to an application for determination under s 61. If a number of elaborated 'circumstances exist' then s 61AA stipulated that it must be presumed that: the customs and laws acknowledged are those that were acknowledged at sovereignty; the native title holders have a connection to land and waters by the traditional laws and customs; and the rights are capable of recognition by the common law. However, while this section reversed the burden of proof, claimants would have found it difficult to show the circumstances necessary to trigger its operation. In particular, s 61AA (1)(c) required that the claimants show that they, 'by the laws acknowledged and the customs observed, have a connection with the land or waters the subject of the application'. Section 61AB(1) provided that if the presumption were established, it might only be set aside by evidence of a substantial interruption in the acknowledgement or observance of those customs. Even if the interruption were to arise from the actions of a non-indigenous party, such as the Crown or a private person, the connection would be severed (s 61AB(2)).

Section 223A redefined the meaning of 'traditional' in s 223. The current (much criticized) position is that traditional laws and customs must remain largely unchanged since first contact in order to found a native title right. The proposed s 223A stated that laws and customs would be considered traditional if they remain identifiable through time. Importantly, s 223(1C) removed the requirement that the connection be physical. Finally, s 223(2) was to be repealed.

However, while the proposed amendments would most likely have changed the terms of engagement between laws, perhaps allowing for an easier path to proving native title, in the end we remain within our current jurisdictional resources. A reversal of the burden of proof might well make the meeting of laws easier but it does little to change the quality of the encounter. It might have diminished the sceptical character of the engagement of laws but the section would still have been, in ambition, a matter of proof. Even an amended s 223 would only allow for the recognition of indigenous relationship to country as 'social fact' rather than as law. It is here that we reach one of the limits of our contemporary jurisdictional thinking.

Concluding comments

In different ways Noel Pearson and Paul Carter have drawn attention to our responsibility to think about the relationships between Australian common law and jurisprudence and Indigenous laws and jurisprudence. This chapter has drawn out the quality of the meeting of laws within the common law tradition by emphasizing the jurisdictional form of the engagement of law. We have argued that the form of engagement of laws created by s 223 joins a longer pattern of jurisdictional engagement of laws. In some respects, contemporary jurisdictional technique repeats earlier legal patterns by which the common law has regulated relations between itself and other jurisdictions. In other respects, s 223 and its judicial interpretation has provided a distinct jurisdictional practice.

Section 223 and its jurisprudence have required native title claimants to present their law as if it were no more than social facts open to evidential testing; this is not a meeting of laws. Turning to the conduct of the meeting of laws we have tracked some of the limitations of what it might mean to recognize a meeting place of law as a practice of jurisdiction.

Notes

1 Our thanks to Paul McHugh and Lee Godden. The usual disclaimer applies.
2 Section 223 obviously does not exist in isolation from other key provisions of the Act, in particular, s 225. However, this essay draws on s 223 in order to focus on the jurisdictional qualities of the encounter.
3 But see the partial definition of 'rights and interests' in s 223(2).
4 None of this is to ignore our highly inconsistent views of property within the Anglo-common law tradition.
5 These changes were recommended by the Social Justice Commissioner, Tom Calma, and the Chief Justice of the High Court of Australia, French CJ (Calma 2009). The Explanatory Memorandum to the Bill acknowledges that proposed amendments are in line with the opinion of French CJ.

Chapter 15

Whakaeke i ngā ngaru – riding the waves

Māori legal traditions in New Zealand public life

Carwyn Jones

Ka rere te karekare o te moana
Ka whangai te mauri o te ora
Ka ora ai te ao hurihuri
As the waves continue to ebb and flow
As life-force is nurtured
So wellness continues in the turning world

Introduction

This chapter is concerned with the role of Māori law in New Zealand public life. Māori legal traditions are part of the legal framework that regulates New Zealand society but their role is complex and has ebbed and flowed with changing social, environmental, and political circumstances. However, the Māori legal system is not simply a passive recipient of changing circumstances, merely floating with the tide of social change. Like all legal cultures, Māori law influences, and is influenced by, the society within which it operates. To understand the role of Māori legal traditions in New Zealand public life in the twenty-first century requires one to first comprehend the general nature of the pressures exerted on the Māori legal system and the way in which that system responds. This paper uses three tensions in Māori legal history to draw attention to those matters and to begin to explore the role of Māori legal traditions in contemporary New Zealand society, especially at the interface between Māori collectives and the state.

The adaptation of Māori legal traditions to settler colonialism grew out of core principles underpinning Māori law (Mikaere 1994). Māori legal traditions are based around a system of *tikanga* ('the right/correct/just way of doing things').[1] The system of *tikanga* is in turn based upon a set of underlying values. There is some debate about the precise set of values that form the basis of *tikanga* and Māori legal traditions. The following five values appear to be considered foundational by the leading scholars in this field:[2]

Whanaungatanga – 'the centrality of relationships to Māori life' (Williams 2000: 8);
Manaakitanga – 'nurturing relationships, looking after people, and being very careful how others are treated' (Mead 2003: 29);

Mana – 'the importance of spiritually sanctioned authority and the limits on Māori leadership' (Williams 2000: 8);
Tapu – 'respect for the spiritual character of all things' (Williams 2000: 8);
Utu – 'the principle of balance and reciprocity' (Williams 2000: 8).

As a whole, these values reflect the importance of recognising and reinforcing the interconnectedness of all living things and maintaining balance within communities (Mikaere 2005: 332).

Māori lawyer and advocate Moana Jackson sees the philosophy of Māori law being sourced not only within the basic values of Māori culture, but within the histories and the lived experiences of Māori communities:

> The Māori philosophy of law, *te māramatanga o ngā tikanga*, was sourced in the beginning. From the *kete* of Tāne[3] it was handed down through the precedent and practice of ancestors. Like an intricate *tāniko* pattern,[4] it was interwoven with the reality of kinship relations and the ideal of balance for those within such relationships. It provided sanctions against the commission of hara or wrongs which upset that balance, and it established rules for negotiation and agreement between *whānau*, *hapū*, and *iwi*.[5] It formulated a clear set of rights which individuals could exercise in the context of their responsibility to the collective. It also laid down clear procedures for the mediation of disputes and for adaptation to new and different circumstances.
>
> (Jackson 1992: 5)

This basic philosophy provides the foundation for the Māori legal system. It reflects core values and sets guidelines for the application of Māori law. However, *tikanga* is also historically emergent. It has adapted in the course of its encounter with settler colonialism. I will argue, however, that it has adapted in ways that have maximised the potential for Māori autonomy.

Tensions in Māori legal history

In this paper, I have identified three broad 'tensions' that run through Māori legal history and that I consider are helpful in examining the application of Māori legal traditions to New Zealand public life. I have used the concept of 'tension' to try to capture the complexity and diversity of the development of Māori legal traditions, and also to provide an analytical framework that suggests the broad shape (if not the precise detail) of the nature of Māori legal traditions at the beginning of the twenty-first century. The concept of 'tension' also avoids the appearance of uniformity (or near uniformity) that might be suggested by a 'theme'. By focusing on the tensions themselves, it is hoped that some of the central concerns, strategies and modes of operation of Māori law will be revealed.

The three tensions that I have identified are: adaption (self-determined change versus reactive change); relationship to the Crown (engagement versus

disengagement with the state legal system); and, renewal (reinvigorating *tikanga* versus losing relevance). These tensions are not completely separate from one another; they overlap. Here I explain through historical examples how these three tensions have operated in Māori–settler engagements since the nineteenth century, before showing their value as ways of reading the design and operation of contemporary Māori decision-making institutions.

Adaptation: self-determined change versus reactive change

It is difficult to distinguish changes in Māori legal traditions that are self-determined from those that are forced upon the Māori legal order. All change is responding to pressures on the Māori legal order, and every change to Māori legal traditions is intended to maximise the self-determination of Māori communities.

There are many examples of Māori legal traditions changing in response to changes to Māori society initiated by Māori communities themselves at the same time as more reactive changes are taking place. While the pan-tribal movements in the nineteenth century can be seen as a response to the pressures of colonisation, they can also be seen as a continuation of the natural rhythm of Māori constitutional development. A consideration of Māori forms of social organisation prior to the arrival of European settlers in Aotearoa illustrates this point. Māori social organisation in the eighteenth century centred on the politically independent kin community called the '*hapū*'. At that time, *hapū* came in a wide range of sizes. While new *hapū* typically formed through fragmentation and 'ramification', the defining characteristic of a *hapū*, whether large or small, was that it was a community that saw itself as part of a larger social grouping. That is, *hapū* 'considered themselves a part, not the whole, of a people' (Ballara 1998: 161–78). *Hapū* were politically independent but the connections that linked them to the larger community remained important and were particularly relevant at times of crisis. For example, in times of war, the instinctive response was to activate those links and collectivise, to come together as a confederacy with alliances based on the existing connections between *hapū*. Consequently, scholars such as Māori Land Court Judge Caren Fox have suggested that, 'The Māori rhythm was to naturally unify, to confront threats to their tribal sovereignty or autonomy' (Fox 2010: 43). So, despite the fact that the *Kingitanga* (the Māori King movement) was clearly established to parallel the British monarchy, the aggregation of Māori polities in this way is entirely consistent with the constitutional evolution of self-determining Māori communities.

Relationship to the Crown: engagement versus disengagement

A number of New Zealand legal and political histories have considered the strategies of engagement and disengagement employed by Māori communities in attempts to retain the authority to regulate themselves (Bargh 2010). Māori

engagement with the state is a theme of the New Zealand-focused material in Paul McHugh's *Aboriginal Societies and the Common Law* (2004) and of Richard Hill's studies of Crown–Māori relations in the twentieth century (2004; 2009). These studies show that the location of Māori legal authority shifted to accommodate government institutions such as the system of Māori Councils established by the *Māori Councils Act 1900* (NZ) (Hill 2004: 50–64). Māori Councils aimed to reflect Māori community structures and social organisation. However, the authority of the councils derived from the Crown. Even where the personnel may have been the same, the authority of council members was not based on accountability to the community in the way that leadership within Māori communities traditionally was. Yet the Councils legislation was also seen by many Māori leaders to be the only way of achieving a measure of autonomy within the settler system at the time (Hill 2004: 50–64).

Strategies of disengagement have also affected the Māori legal order. For Māori, standing apart required as much restructuring of social organisation and traditional lines of authority as was required by engagement with Crown institutions. For example, the *Kīngitanga* aimed to assert the authority of Māori law and yet its pan-tribal structure was a significant change from the traditional forms of social organisation. The *Kīngitanga* clearly mirrors many of the institutions of the Westminster Parliament and British constitutional monarchy. The idea of establishing a pan-tribal Māori king was discussed by Māori leaders throughout the 1850s. The proponents of the *Kīngitanga* aimed to unify the different Māori peoples under a monarch who could then engage with the British monarch on equal terms. Mirroring British institutions was, therefore, a deliberate tactic to ensure settlers and settler governments could readily recognise the structure. Many Māori leaders at the time were very concerned about the rapid alienation of Māori land and stopping the sale of Māori land was a key objective of the *Kīngitanga*. In 1858, the respected leader Te Wherowhero was crowned as the first Māori king and took the name Potatau. Leaders who supported the establishment of a Māori king agreed that Potatau-Te Wherowhero ought to be the first king, in no small partbecause of his genealogical connections to the chiefly lines of so many communities. Since the coronation of Potatau-Te Wherowhero, the *Kīngitanga* has become a symbol of Māori self-determination. In the nineteenth century, the *Kīngitanga* engaged in armed conflict with settler government forces. Through the twentieth century it has provided an effective figurehead for social and political initiatives. Today, the Māori King remains as an important position within Māoridom and is supported by a council of elders and advisors and a parliament.

Renewal: reinvigorating *tikanga* versus losing relevance

Another significant tension in Māori legal history has arisen from the countervailing impulses to reinvigorate Māori legal traditions and to set them aside when they have been deemed irrelevant to public life. Both are evident in the

choices made by Māori communities as they moved through the Treaty of Waitangi settlement process and established post-settlement governance entities.

Settling communities have to consider how, and to what extent, their legal traditions should be reflected in their constitutions. Such choices determine what the Harvard Project on American Indian Economic Development calls 'cultural match'. The Harvard Project's research suggests that attaining 'cultural match' – crucial to effective governance – 'is not necessarily an argument for a return to "tradition"'. Rather, '[t]he point is to search out and organize a resonance between formal institutions and what people currently view as appropriate for them' (Cornell 2002: 9). The dispute resolution process that has been designed for the Central North Island (CNI) forestry settlement is a contemporary attempt at 'cultural match'; it is discussed below. The setting aside of *tikanga* that is no longer relevant can be seen most starkly in the context of Māori settlement of Aotearoa. The new environment and ecosystems of Aotearoa required a change in horticultural practices and subsequent changes in social organisation. The careful cultivations of the Polynesian homeland changed to 'a partial and seasonally enforced hunter-gatherer culture' (Waitangi Tribunal 2011: 5–6).

Māori legal traditions at the beginning of the twenty-first century

Shaped by the tensions identified above, *tikanga* Māori has remained a dynamic mechanism of social regulation which has had a transformative impact on the regulation of New Zealand public life. It has done so in a number of important ways: chiefly through law, ritual and dynamic Māori engagement with the claims settlement process.

The most transparent way in which *tikanga* has shaped public life in New Zealand is in the state legal system's sporadic recognition and enforcement of customary law (Boast 2004). A significant example of this is the ability of the New Zealand courts to recognise Māori customary title to land. The courts have used the common law doctrine of aboriginal or native title to recognise Māori rights where those rights could be proved to exist under *tikanga* (Boast 2004). In addition, the Native Land Court (now the Māori Land Court) was established with the express purpose of determining who held interests in land according to Māori custom. However, some scholars have questioned the ability of both the common law doctrine of aboriginal title and the Native Land Court to give effective expression to *tikanga* (Williams 1999). Those questions were also at the heart of the recent debate surrounding the enactment and subsequent repeal of the controversial *Foreshore and Seabed Act 2004* (NZ) (Durie *et al.* 2009).

Tikanga has also been a mechanism of social regulation that does not fall within the rubric of settler law. For example, the traditional welcome ceremony, the *pōwhiri*, is a distinctly Māori process, usually carried out in a distinctly Māori space, which is governed by *tikanga*. The *pōwhiri* provides a useful example of the way in which the 'conceptual regulators' govern interactions within the Māori legal

system. The *pōwhiri* is a common ceremony for welcoming guests. Although important occasions may require the ceremony take place on a grander scale, the key elements of the *pōwhiri* can be seen in a range of essentially everyday situations. A *pōwhiri* may be used to welcome delegates to a conference or a new staff member to the workplace. A *pōwhiri* may also be used to welcome groups to public events such as graduation ceremonies, or to community events such as celebrations or funerals. In short, whenever a Māori community is required to greet and host visitors, a *pōwhiri* ceremony is likely to set the framework for the management of the relationships between hosts and guests.

This chapter focuses on two examples that illustrate the application of Māori legal traditions in non-Māori settings: the constitution of a political party and a '*tikanga* based dispute resolution' process designed to facilitate the settlement of a significant group of Māori claims against the Crown.

Māori Party constitution

The Māori Party is a political party that was established in 2004 and its establishment reflects the three tensions in Māori legal history identified above. The catalyst for the formation of the Party was the then Government's determination to enact the *Foreshore and Seabed Act 2004* (NZ), which many Māori saw as discriminatory and a confiscation of property rights in the foreshore area. This led to a Cabinet Minister resigning from both the Government and the Labour Party and eventually leading the Māori Party in Parliament. The impetus for the Party's formation can, therefore, be seen as directly connected to an assertion of self-determination. From its establishment, the Party aimed to provide an independent and authentic Māori voice within the settler Parliament, highlighting the carefully balanced relationship with the state legal system. And the Party founders have deliberately constructed a constitution that uses those aspects of *tikanga* that they determined to be relevant to the operation of a political party in the twenty-first century.

The Māori Party constitution recognises that a distinctive Māori worldview is expressed through Māori songs, legends, prayers, proverbs and other art forms that reproduce, transmit, and develop Māori culture. This worldview leads to a particular set of *kaupapa*, described as 'principles, values, philosophies'. These reflect the core values, the conceptual regulators discussed above, which underlie the system of *tikanga*. In the context of the Māori Party's constitution, *tikanga* comprises the 'processes and policies aligned to the *kaupapa*'. The first *kaupapa* and associated set of *tikanga* in the constitution is *manaakitanga*:

> **Manaakitanga**
>
> Manaakitanga is behaviour that acknowledges the mana of others as having equal or greater importance than one's own, through the expression of aroha, hospitality, generosity and mutual respect. In doing so, all parties are elevated and our status is enhanced, building unity through humility and the

act of giving. The Party must endeavour to express manaakitanga towards others, be they political allies or opponents, Māori and non-Māori organisations, taking care not to trample Mana, while clearly defining our own.

Tikanga of the Māori Party derived from Manaakitanga

i. to be recognized by Māori as a political organisation that does manaaki the aspirations of Māori;
ii. to ensure that relationships between the Party and *whānau*, *hapū*, *iwi* and other Māori organisations are elevating and enhancing;
iii. to promote a fair and just society, to work for the elimination of poverty and injustice, and to create an environment where the care and welfare of one's neighbour is still important.
iv. to ensure that members agree to work together, treat each other with respect and act with integrity in their party work.
v. to involve all peoples in the process of rebuilding our nation based on mutual respect and harmonious relationships.

(The Māori Party 2010)

The constitution goes on to list other core values and to describe the practices that derive from those values and which govern the actions of Party members elected to the New Zealand House of Representatives. The *tikanga* derived from *manaakitanga* led to the Party's members of Parliament (MPs) demonstrably avoiding personal attacks in Parliament. The constitution also includes *tikanga* based on the importance of the Māori language to Māori culture and identity. The Māori Party MPs make a deliberate effort to use the Māori language in the House. This has led to the development of much improved processes for simultaneous translation of Parliamentary proceedings. The rules in the constitution apply only to the Party's members, and yet they have an impact on the way the Party engages with others. These values are evident in the way Māori Party MPs conduct themselves in the House, in the policies of the Party and in the content of legislation (Turia 2007). The position the Party took in 2007 on the Human Tissue Bill 2006 (NZ), which included amendments to legislation regulating organ donation, was determined by the *tikanga* relating to the integrity of the human body. In relation to legislation regulating electoral campaign spending, the Māori Party's points of reference were the *tikanga* relating to the accountability of traditional leadership and the responsible and sustainable management of resources (Turia 2007).

Aspects of this *tikanga*-based constitution were tested and subjected to significant scrutiny when the Party suspended one of its MPs from the Parliamentary caucus in 2011. The constitution includes a mechanism for the 'Resolution of differences'. All members of the Party must 'treat each other with respect and are expected to act ethically and with integrity in their party work' (The Māori Party 2010: rule 11.1). Another rule sets out a procedure for disciplinary action against a member who refuses to comply with the constitution, improperly deals

with party funds, or 'in any other way wilfully brings the party or its members into public disrepute' (The Māori Party 2010: rule 11.2). A Disciplinary and Disputes Committee of the Party's governing body, the National Council can address serious complaints against a member. (The Māori Party 2010: rule 11.3). The National Council aims to ensure that any such dispute 'is resolved on the basis of the *kaupapa* of the Party' (The Māori Party 2010: rule 11.3), reinforcing those principles that derive from a Māori worldview.

In 2011, members of the Party's five person caucus made a complaint against one of the Party's MPs, Hone Harawira (Gower 2011). Following a series of controversial incidents involving Harawira ('Faith in Harawira lost – caucus' *New Zealand Herald* 2011), an opinion piece written by Harawira and published in a national newspaper (Harawira 2011), provoked the complaint. Harawira's article criticised the Māori Party's cosy relationship with the governing National Party and reiterated his concerns about the Marine and Coastal Area (Takutai Moana) Bill 2010 (NZ) (subsequently enacted), which the other Māori Party MPs supported and continue to promote as a major achievement. Harawira was suspended from the Party's parliamentary caucus prior to the formal dispute resolution process being completed (*New Zealand Herald* 2011). According to the Party's co-leaders, Harawira had breached the *kaupapa* and founding principles of the Māori Party (*New Zealand Herald* 2011). 'Having no regard for the constitution is one thing. It is quite another to have no regard for the *kaupapa* and *tikanga* of the party, and that is what has really brought us to this point' (*New Zealand Herald* 2011). Evidently, to the Māori Party leadership the *kaupapa* and *tikanga* are not only reflected in the constitution but are also independent of the constitution; their independent status is seen by the Māori Party leaders to be more important, at least in terms of political justification and legitimacy.

The formal complaint reportedly stated that the other Māori Party MPs had 'lost trust and confidence' in Harawira because he 'acts unethically and without integrity' and 'deliberately undermines' the party and the leaders (Gower 2011). Harawira criticised the complaint process in an interview with Radio New Zealand: 'The process is not consistent with *kaupapa* Maori [Māori style of governance]. I also think that it's very, very Pakeha the way that it's being run' ('Maori Party plays down Harawira tensions' *The National Business Review* 2011). Harawira repeatedly stated that the issue ought to be resolved on the marae in accordance with Māori protocols and processes (Cheng 2011). The party president, however, was adamant that the process was consistent with *kaupapa* Māori and emphasised that 'Meeting face to face in a safe environment is Maori' (*The National Business Review* 2011). Again, the political legitimacy of the process seems to rest on whether it is consistent with *kaupapa* Māori rather than with the constitution of the Party, which must of course be complied with as a legal requirement.

The Disputes and Disciplinary Committee found that the differences between Harawira and his parliamentary colleagues could not be resolved and referred the matter back to the Party's National Council, recommending that Harawira be expelled from the Party. Before this recommendation was considered by the National

Council, Harawira resigned his membership of the Party and announced that he would seek re-election as an independent candidate. Re-elected in a by-election in June 2011, he formed a new party, the Mana Party. As the Party's name suggests, it is intended to have a significant Māori focus. Interestingly, the Mana Party's interim constitution, approved in May 2011, made no mention of *kaupapa* or *tikanga*.

Throughout this episode the three tensions in Māori legal history are evident. The emphasis on the need for the process to be one that is authentically Māori illustrates the desire to assert self-determination, even though the enforcement of the obligations in the constitution would ultimately have rested with the state legal system. The relationship between *tikanga* and the state legal system sits at the very foundation of this episode. That is, this case highlights different views as to how Māori voices might be most effectively heard within the state system and the catalyst for the dispute was the way in which *tikanga* was expressed within state law (see the preamble of the *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ)). The application of the Māori Party constitution and the lack of explicit reference to *tikanga* in the Mana Party's interim constitution illustrates distinct and deliberate choices about the relevance of particular *tikanga* to the governance of Māori political parties within the New Zealand parliamentary system.

The Central North Island (CNI) forestry settlement

The second example of contemporary application of Māori legal traditions relates to the settlement of Māori claims against the Crown. The *Central North Island Forests Land Collective Settlement Act 2008* (NZ) (*CNI Act*) is the result of negotiations between the Crown and various tribal groups as part of the systematic programme aimed at settling historic claims based on the 1840 Treaty of Waitangi (Te Aho 2008). Involving eight different tribal groups representing over 100,000 people, the settlement comprises 176,000 hectares of forestry land and is worth approximately $220 million.

In a treaty settlement dealing with forest land, the settling group receives not only land but also accumulated rental fees received by the Crown from third parties for forestry licenses over those lands. The proportion of the accumulated rentals that each tribal group within the CNI collective will receive from the settlement was determined at the time that the settlement package was agreed. However, the allocation of the land itself is to be determined by the tribes involved, in what is described as a '*Tikanga* based resolution process' that is set out in schedule 2 to the *CNI Act*, which implements aspects of this settlement. Core values that underpin Māori legal traditions are reflected in the principles of the resolution process (*CNI Act* sch 2 s 2(3)):

The iwi acknowledge their commitment to a resolution process that—

a) enhances and promotes the mana and integrity of all iwi; and
b) is open and transparent; and
c) promotes whanaungatanga, manaakitanga, and kotahitanga amongst the iwi; and

d) recognises the desirability of post-settlement collaboration between them in the collective management of assets.

The maintenance of relationships is clearly a central concern of the groups participating in this process. The principle of *whanaungatanga* is explicitly referred to in the CNI allocation/resolution process and this is reinforced by the recognition of the desirability of future collaboration and other features of the resolution process, such as the references to *mana* enhancement, transparency, and the value of *manaakitanga*. As *CNI Act* schedule 2 section 2(2) records: 'The CNI Iwi Collective is committed to the iwi deciding upon the allocation of CNI forests land for themselves, on their own terms, answerable to one another.' This statement also reflects an assertion of authority and responsibility on behalf of the participating *iwi* and thus links the concepts of *mana* and *whanaungatanga*.

The first stage of the allocation/resolution process is the identification of the relative interests of the CNI *iwi* in CNI forests land by reference to *tikanga* Māori (*CNI Act* sch 2, s 4). The relevant interests are described as 'mana whenua interests' (traditional authority and responsibility in relation to the land) and evidence for the existence of such interests may be found in traditional Māori oral records such as songs, tribal histories and genealogies as well as in written sources.

The second stage of the process addresses overlapping interests, where two or more *iwi* have identified a *mana whenua* interest in a particular area of forest land (*CNI Act* sch 2 s 5). Again, the key principles and practices of *tikanga* govern the procedure. In this stage, negotiations are 'kanohi ki te kanohi' ('face to face'). The *iwi* involved in negotiation over particular interests will determine the *tikanga* that applies to those negotiations. These negotiations are intended to take place between representatives who have the authority to commit their *iwi* to agreements and who are themselves committed to engage in an 'open, principled and trustworthy dialogue' (*CNI Act* sch 2 s 5(2)). The legislation refers to this as 'kōrero rangatira' (chiefly discussion) and draws again on the basic principles that underlie Māori legal traditions. While *iwi* representatives may take expert advice, those advisers are not permitted to participate directly in the negotiations themselves.

If negotiations do not produce agreement about recognition of *mana whenua* interests and the allocation of CNI forest land, the unreconciled *iwi* may refer the matter to either mediation or adjudication (*CNI Act* sch 2 s 6(3)). The appointment of mediators or an adjudication panel also reflects Māori legal traditions. The legislation requires that mediators and adjudicators be fluent in te reo (the Māori language) and have knowledge of *tikanga* Māori, in particular *tikanga* based dispute resolution and how *mana whenua* is held and exercised by *iwi*.

The final allocation of the settlement lands was supposed to have taken place by 1 July 2011 (*CNI Act* sch 2 s 7(1)) but, at the time of writing, no allocation has been agreed. Each *iwi* has identified the areas where it held the *mana whenua* interest, and face-to-face negotiations have taken place, but there remains significant disagreement. The appointed adjudication panel advised that it needed more time and resources to make robust allocation decisions. Some *iwi* also

argued that an extension of the timeframe was not possible, even if unanimous agreement to do so was achieved. CNI *Iwi* Holdings obtained a declaration from the High Court that it would be lawful to take more time to negotiate the allocation of land, but the *iwi* were not able to agree on a new termination date for the negotiations and some *iwi* refused extra time. The adjudication panel has resigned without deciding allocations. One of the CNI *iwi*, Ngati Manawa, filed proceedings with the High Court to have the time limit for adjudication extended absent unanimous agreement so that the allocation process can be completed. When the application of *tikanga* cannot bring about consensus among Māori interests, the High Court is available as a neutral arbiter, though the Court is not obliged to reason its decision in terms of *tikanga*.

Tensions and *tikanga* today

Once we understand something of the pressures that have been brought to bear on Māori legal traditions and the way the Māori legal system has developed in response, we can begin to understand the Māori legal context of Māori political activity in the twenty-first century. Neither the constitution of the Māori Party nor the CNI forestry settlement sits within an exclusively Māori context; each is an interface between Māori and state governance. Neither of these examples of the recognition and incorporation of custom is in accordance with the standards and processes of the common law, but in each case Māori are attempting to give expression to *tikanga* using instruments that engage the New Zealand legal system.

The three tensions in Māori legal history provide interpretive tools that help to analyse the dynamic application of *tikanga* in the twenty-first century. The adaptation of Māori legal traditions is a creative force in the Māori Party's explicit use of *kaupapa* and *tikanga* as the foundation of its constitution. The constitution asserts that the Party's members want Māori values and principles to regulate the organisation. Yet, this is also a reaction to the operation of state processes. The Māori Party was formed to engage Māori in New Zealand's law-making processes and, in particular, to represent the Māori partner in the Treaty of Waitangi relationship.

The expression of Māori legal traditions within the Māori Party constitution was subjected to legal and political scrutiny when the party expelled Hone Harawira. The way in which *tikanga* and *kaupapa* were interpreted and applied in that situation can be understood by reference to tensions in the development of Māori legal traditions. While all of the protagonists emphasised the need for 'a Māori process', the process was also determined by the Party's need to remain as disciplined as a Westminster-style Parliament demands.

While the CNI forestry settlement process is '*tikanga* based', it is also an adaptation to the social and political circumstances of New Zealand today. It both expresses self-determination and recognises the regulatory powers of the state. It reflects a desire both to engage with, and maintain distance from, the Crown. While emphasising and reinvigorating relevant *tikanga*, the process does not mobilise traditions that many *iwi* deem to be unhelpful. Among the CNI *iwi* there remain

differences of opinion as to how best to give effect to the *tikanga* described in the allocation mechanism.

By analysing the role of Māori legal tradition in contemporary Māori institutions through three long-standing, historical tensions – adaption (self-determined change versus reactive change); relationship to the Crown (engagement versus disengagement with the state legal system); and renewal (reinvigorating *tikanga* versus losing relevance) – I have also suggested that Māori law has survived and remains a vibrant force within New Zealand society, not by simply drifting with the tide, but by charting its own course and riding the waves of change.

Glossary of Māori terms

Aotearoa	*New Zealand*
hapū	Māori kin community
iwi	Māori nation/people
kanohi ki te kanohi	face to face
kaupapa	principle/foundation
Kīngitanga	Māori King Movement
kotahitanga	unity
kōrero rangatira	chiefly discussion
mana	spiritually sanctioned authority
mana whenua	authority in relation to land
manaakitanga	nurturing relationships
mauri	life force
noa	profane/everyday/flipside of *tapu*
pōwhiri	welcome ceremony
tāniko	traditional Māori form of weaving
tapu	spiritual character of all things
te maramatanga o ngā tikanga	philosophy of Māori law
tikanga	system that encompasses Māori law
utu	reciprocity
whānau	extended family
whanaungatanga	relationships
whenua	land

Notes

1 It should be noted that *tikanga* is not equivalent to customary law, though the two concepts share many characteristics. It is not a definite set of rules that apply to discrete areas of social life, rather *tikanga* operates in all aspects of Māori life and incorporates spiritual, cultural, and practical aspects which are beyond a strictly legal domain (Jackson 1988: 43).

2 Though there is some variation in the terminology used, there appears to be agreement as to the basic substantive content of these foundational concepts (Mead 2003: 28–32; New Zealand Law Commission 2001: 28–40; Williams 2000: 8).

3 The 'kete of Tāne' refers to the baskets of knowledge said to have been brought to the world of humankind by the god Tāne. These baskets form the basis of Māori systems of knowledge.
4 'Tāniko' is a traditional Māori weaving technique.
5 'Whānau', 'hapū and 'iwi' are the basic units of Māori social organisation, often translated as 'extended family', 'wider kin community', and 'nation/people' respectively.

Chapter 16

Indigenous jurisdiction as a provocation of settler state political theory

The significance of human boundaries

Kirsty Gover[1]

Introduction

Customary tribal governance predates the western settler states and continues to structure the political life of indigenous communities in those societies. Increasingly, however, tribes are constituted as legal entities and brought into formal jurisdictional relationship with other governments in the vertical and horizontal frameworks of settler state constitutionalism. This requires the complex 'realignment' of intergovernmental relationships within settler states to accommodate tribal jurisdiction and formalize its boundaries, both territorial and personal.[2] In this paper, I argue that these relationships are governed by mechanisms that are recognizably 'quasi-international' in character,[3] bearing many of the hallmarks of international relations, including negotiated agreement-making, formal intergovernmental diplomacy and official apologies. They are typically managed almost exclusively by the executive branch of settler governments and are attended by conventions of judicial and legislative deference. I argue that while the primacy of settler executive discretion in the management of indigenous–state relationships is controversial, it is an effective way to manage the 'conflicts of laws' that emerge from contemporary settler state legal pluralism, especially where these implicate principles of human rights and non-discrimination. Given the distinctive place of indigenous peoples and their legal systems in the ongoing constitution of settler states, it is inappropriate to force uniformity between tribal and settler law by applying unmodified statewide human rights norms to tribal law-making processes. This is particularly true of tribal membership law, because it is the mechanism used by tribes to establish their jurisdictional boundaries, and deeply intertwined with the concept of indigeneity that is itself constitutive of settler state identity.

To show the function and promise of 'quasi-international' indigenous–state arrangements, I discuss a conflict that has arisen alongside the official recognition of tribal jurisdictional boundaries in the CANZUS states: the efforts of tribal governments in New Zealand and Canada to exclude adopted children from membership, in apparent contravention of settler law on non-discrimination.

(This conflict does not arise in Australia and the United States in the same way, for the reasons discussed below.) An orthodox rights-based approach would style such a dispute as a clash between the human rights of the excluded individual and those of tribal members or the tribal collective. Adjudication would entail the 'balancing' of two competing rights (usually drawn from those articulated in a settler state constitution or statute) in order to determine which will prevail and to what degree. Typically, a tribal defendant might assert rights to self-determination, communal property, freedom of association or cultural community, while a legally adopted applicant would rely on their human right not to be discriminated against on the basis of their race, ethnicity or familial status. A second approach, which I explain and advance in this paper, is to frame the inconsistency as a jurisdictional one, arising because tribal and settler legal systems have produced different concepts of tribalism and of tribal membership. A jurisdictional approach acknowledges that both tribal and settler governments are public actors, and that they generate law and policy by considering the competing claims of individuals and deciding on an outcome that is thought best to serve the 'public interest' of their constituency. Attention to the political and legal theories used by tribes to guide law-making is a necessary and timely concomitant of new jurisdictional arrangements in settler societies.

Executive prerogatives in indigenous–state relations

Given the histories of settler state nation-building, the consent of indigenous peoples to extant governance arrangements is often in question. As a result, settler states have a genuine contractarian dilemma on their hands. Because indigenous peoples are, in many respects and contexts, 'outside' of the national body politic, settler states, embodied in the institutions of their executives, are required to perform feats of special representative agility. When it addresses indigenous communities, a settler state is obliged to represent both the national public and the *settler* public within that population. Performing these roles, the state represents both settler and indigenous publics separately and simultaneously, in order to broker and supervise their relationships with one another, while also carrying out its 'own' diplomatic intergovernmental relationships with recognized tribes as a corporate actor. In this corporate capacity, settler executives negotiate and conclude agreements with recognized tribes, including modern treaties, land claims settlements, self-governance agreements, self-determination contracts and jurisdictional protocols (such as memoranda of understanding).

Similarly, formal apologies provide striking examples of the unusual identity and agency demands made of settler governments. All four western settler states have made official apologies to indigenous communities in the past decade (Nobles 2008). An examination of the text of these apologies shows that it is not always clear which public is 'speaking' when an apology is offered by a public official. Whatever the composition of the 'apologiser', it must logically exclude

those apologised *to*, even if temporarily. In some cases the recipient of the apology is a particular indigenous group (for example, members of the 'Stolen Generation',[4] or members of a particular tribe), in which case the state is effectively including some, but not all, indigenous peoples within the public that it represents in that formal exchange. Institutional authorship of apologies has varied across the western settler states. Apologies have been offered to indigenous peoples variously on behalf of 'the Crown' as a personified, corporate entity (as in the apologies negotiated in New Zealand's Treaty of Waitangi Claims settlements and legislatively enacted in 18 Treaty settlement statutes); as a single public institution (as in the US Bureau of Indian Affairs' 2009 apology) (Gover 2000); or the legislature (as in Australian Prime Minister Kevin Rudd's and Opposition Leader Brendan Nelson's 2008 apologies to members of the Stolen Generation, and the Canadian Federal Government's 2008 apology to citizens who had been part of the Indian residential school system) (Harper 2008; Nelson 2008; Rudd 2008).

Importantly, official apologies are a well-established tool of international diplomacy and are often used as part of a set of reparative measures provided by a state in order to remedy a breach of its obligation to another state (International Law Commission 2001).[5] The reparative 'purpose' of official apologies in international law is to reaffirm the sovereignty of a state where this has been compromised by another, and so formally to acknowledge the injured state as a sovereign and independent equal. An official apology can thus be an act both of recognition and of jurisdictional boundary-setting.

Other features of state–indigenous relationships mirror those that structure international relations. The judicial and legislative branches of the New Zealand, Canadian and US governments tend to defer to the executive in its official dealings with indigenous peoples. Courts have explained that this approach is necessary to preserve the executive's capacity and obligation to make certain political decisions; a rationale that is an analogue of the 'act of state' or 'political question' doctrines that courts have also used to justify the non-justiciability of executive actions in international relations.

This attribute of indigenous–state relations is most explicit in the United States, where the doctrine of tribal sovereignty constructs recognized tribes as 'domestic dependant nations' (*Cherokee Nation v Georgia* (1831) 30 US 1) and accords to them all the powers of independent statehood that are not incompatible with that status and have not been abrogated by Congress. Tribe–state relationships are conducted as diplomatic, intergovernmental relations, historically structured by treaties and now also articulated in a web of contracts and agreements concluded between tribal governments and the federal executive (via the Department for the Interior and Bureau of Indian Affairs). Like foreign states, recognized tribes enjoy sovereign immunity in the US federal court, an attribute that expressly limits the involvement of the federal judiciary in matters implicating tribal jurisdiction.

In the other CANZUS states, tribes are not regarded as 'sovereigns' in public law or policy. However, in matters involving indigenous property or treaty claims,

courts in Canada and New Zealand have urged the executive branches to negotiate agreements with tribes, in accordance with broadly stated moral principles, including the 'honour of the Crown'. One rationale for this move is evident in the observation made by Lamer J of the Canadian Supreme Court in the 1997 landmark *Delgamuukw* case (*Delgamuukw v British Columbia* [1997] 3 SCR 1010, [186]):

> the Crown is under a moral, if not a legal, duty to enter into and conduct … negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … reconciliation. … Let us face it, we are all here to stay.

Judicial forbearance in Canada and New Zealand extends to a refusal to review executive discretions used during claims negotiations, including decisions on the recognition of claimant representatives and the boundaries of claimant communities (*Hayes v Waitangi Tribunal* (2001) (Unreported, High Court of New Zealand, Goddard J, 10 May 2001)).[6] These refusals mirror judicial deference to the executive's well-established prerogative in international relations to recognize or 'unrecognize' states (and governments) and to decide whether and how to enter into diplomatic and legal relationships with them.

Similarly, legislation giving effect to agreements concluded between states and indigenous communities may not be subject to ordinary rules of parliamentary procedure. In New Zealand, for example, Parliamentary Select Committees have developed conventions of restraint when reviewing Bills implementing Treaty settlements: 'Bills that implement international treaties or deeds of settlement of claims under the Treaty of Waitangi have a particularly narrow scope. Any amendments recommended must be consistent with the treaty or deed concerned' (Māori Affairs Committee 2002: 2). Treaty settlement statutes are, accordingly, dealt with by parliamentary processes analogous to those used to enact legislation for the implementation of international treaties: by convention, parliament's role is narrowly confined to proposing technical textual changes or correcting errors (Gover 2010).

Agreement-making and the exercise of executive prerogatives have not been a prominent attribute of indigenous–state relationships in Australia. The complex legislative regime governing the determination of native title claims remains a dominant interface. Increasingly, however, claimants, governments and third parties have opted not to litigate native title claims but rather to negotiate agreements that are either endorsed by the Federal Court (consent determinations) or stand alone as contractual arrangements that are permitted but not governed by the *Native Title Act 1993* (Cth) and do not require a judicial determination (Indigenous Land Use Agreements). Similarly, the new *Traditional Owners Settlement Act 2010* (Vic) is a statewide framework facilitating the negotiation of land use agreements between the Crown and officially recognized 'traditional owners'

outside of the native title regime, whether or not those traditional owners are native title holders.

The emergence in the CANZUS states of a *sui generis* body of judicial and parliamentary methods to manage the diplomatic exigencies of state–indigenous jurisdictional relationships is a significant development in the political theory of settler states. It may now be the case that, aside from aboriginal title, the justificatory basis of distinctive indigenous entitlements in those states is essentially contractual, emerging from political bargains but not from an independently enforceable set of legal rights. In fact, once the process of negotiating agreements is set in motion, legal rights may pose a threat to those bargains. Rights based claims may have the effect of prematurely bringing to a close ongoing negotiations about the allocation of jurisdictional authority between indigenous and settler governments (as well as between indigenous governments). Accordingly, in some respects it appears that settler states have elected to 'contract out of' applicable human rights regimes in order to secure and protect indigenous jurisdiction within a liberal democracy. These developments enact the tension between rule of law principles of equality, neutrality, certainty and transparency, and the political reality of legally plural settler societies – a tension which necessarily underpins the constitution of settler states.

Two ways of justifying indigenous rights

Mainstream liberal political theory for the most part has not engaged directly with the justificatory basis of indigenous rights (but see Ivison *et al.* 2000). The analyses that have been offered can be grouped into two broad and overlapping strands of inquiry, representing two concepts of indigenous particularity. Cultural pluralists fit indigenous rights within a broader theory of multiculturalism, in which cultural difference is framed as a public good that should be protected by the state, either because cultures have inherent value (communitarianism) or because the protection of cultures improves individual agency and choice (liberal multiculturalism). Theories of cultural pluralism are dominant in the political theory of indigenous peoples because these approaches are relatively compatible with the liberal tradition. Cultural pluralism can bring indigenous rights into line with liberal principles by prioritizing the individual in concepts of culture, for example by conceptualizing culture as the expression of collectively exercised individual human rights (*ICCPR* 1966 Art 27 – see also similar provisions in domestic human rights instruments) or as derivative of the individual autonomy necessary to choose a 'good life' (see, for example, Kymlicka 1989).

A second, more controversial body of political theory locates the relevant particularity of indigenous communities in their historic exclusion from the formation of settler states. These 'historic particularist' approaches emphasize not the cultural 'equality' of indigenous peoples, but their *sui generis* status, arising from their prior occupancy of the territory in question and their continuity with

pre-contact communities. While cultural pluralists address indigenous claims alongside the rights of other cultural minorities, 'historic particularist' theorists deploy the logics of sovereignty, self-determination and property instead.[7] In this way, they can explain the emergence of indigenous jurisdiction as a response to the particular experiences of indigenous peoples in settler societies: the distinctive nature of their claims arises from the distinctive course of settler state history. While the concept of culture as a basis for indigenous rights is limited by liberal principles of equality (and so does not justify the conferral of benefits on indigenous peoples that cannot be allocated to other groups), historic particularism can make up the normative 'shortfall', by providing an indigenous-specific basis for indigenous jurisdiction. Indigenous peoples are indigenous precisely because they were colonized, and so distinctive indigenous jurisdictions are necessary elements of a constitutionally-complete settler state polity. Historic particularism provides a promising framework with which to approach complex jurisdictional questions in the western settler states, including those arising in the governance of tribal membership.

In the following discussion, I address the disputed tribal membership of legally adopted children in order to illustrate that human right based accounts only partly explain and justify settler state accommodation of indigenous jurisdiction.

Adopted children and tribal jurisdiction

As a general principle, the jurisdiction of tribes in the CANZUS states is membership based and personal, rather than territorial. It attaches to some but not all persons resident on tribal territory and is generally confined to those persons who can be said to have consented to tribal authority by virtue of their membership, or who have otherwise accepted tribal jurisdiction through contract, agreement, or as a condition of residence. Once recognized, tribes in all four countries determine their own membership (within certain constraints). Accordingly, the promulgation of tribal membership law is an act of tribal self-constitution, establishing the human boundaries of the community and, consequently, of its jurisdiction.

When CANZUS states define indigeneity in law or officially recognize tribes, continuity tests are paramount. In all four countries, requisite continuity for tribes is a measure of both political integrity (assessing the continuity of indigenous institutions and legal systems) and genealogy (assessing the continuity of shared descent). For individuals, the two categories of tribal membership and legal indigeneity map onto these overlapping views of continuity. As a matter of settler law, legal indigeneity is a measure of descent, but to be legally recognized as a tribal member in settler law, descent must be accompanied by tribal enrolment or registration. Generally speaking, in settler law and policy, tribal members form a subset of the legally indigenous population, not an alternative to it. Much turns then, on the legal meaning of 'descent' as it is used by settler states to identify indigenous persons. On this point the CANZUS states diverge. In

Canada and New Zealand, indigenous descent is a political and familial measure, while in Australia and the United States it is biological.

Thus the effect of legal definitions of Māoriness and Indianness in New Zealand and Canada is that the adopted child of an indigenous person is legally indigenous, even if they lack biological ancestry.[8] This is structurally important because in both countries non-discrimination law seems to prevent settler governments from making distinctions between adopted and biological children. If a biological child inherits indigeneity, so too must an adopted child. In contrast, in Australia and the United States, distinctions made between the adopted and biological children of indigenous parents are in effect distinctions made between indigenous and non-indigenous persons. Some distinctions between indigenous and non-indigenous persons are permissible, even if distinctions between adopted and biological children are not. Therefore, in Australia and the United States, differential treatment of the adopted children of indigenous parents could arguably be justified by reference to the same general exceptions that allow settler states to confer benefits on indigenous peoples in accordance with domestic and international law (*Native Title Act 1993* (Cth); United Nations Committee on the Elimination of Racial Discrimination 1999: paragraph 27; *Morton v Mancari* (1974) 417 US 535; United Nations Committee on the Elimination of Racial Discrimination 2009: paragraph 15).[9]

What if the differential treatment occurs in the allocation of tribal membership? In CANZUS law and policy, and in academic commentary, there seems to be a general (if tacit), consensus that tribes may legitimately deny tribal membership to non-indigenous applicants and that this does not amount to impermissible racial discrimination. The very concept of tribalism as an expression of indigeneity is sustained by this principle. There is no consensus, however, on whether the *descendants* of tribal members may be excluded and whether adopted children who lack biological ancestry should count as descendants. Again, the CANZUS states diverge in their approach to these issues. An adopted child lacking biological indigenous ancestry will not be legally indigenous in Australia (*Gibbs v Capewell* (1995) 54 FCR 503, 506), or in the United States (United States Department of the Interior 2000). US law recognizes, however, that such persons may nonetheless be (non-indigenous) members of tribes.[10] In contrast, in Australia, because a native title holder *must* be legally indigenous, a native title prescribed body corporate may not admit a non-indigenous person as member. In both countries, settler law operates to ensure the uniformity of tribal and state law on membership by giving *ex ante* priority to tribal law (the United States) or to state law (Australia).

In Canada and New Zealand, however, no conflation of tribal and settler law on membership has been attempted. In those jurisdictions, legal pluralism persists in tribal membership governance and so, from time to time, membership disputes generate conflicts of laws. In New Zealand, the membership claims of adopted children have yet to be litigated. The Crown has insisted that the adopted children of settlement beneficiaries are also beneficiaries by descent, following the *Adoption Act 1955* (NZ) s 16, which deems adopted children to be

'for all purposes' the child of their adoptive parents.[11] Treaty settlement legislation defines beneficiaries as descendants of an eponymous ancestor or ancestors, sometimes including an express reference to legal adoptees, and sometimes not. There remains a question about whether the 'descendant' category includes legal adoptees where they are not otherwise expressly referenced. In apparent contravention of their Treaty settlement statutes and Deeds of Settlement, some tribes have vehemently asserted that they do not admit all legally adopted children because their customary law confines membership to biological descendants. The public statements of Ngai Tahu illustrate this stance:

> [t]he policy remains that enrolments are only accepted from direct bloodline descendants of the Kaumatua in the 1848 Ngai Tahu Census.
>
> Adopted persons are therefore not eligible to enrol as Ngai Tahu beneficiaries unless they are of Ngai Tahu descent.
>
> (Te Rūnanga o Ngāi Tahu 1996)

In contrast, the Crown is of the view that even if adopted children are not 'descendants' in the express terms of Treaty settlement statutes, if a tribe were to deny membership to an adopted child, this would amount to an act of discrimination prohibited by the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZBORA*') and *Human Rights Act 1993* (NZ). Importantly, however, in accordance with the *NZBORA*, a public actor can limit enumerated rights if the limitation is reasonable and 'demonstrably consistent with the values of a free and democratic society' (*NZBORA* s 5). If tribes and their representative bodies are designated as public actors (or as entities performing public acts in the relevant context), then the *NZBORA*'s proportionality test would arguably apply to tribal decisions that exclude adopted children. No New Zealand court has yet been asked to decide whether the exclusion of an adopted child from tribal membership would limit the rights of that person, nor whether a limitation of this kind is reasonable in a 'free and democratic' society.

In Canada, however, an identical proportionality provision (*Canadian Charter of Human Rights and Freedoms*, RSC 1985, c H-6, s 1) was applied by a federal court in a challenge to the membership rules of an Indian First Nation. In the case of *Grismer v Squamish Indian Band* [2006] FC 1088 ('*Grismer*'), an adopted child contested his exclusion from membership in the Squamish Indian Band (now the Squamish Nation). The Nation's Membership Code provided for the enrolment of the biological children of an enrolled member and of adopted children who had two enrolled parents, but did not allow the enrolment of adopted children, like the applicant, who had only one enrolled parent. (*Grismer*: [6]–[8], [37]–[40]). The Judge found that the Membership Code did indeed discriminate against the applicant because he was treated less favourably than the biological child of an enrolled member would have been. Accordingly, the Code imposed a limitation on the rights of the applicant but, applying the proportionality test, the Judge concluded that the limitation was a reasonable and justifiable one: '[r]estricting

membership to persons who have a bloodline connection to the Squamish Nation is [a] rational way of preserving and protecting the unique Squamish culture and identity' (*Grismer*: [64]–[65]). Importantly, the Judge was of the view that the First Nation had 'sought to balance the potential rights of persons with no Squamish blood against the Squamish tradition and the need to preserve the unique Squamish culture and identity' (*Grismer*: [77]). The significance of the Court's reasoning, then, lies in the emphasis given to tribal policy-making and law-making. Like any self-governing polity, a First Nation must find a way to balance the competing interests of its members (and aspirant members).

Thus the application of the proportionality test to the tribe as a public actor[12] provided an opportunity for the Squamish Nation to defend the content of its membership law by reference to the community's values, history and political context. The Judge was satisfied that the discriminatory Membership Code was intended 'to preserve the collective Squamish culture and identity, particularly in the face of an overwhelming non-Native and non-Squamish population, in a manner consistent with Squamish heritage, culture and values' (*Grismer*: [61]). The vulnerability of the Squamish Nation as a distinctive cultural minority, the importance of heritage and tradition to such a community, and the Nation's responsibility to act in the tribal public interest were all relevant factors. One way to understand the judicial method used in *Grismer*, then, is that the 'reasonableness' of indigenous membership law in a 'free and democratic' *settler* society must be understood in the context of settler state history. This history is unavoidably and crucially a history of colonization.

Is a settler judicial forum the best place for deep jurisdictional dialogue of the kind evident in *Grismer*?[13] While *Grismer* shows that judges may be sympathetic to indigenous particularity in the application of human rights law, adjudication of this kind is necessarily an *ex post* response, narrowly confined to the particulars of the dispute in question, and in which tribal law is challenged in a non-tribal forum. Diplomatic and agreement based arrangements could provide a better institutional interface for the management of jurisdictional conflicts over tribal membership. Justice Marinteau, the presiding judge in *Grismer*, seemed to agree: 'judicial review applications are perhaps not the best vehicle for resolving the complex constitutional issues involving alleged discriminatory actions involving members of First Nations.' (*Grismer*: [83]). In the discussion that follows, I argue that discrete tribal membership disputes like this one test and catalyze settler state political theory.

Complicating factors – why tribal membership disputes are different

Membership governance provides the underpinnings of an intricate and fast-developing body of law and policy on tribal jurisdiction in the CANZUS states. When considering the tribal membership of adopted children, should tribes be obliged to accept the settler law designation of adopted children as 'descendants'?

Why should settler law take priority in this context? 'Descent' has no natural meaning and its formal content is provided by legal rules that determine how it is to be measured (descent from whom or what?). A conflict of laws arises where settler and tribal legal systems arrive at different concepts of 'descent'. The definition of descent that determines the scope of tribal jurisdiction is as much about the place of tribes and tribal law in settler states as it is about the human rights of adopted children.

It is important to recognize that a political and constitutional principle is at stake here. Tribal exclusions of adopted children cannot be completely explained as an expression of tribes' material interests, because the number of persons denied membership on this basis is likely to be tiny, relative to tribal populations and resources. Further, there is no evidence of a general tribal antipathy towards adoption as a practice. After all, many tribes admit children adopted in accordance with *tribal* law and some of these children are also legal adoptees (Gover 2010). Conflict over the tribal membership status of adopted children is not strictly about whether legally adopted children can *ever* be included; rather, these disputes are about the jurisdiction of tribes to determine *if and when* legally adopted children will be recognized as members in accordance with tribal law.

Political and legal traditions inherited from Britain and developed in countries without indigenous populations include principles that could be used to adjudicate disputes about the tribal membership of adopted children, but they give no guidance on the larger normative question: how to reconcile tribal and settler law on indigeneity and membership? Only settler societies face the challenge of indigenous particularism. Thus, settler societies are obliged to make use of concepts such as 'discrimination', 'race', 'ethnic or national origin' and 'culture' in ways that are compatible with their particular histories and pluralism. This includes the design of methods with which to balance rights against one another, or to impose reasonable limits on those rights in the public interest. In a settler society, this requires engagement with the indigenous legal and political theories that guide tribal law-making.

Finally, as I have argued elsewhere, liberal responses to tribal membership governance encounter a conceptual difficulty that is endemic to liberalism itself (Gover 2010). The self-constitution of any liberal polity creates a 'boundary problem' – what Robert Goodin (2007) calls the problem of 'constituting the demos' (Dahl 1979: 109; Nootens 2009). So does the self-constitution of tribes. That is, during the constitution of any demos – whether nation-state or tribe – there occur exclusions that cannot be defended against liberal principles of non-discrimination because the process of constitution entails a degree of arbitrariness (Dahl 1979; Goodin 2007; Nootens 2009). As Seyla Benhabib (2006: 35) has put it, 'democracies cannot choose the boundaries of their own membership democratically'. Since non-members are not part of the tribe as formally constituted, what theory could explain or contest their exclusion? Any plausible theory must identify a constitutive premise that could justify the drawing of boundaries in such a way as to include or exclude adopted children within a particular tribal demos.

In the context of state formation, understandings of nationality, territory and 'history' have served as such premises (Benhabib 2006: 35). In the indigenous context, however, the concept of descent has persisted as the organizational centrepiece of tribal law and custom. Descent is present in settler societies as an organizing principle that exists alongside the official infrastructure of the state, not as a vestige of premodernism, but as a premise that is fundamentally constitutive of tribes (and so also of settler states), as political entities. How, then, should tribal concepts of descent be reconciled with liberal democratic principles and the rule of law?

Litigation can provide a short-term solution in particular cases but, arguably, at the expense of ongoing diplomatic relationships of the kind required by the particular pluralism of settler states. Jeremy Webber (2000: 70) has argued persuasively, for example, that recognition of indigenous collective property rights is not achieved by a single act, but requires 'the initiation of a longer process of interaction, mutual adaptation and incitement to reflection and reform,' a process that 'may only be achieved through mutual accommodation over the very long term.' In light of the complexity and constitutional import of tribal governance, the political, diplomatic, and 'quasi-international' aspects of state–indigenous relationships provide a more durable and transformative institutional response to settler state legal pluralism. The aim would be to coordinate, by intergovernmental dialogue, tribal and public law on matters of membership. In the case of adopted children, tribes may be willing, under specified circumstances and with requisite reciprocity, to recognize settler law by exercising their discretion to admit legally adopted children as tribal members in *tribal* law.

Conclusion

In CANZUS settler states, most interactions between indigenous peoples and settlers began as international encounters, involving treaty-making, trade, diplomacy and war. The legal fictions embedded in positivist legal theory have been ascendant in the settler states for most of the twentieth century but have not displaced the operation of law-like norms in non-state orders – including tribes – as a matter of social and political fact. (Legal pluralism is premised on exactly this empirical challenge to legal positivism.) The international aspects of state–indigenous relationships in the western settler states have likewise persisted in muted form since the original colonial encounters, despite the powerful legal orthodoxy of absolute state sovereignty. These international dimensions have emerged again, perhaps by default as much as design, as tools with which to manage the formalized constitutional pluralism emerging from the 'indigenous claims era' of the 1970s and 1980s. The inherited *legal* theory of the western settler states limits the capacity of settler law to recognize tribes as sovereigns or states but, as a matter of *political* theory, the institutions of settler governments have evolved a series of practices that have very strong parallels with those that structure international relations.

Universality is an elusive concept in the legal systems of settler states, to the extent that indigenous particularity asserts limits to the comprehensive application of human rights laws and concepts. This is evident in the awkward application of non-discrimination norms to tribal membership governance. The difficulty of reconciling tribal and settler law on the status of adopted children shows that, on their own, human rights norms cannot satisfactorily resolve jurisdictional disputes about tribal membership. In the worst case, they can support the conclusion that tribal jurisdiction is illegitimately premised on acts of racial and familial discrimination. I have suggested that arms-length dealings between settler and tribal governments provide a way to incorporate indigenous groups within a settler state body politic by expressly accommodating indigenous particularity. Agreement-making does not, of course, guarantee procedural or substantive justice, and is susceptible to illegitimate or coercive uses of executive power that can and should be checked by other branches of government (and by other executives, including those of tribes). These are challenges that liberal democracies have faced and dealt with in other contexts, especially in efforts to improve the transparency of executive decision-making in international relations.[14] State–indigenous jurisdictional arrangements established by agreement are not ad hoc aberrations that are tolerable only during a transition to legal monism. They are a political and constitutional response to the social fact of indigenous particularity. 'Quasi-international' methods and conventions of the kind discussed above should be celebrated as innovations that can accommodate *sui generis* settler state pluralism, further the just allocation of political power in settler societies, and give practical expression to a distinctive settler state political theory.

Notes

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2 The logic and substance of indigenous boundaries are explored in Kingsbury and Gover (2005).

3 I have borrowed this term from Ivison (2003).

4 Indigenous Australians who were removed from their families by federal and state officials in accordance with 'Aboriginal Protection' statutes and policies in place during the period 1869–1969.

5 See, for example, the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* Art 37(2), which states: 'Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.'

6 For example, the following commentary:

> what in effect is sought is a review of the Crown's decision to recognize and accept the mandate of Ngati Ruanui to enter into settlement negotiations with the Crown, including on behalf of Pakakohi and Tangahoe. Such an attempt must fail because the process which it is sought to review is essentially political, involving questions of policy and political judgment.
>
> (*Hayes v Waitangi Tribunal* (2001) (Unreported, High Court of New Zealand, Goddard J, 10 May 2001), 17)

7 See, for examples, the works of Tully (1995) (sovereignty and nationhood), Anaya (2004) (self-determination) and McNeil (2002) (property).

8 Crown Law Office (2005) *Advice from Crown Law Office to Office of Treaty Settlements*, 'Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Bill', 8 March 2005, OTS&240/142; (obtained under Official Information Act 1982 request to Crown Law Office): paragraph 14. See also section 2 of the *Indian Act*, RSC 1985, c 1–5. New Zealand's Crown lawyers are of the view that:

> a non-Maori who had been legally adopted into a Maori family (and is deemed to be the child of his parents and therefore descend from his parents) could also be, theoretically at least, considered to be 'Maori'. This is a consequence of s 16 of the *Adoption Act 1955* [(NZ)].
>
> (Crown Law Office 2005)

9 See, for example, the classification of the native title legislative regime (in its original form) as 'a special measure' in the Preamble to the *Native Title Act 1993* (Cth) and United Nations Committee on the Elimination of Racial Discrimination (1999), and the exemption for policies benefitting only Indian persons established by the United States Supreme Court in *Morton v Mancari* (1974) 417 US 535.

10 See Gover (2009).

11 One complicating factor that has so far not surfaced in policy debates is the fact that the *Adoption Act 1955* (NZ) provides that an adoption order does not change the 'race' of an adopted child. In New Zealand legislation, 'Māoriness' is a measure of race. Does this mean that adoption cannot make a child a Māori? For further discussion, see Gover (2011).

12 The Nation's defence did not depend on any enumerated indigenous rights, such as ss 25 and 35 of the *Constitution Act 1982* (Can), nor on common law property rights or treaty rights.

13 Signifciantly, as of 18 June 2011, First Nations are subject to the *Canadian Human Rights Act*, RSC 1985, c H-6. The amended Act includes non-derogation and interpretative provisions, specifying that if a complaint is made against a First Nation, that the Act be:

> interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.
>
> (*An Act to Amend the Canadian Human Rights Act*, SC 2008, c 30, s 1.2)

14 For example, in Australia, the domestic process of treaty-making was changed in 1996 to improve the transparency of the Commonwealth Executive's decision-making by providing for, inter alia, parliamentary scrutiny of treaty texts and consultation with state and territory executives (Department of Foreign Affairs and Trade 2000).

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