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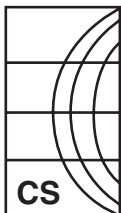
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The Social Construction of Indigenous 'Native Title' Land Rights in Australia

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abstract: Legal scholars and political theorists dominate academic writing on the issue of indigenous peoples' rights. This article, however, adopts a sociological approach, analysing indigenous rights in Australia as a socially constructed phenomenon, the product of ideals, entrenched colonial structures and the balance of power between political interests. It shows how, during rights institutionalization processes, ably aided by a receptive government and media, commercial lobby groups constructed propaganda campaigns to further their interests to the detriment of indigenous interests. The resultant legislation was an exercise in rights limitation behind a veneer of agrarian reform. The article concludes by highlighting the tension between national rights regimes of this nature and international human rights norms and suggests an approach that could overcome this problem.

keywords: Australia ♦ indigenous people ♦ legislation ♦ rights ♦ social construction

Introduction: Sociology and Indigenous Rights

Until relatively recently, the discipline of sociology has largely confined its examination of rights to the realm of citizenship (Morris, 2006: 1). The concept of citizenship, however, is closely linked with the modern nation-state, a political form that has been infected with the problems of imperialism, globalization, migrant workers, refugees and indigenous peoples (Turner and Rojeck, 2001: 109). In a seminal essay for the journal *Sociology*, Brian Turner (1993) suggested that globalization has created problems that are not wholly internal to nation-states and consequently we should extend sociological enquiry to the concept of *human* rights. While few

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sociologists have attempted, like Turner (1993), to develop a sociological theory of human rights, there is now a growing body of research that analyses the social life of rights.¹ Such studies show that 'rights' are not simply givens, but products of social and political creation and manipulation. This point is underlined by Wilson (1997: 3–4), who suggests that social scientists should primarily be concerned with analysing rights as socially constructed phenomena. He writes:

the intellectual efforts of those seeking to develop a framework for understanding the social life of rights would be better directed not towards foreclosing their ontological status, but instead by exploring their meaning and use. What is needed are more detailed studies of human rights according to the actions and intentions of social actors, within wider historical constraints of institutionalized power.

While the discipline of sociology has been slow to engage with human rights, it has been even slower to engage with the specific case of indigenous rights. Historians, anthropologists, political and legal theorists have all made commentaries and undertaken significant research on indigenous peoples and their rights, yet only a few sociologists have taken an interest in a subject that is now truly global in its ramifications (Samson and Short, 2006). In the face of the homogenizing forces of economic globalization and strong nation-states, it is becoming increasingly clear that the affluence produced by international capitalism comes at the expense of both the ecosystem and the cultural vitality of small peoples whose ways of life depend on local environments (Samson and Short, 2006). Global activism of hitherto separate groups of indigenous peoples has developed in response to these destructive homogenizing forces. Indigenous groups such as the Wirajuri, Ngunnawall, Nahuatl, Ogiek, Blackfoot, Tuareg and Innu are now intimately involved in the construction of their rights through the United Nations system (see Morgan, 2004; Niezen, 2003). This quest through the UN system is born out of frustration at the extreme social and political disadvantage suffered by many indigenous peoples worldwide, and frequently out of disillusionment with the rights conferred on them by the settler states in which they live.

This article examines the case of one such domestic rights regime: 'native title' land rights in Australia. The article argues that in the Australian context the domestic institutionalization of international human rights standards² as they pertain to indigenous peoples is best understood as a product of ideals, entrenched colonial structures, and, most importantly, the balance of power between political interests. In 1992, the High Court of Australia decided in the *Mabo* case that to deny indigenous rights to land would be unjust and contrary to contemporary international human rights standards, especially the principle of racial equality. The court was aware

of, in Turner's (2006: 124) terms, the 'vulnerability' of dispossessed indigenous people and did not seek to worsen their plight by flouting the international moral code that prohibits racial discrimination. Yet, when the government responded to the landmark case, the interests of vulnerable indigenous groups were ignored in favour of powerful commercial interests. The net result was legislation that sought to *limit* indigenous rights behind a veneer of agrarian reform. Thus, as Freeman (2002: 85) writes:

. . . the institutionalisation of human rights may . . . lead, not to their more secure protection but to their protection in a form that is less threatening to the existing system of power. The *sociological* point is not that human rights should never be institutionalised, but, rather, that institutionalisation is a social process, involving power, and that it should be analysed and not assumed to be beneficial.

In the rest of this article, I examine the trajectory of indigenous rights to land in a manner that goes beyond the formal, legalistic dimensions of such rights, where, as Wilson (2001: xvii) points out, they will always be a 'good thing'. In contrast to such perspectives, this article takes a broad sociological approach, which shows how the institutionalization of 'native title' land rights is a social process bound by colonial structures and ultimately intertwined with power, elites, privilege and the actions, intentions and interests of the social actors involved. The article places the institutionalization of native title rights in the context of political battles for control of resources that pitted indigenous peoples against powerful commercial lobby groups. It shows how, through the social construction of a discourse of crisis, industry 'uncertainty' and the deliberate generation of unfounded public fear, commercial lobby groups and their political and media supporters successfully pressured the government to severely limit indigenous land rights. In short, the article argues that seemingly beneficial land rights were in fact constructed in such a way as to actually *maintain* existing social, political and economic inequalities and perpetuate the colonial status quo. In this sense the article highlights a gulf between settler state-granted indigenous rights and their normative benchmark: the United Nations Draft Declaration on the Rights of Indigenous Peoples (hereafter the Draft Declaration).³ Indeed, the indigenous land rights debate in Australia is an example of, in Turner and Rojeck's (2001: 127) terms, 'the frequent tension between national systems of rights and international human rights'.

The Social Construction of 'Native Title' Land Rights

The first fleet of European colonizers arrived on Gamaraigal land on 26 January 1788. The colonizers applied the legal doctrine of *terra nullius*, meaning 'land of no one', to the Australian continent. The philosophical

Eurocentric underpinnings of this assertion were based on John Locke's 17th-century notion of property ownership. In his *Two Treatises of Government*, Locke proposed that property in land originated from tilling the soil, 'mixing labour with land' (Locke, 1970). The apparent absence of such activities led to the colonizers' conviction that the natives had no investment in the soil and hence no legitimate claim to it. It was not until the *Mabo* case in 1992 that this Eurocentric assertion was overturned.

On 3 June 1992 the High Court in *Mabo* ruled that the doctrine of *terra nullius* was a legal fiction based on 'little more than bare assertion'. The claim before the court was that the Meriam people of Murray Island, living in permanent communities with social and political organization, had continuously and exclusively inhabited the Island and its surrounding islands and reefs. While it was conceded that the British Crown (in the form of the colony of Queensland) became sovereign of the islands upon their annexation in 1879, the plaintiffs claimed continued enjoyment of their land rights and contended that these had not been validly extinguished by the sovereign. Thus, they sought legal recognition of *continuing* rights. On 3 June 1992, the High Court, by a majority of six to one, upheld the claim. The court recognized that a form of indigenous title to land, which it termed 'native title', *may* continue to exist in areas where indigenous people still 'occupied' and could display a 'continuing association with their traditional land'. Where there was possible conflict with non-indigenous interests, however, *it would be the rights of the native title holders that would yield*. Not one millimetre of non-indigenous land was at risk from the legal principles laid down in *Mabo*. In fact, the native title indigenous land rights recognized by the court were extremely limited. The rights granted limited occupation only; they were not even akin to a standard lease. Only traditional 'native practices', as defined by the courts, would be permitted. There was no right of sale or transfer. The Court ensured that native title would operate around the fringes of white property rights and do nothing to alter the established colonial order. Despite the extremely limited nature of native title recognized by the High Court, the next section shows how commercial interests lobbied the government to ensure that when these rights were institutionalized via legislation, they would pose no threat to commercial interests and maintain existing inequalities.

Industry 'Uncertainty' as a Constructed National Crisis

A crisis, like all news developments, is a creation of the language used to depict it; the appearance of a crisis is a political act, not a recognition of a fact or of a rare situation (Edelman, 1998: 31).

Following the *Mabo* decision, there began the construction, by powerful vested interests, of a public 'debate' that largely focused on hypothetical

counterfactual concerns but which nonetheless successfully shaped the subsequent legislation. Indeed, the Court's legal reasoning, in particular the limited nature of native title, was ignored by commercial interests that sought advancement of their cause via a campaign that constructed a 'national crisis' out of a relatively minor private concern.

Industry groups, and in the particular the mining lobby, were threatened by the case as it was conceivably possible that some of their existing land titles could be deemed invalid, as they had not compensated resident Aboriginal groups when they purchased indigenous occupied land from non-indigenous land owners. The mining lobby were further concerned by the possibility of future grants of native title hindering their hitherto unbridled claims for land development. It is worth noting at the outset, however, that given the extremely limited nature of native title⁴ as defined in *Mabo*, and the poor financial status of indigenous groups, there really was no significant danger to commercial interests. The worst case scenario for industry was that they might have to pay retrospective compensation to *proven* native title holders for land titles acquired without paying compensation prior to *Mabo* and possibly negotiate with *proven* native title holders over future developments on land subject to the doctrine.

Essentially, the concept of native title posed a minor problem for an enormously affluent industrial lobby, in that it had the potential to dent profits, but in keeping with the inherent desire of commercial interest to maximize profits it was nonetheless economically rational for them to lobby the Commonwealth to do two things: (1) validate existing commercial titles by extinguishing native title and paying compensation on their behalf; and (2) ensure that native title holders could not veto future land development. The primary lobbying tactic for this was the transformation of a minor private concern into a 'national crisis'. The media, as one of the key institutions that can promote misinformation, took a lead role in aiding this construction. As former minister for indigenous affairs, Robert Tickner (2001: 94), commented, 'the reporting of the native title debate was . . . abysmal. It reached its lowest point when the front page of a Sydney Sunday paper seriously reported a *Mabo* land claim over Sydney Opera House, which was without legal foundation of any kind.'

One of the major tools of the press was the 'opinion' poll and in the vast majority of cases the contextual framing of questions and propositions was more likely to resonate with mining than with Aboriginal interests. As Goot (1994: 134) suggests,

the explanation for much of this is not far to seek . . . over 60 percent of the poll items which the press paid for, or were invited to report, were sponsored by the mining industry's peak council or produced at the initiative of an organisation with direct mining links . . . *no polls were paid for or conducted by Aborigines or by those whose fortunes were linked to Aboriginal interests* (my emphasis).

The construction of a national crisis that was aided by the press and financed by mining companies and their support networks can be deconstructed into four interrelated layers, as follows.

The 'Granting' of Native Title

Soon after the *Mabo* judgement, John Hyde, former Liberal MP and then director of the influential Institute of Public Affairs (IPA), gave an indication of what was to come from the industry lobby when he wrote: 'the Justices of the High Court had learnt nothing from the experience of Communism. The particular title that they have "recognised" has all the worst features of property in Russia' (cited in Goot, 1994: 134).

The statement seemed to suggest that indigenous social organization, which existed from time immemorial, was merely an unfortunate and problematic *creation* of the High Court. The erroneous conception of native title, as something that was being 'given' to Aborigines to the detriment of the nation, rather than the long overdue common law *recognition of a pre-existing inherent right*, was a necessary precursor to the construction of native title as a national 'crisis'. If native title could be widely understood as a new phenomenon that the High Court had 'granted', in error, without due consideration for business interests, it would greatly strengthen their arguments for extinguishment. This conception of native title, which was promulgated by large sections of the press and fully embraced by members of the Coalition, was crucially only the first stage in the construction of native title as a 'national crisis'.

'Unacceptable Uncertainty'

The second stage of this 'crisis' framing was the assertion that the concept of native title made existing land titles and future industrial development possibilities unacceptably *uncertain*. The issue of 'uncertainty' for industry was the central rhetorical pillar in the construction of native title as a 'nation crisis'. The fact that the construction depended on an extremely tenuous legal argument did not stop it quickly gaining credence in the press and becoming a justificatory magic mantra to be invoked whenever the argument for extinguishment was challenged.

Just before the federal election in 1993, the Australian Mining Industry Council (AMIC) produced a paper for consideration by the newly constituted Mabo Ministerial Committee that encapsulated the first element of the *uncertainty* argument. The paper argued that the Racial Discrimination Act (RDA) 1975, which gave legislative effect to the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Mabo decision placed at risk some land titles, including mining interests, gained after the passage of the RDA on what could now prove to be native title land.

The crux of the AMIC's legal argument was that post-1975 all transactions in land had to be non-discriminatory and since many potential native

title holders would not have been treated the same as other title holders during that time (for example, they would not have had advanced notice of impending government appropriation of their land for a mining grant and would certainly not have received compensation), they were treated in a discriminatory manner. Thus, the only way to remedy the situation, so the argument contended, was to introduce retrospective legislation to override the RDA, Australia's only anti-discrimination legislation.

The underlying assumption of AMIC's position was that a defective title *could not be legitimated by the payment of just compensation*⁵ and consequently the Commonwealth had to overcome the failure of governments to recognize and respect the interests of native title holders between the years 1975 and 1993 when native title was not recognized and governments were understandably ignorant. Robert Tickner (2001: 100) suggests the acceptance of this argument was a disaster for the hopes of a reasoned and rational response to *Mabo*. He writes,

one of my deepest regrets in all the native title debate is that what I regard as a nonsensical legal argument took hold and dominated the agenda of industry groups, politicians and, worst of all, Aboriginal people, even though it was not supported by the government's own legal advice' (Tickner, 2001: 100).

Indeed, the Attorney-General's Department suggested that all that was needed was for each state to enact legislation to extinguish native title providing that it pay 'reasonable compensation' to the native title holders while validating the previous grants.

The second element of the 'uncertainty' argument was the claim that the existence of native title made planning for future developments unacceptably problematic. One of the first people to invoke this logic was Norm Fussell, chief executive of Mount Isa Mines (MIM), who announced strong concern over the 'certainty' of the MIM McArthur River mine in the Northern Territory, a AUS\$250-million lead/zinc/silver project approved the previous year by the federal government, which had become the subject of a native title claim. He publicly threatened to pull out of the deal if the government did not take prompt action to confirm land titles and provide the mining industry with the *certainty* it thought it had (see Tickner, 2001).

The most high profile use of the argument, however, concerned what became known as the *Wik* claim. The claim was made by the *Wik* peoples of northern Queensland and covered 35,000 km² of Cape York. The claim included several areas under a mining lease to Conzinc Riotinto of Australia Ltd (CRA) and the Archer Bend National Park. In a television interview in July, CRA managing director, John Ralph, suggested that his company would defer or scrap projects worth AUS\$1.75 billion unless the *Wik* claim issues were resolved. The company followed this up by sending

letters to all government ministers stating that 'you will appreciate that we cannot enter into any consultations with the *Wik* people until we have *an assured position* regarding title and absence of liability for any compensation arising out of invalidity' (cited in Tickner, 2001: 110).

The crux of the argument was that negotiating in good faith and on just terms was unacceptable to business; negotiations would only be acceptable when commercial interests were *certain* of the best possible outcome. Yet, as the late 'Nugget' Coombs (1994: 210) suggested, 'dealing with uncertainty is what entrepreneurs are rewarded for . . . the Pintubi had no certainty that they would be given the right to live at Yayai. They asked the owners and no doubt negotiated. Let miners do likewise.'

Commercial Interests as 'National Interests'

The third, and most crucial, stage of the construction was the promotion of the argument that it was not just industry interests that were threatened by this 'uncertainty', but also *the interests of the whole nation*. It seems that this is a relatively easy task nowadays due to the success of corporate propaganda in western countries in the years since the Second World War. As Chomsky (1999: 96) writes,

the terms, United States, Australia, Britain, and so on, are now conventionally used to refer to the structures of power within such countries: the "national interest" is the interest of these groups, which correlates only weakly with the interests of the general population.

Commenting on the Australian context, Coombs (1994: 104) observed

there is currently . . . extensive propaganda urging expansion of investment (especially foreign capital) in mining as a stimulus to employment. It should be noted that measured by jobs per unit of capital costs . . . money spent in expanding the mining industry produces a minimum of jobs.

Moreover, an economic report by O'Faircheallaigh (1986) for the Northern Land Council concluded that the only significant benefit to that economy came from the expenditure *by Aborigines* and their organizations of the money paid to them by mining companies under the terms of the Commonwealth's land rights legislation of 1975 as the rest of the capital gain disappeared overseas.⁶ Nevertheless, since the 1970s' 'exploration rush', the mining lobby has sought to maintain the relatively mythical link between their interests and the national interest, and the *Mabo* debate was no exception.

The Northern Territory Chamber of Mines and Petroleum leader, Grant Watt, was one of the first interested parties to invoke the 'national interest' rhetoric, urging quick Commonwealth action to respond to *Mabo* and warning that a failure to do so would have serious consequences for mining investment *and thus for Australia as a whole*. He was soon followed by

the shadow minister for national development and infrastructure, Ian McLachlan, a member of the Coalition Mabo Subcommittee, who stated, in a speech to the right-wing Harvey Nicholls Society, that in 'granting a new right [*sic*] the High Court had failed to take account of the immense damage it would do to the rights other Australians thought they had' and had 'left great tracks of Australia in turmoil as to title and therefore in those areas, risks the stability and future *development of the nation*' (Tickner, 2001: 115, my emphasis).

The press significantly aided this element of the national crisis construction. One of the more strident editorials came from the *Herald Sun*, which concurred with mining company chief executive Hugh Morgan's assessment that *Mabo* was affecting business and

... cutting off *our* economic lifeblood all because some politicians and their camp followers have become slaves of the green movement and others are determined to punish *us* for crimes by the British against Aboriginals committed before we, our fathers and even our grandfathers were born. (*Herald Sun*, 14 March 1993)

Yet, financial statistics suggest that native title has had a negligible impact on general mining industry trends. In fact, as Manning (1997: 15) writes, 'mineral exploration expenditures revived in 1993 after a lull during the recession of the early 1990s, and since then have been running at levels to rival the boom of the late 1980s'. At the height of the debate about the economic implications of native title, Noonan (cited in Lavelle, 2001: 104) commented,

over the next three years, 120 companies plan to spend more than \$60 billion on mineral exploration and mineral processing plants in Australia. . . . Despite all the hot air and fevered arguments about [native title] in the lobbying forums of the country, the real world of outback mining and mineral processing is getting on with it.

Lavelle (2001) has offered a considered reading of mining industry responses to native title and suggests that it represents opportunist 'political posturing' designed to exert control over a 'negative variable'. The ideological element to this posturing was the notion that modern societies should encourage mineral investment because it is in the 'national interest' (Lavelle, 2001: 108). According to Lavelle (2001: 109),

empirical evidence suggests that mining companies ritually criticise government policies in order to secure more favourable policy outcomes. Mining interests have in the past waged strong campaigns on other policy fronts, conveying the impression that the policies are of greater significance than the evidence suggests.

The major determinant for mining lobbyist action over native title was the perceived ability to control a negative variable. Industry does not target key investment determining factors, such as commodity prices,

because, unlike native title, they are beyond control. Chief executive of the Western Australian Chamber of Mines and Energy, Ian Satchwell, for example stated, 'of the issues affecting exploration [native title] is the only one we can influence in Australia. Low commodity prices and access to capital are largely outside our control' (cited in Lavelle, 2001).

In short, the mining industry waged a propaganda campaign against native title because it was contrary to the industry's interests but nevertheless controllable. The tactical strategies adopted closely resembled those employed against other government policies such as the prediction of industry crisis, the threat of job losses and declining investment, with disastrous consequences for the nation (Lavelle, 2001: 112).

Threatening the Rights of 'Other Australians'

In this layer of the construction the political tool of the 'opinion' poll came into its own. Typical examples of commercial interest oriented polls were those produced by AMR:Quantum and commissioned on behalf of the mining industry.⁷ Each of their surveys asked:

Whether you would be very concerned, somewhat concerned or not at all concerned if the effect of this *Mabo* decision were to:

- Put at risk the existing property titles of other Australians
- Discourage mining investment in Australia
- Delay or prevent economic developments
- Reduce or prevent employment opportunities in Australia
- Result in the control of some publicly owned natural resources by a minority group
- Result in large areas of Australia being claimed by Aboriginal people.

The AMR:Quantum poll was of particular interest as it implicitly and subtly contained all the ingredients of the 'national crisis' construction so far established while introducing a new element. Indeed, it continued to emphasize the now familiar corporate rhetoric that connects mining investment and employment opportunities, with no mention of the word 'profits', while at the same time implying that there was a threat not just to corporate property titles but to the property titles of 'other Australians'. This inference became known as the 'backyards threat', which was to add the final layer to the construction of native title as a national crisis. The AMR:Quantum finding that 89 percent of the electorate 'would be . . . concerned' if the property titles of 'other Australians' were 'put at risk' was a useful propaganda device but hardly a surprising result. Since threats to homes would be unpopular, getting people to fear for their homes

because of *Mabo* would leave any party that backed *Mabo* with a 'large electoral liability' (Goot 1994: 145).

Due to the exceedingly limited nature of the *Mabo* case, the threat to private 'backyards' was entirely without legal foundation, yet it was frequently cited in the press and gained further credence when Coalition leader, John Hewson, utilized the erroneous logic's dramatic impact in his *Mabo* address to the nation in the run-up to the general election. It seemed that the industry lobby and the Coalition were well aware that dubious allegations about the dangers or threats a situation poses are potent avenues for influencing public opinion (see Edelman, 2001: 91).

The Native Title Act 1993: Rights Limitation

Governmental procedures involving controversial issues are typically designed to achieve a resolution whether or not it is fair, reasonable or effective, though rituals and myths always suggest that it meets these criteria. In fact, the resolution virtually always perpetuates the status quo (Edelman, 2001: 96).

Soon after the High Court had handed down its judgement in *Mabo*, it became clear that the Commonwealth would be under immense pressure from powerful vested interests to 'limit' the application of native title, with some industry commentators advocating outright extinguishment. Ultimately, indigenous native title holders were not granted a right of veto over future development of their land, which, as Mr Justice Woodward suggests, renders indigenous land rights largely meaningless (Woodward, 1994: 418).

The right of veto was an integral part of the Northern Territory Land Rights legislation back in 1975 and a key indigenous demand after *Mabo*, yet it gave way to the interests of a powerful commercial lobby with the aid of a constructed national crisis of uncertainty and a sympathetic press. The political spectacle that was the *Mabo* debate served to obscure a standard political compromise, which protected commercial interests and substantively preserved the status quo.

The legislation's primary purpose was the *validation* of existing commercial titles and the provision of guarantees that future land negotiations would be conducted within the parameters set by existing power inequalities. As Prime Minister Paul Keating stated, 'Aboriginal people understood that a generalised veto was never on and that there was some doubt that they even deserved a right of consultation and negotiation' (TV broadcast SBS *Dateline* on 28 July 1993; see also Tickner, 2001: 146). The legislation responded to the agenda of powerful corporations in the mining industry and to particular state interests to the detriment of indigenous interests. Yet the government still claimed indigenous support for the Act.

The government was able to produce such legislation and still claim Aboriginal backing, by primarily dealing with the Aboriginal establishment. The government made no attempt to consult widely with Aboriginal communities around the country. The bulk of the negotiating was conducted with what became known as the 'A-team' of moderate, largely government employed, indigenous 'leaders'⁸ who were aware that a right of veto 'was never on'. A marginalized 'B-team' was depicted as 'radicals', out of step with the political realities, that is, they did not readily accept the validity of the constructed 'crisis' of uncertainty that was allegedly facing the nation. Yet, as Bennett (1999: 52) has pointed out, there is nothing unusual in such tactics, in fact, 'keeping consultations as narrow as possible is the norm for governments when dealing with competing interests'. Indeed, when dealing with contentious indigenous issues, it is a common tactic for governments to consult only the 'Aboriginal leaders' in their employ (Bennett, 1999: 52). In reducing the consultative burden, Keating was seeking to confine discussions to the fine print of his proposals and not the substance.

Such intentional contraction of the consultative net is a common tactic of governments that publicly request the input of a broad range of interests but privately seek mere justificatory ammunition for a path already chosen (see Bennett, 1999; Edelman, 2001). Indeed, Bachrach and Baratz (1962: 949) referred to such use of political power as an example of 'the mobilisation of bias', whereby some issues are organized into politics while others are organized out. By isolating the 'B-team' and failing to canvass the views of indigenous leaders across the country, Keating was essentially 'organizing out' such issues as a right of veto over future developments and the related issues of indigenous political autonomy and control of resources.

When discussing the 'two-dimensional view' of power, Lukes (1980: 17) has also drawn attention to the fact that institutional procedures, the rules of the political game (in this situation the *Mabo* response consultative framework), are themselves a product of power relations and can act as a filter to the airing of issues deemed inimical to dominant interests. Keating's tactics can be seen to invoke this deployment of power.

The 'A-team' played its role for the government by accepting the Act, thereby lending credence to the claim of 'indigenous support'. Moreover, such 'indigenous support' allowed the government to 'validate' titles,⁹ with the tax-payer footing the compensation bill, on behalf of hugely wealthy mining interests. The existence of 'validation' provisions suggests that the Act is less about protection of native title and more about *limitation* and *advancement* of commercial titles. Moreover, the absence of a 'right of veto' over future development guarantees the continuance of an unbalanced

power relationship between indigenous peoples and mining interests, a situation that is clearly of benefit to the latter not the former.

The successful national crisis construction aided the eventual, and perhaps inevitable, victory for commercial interests, who achieved a tax-payer funded *validation* of existing titles and a guarantee that Aboriginal people would not be able to negotiate future developments on anything like an equal footing, even if native title were fully proven. It is perhaps naive to think that even a government that has displayed significant pro-Aboriginal sympathies and instigated an Official Reconciliation process (see Short, 2003a, 2003b) would do anything other than side with industry groups who deem their interests to be threatened by native title holders, since election to high office is almost impossible without the financial backing of such affluent groups. Such explanations for legislative inertia are well researched. As Murray Edelman (2001: 96) states, 'both legislatures and high executive positions are dominated by those who win support from elites by defending established inequalities . . . legislators are therefore rarely the source of significant changes in established conditions or inequalities, although they sometimes enact legislation that purports to provide such changes, knowing the administrators and courts are likely to interpret and implement it in ways that minimise whatever radical potential it contains'.

Edelman's analysis seems entirely applicable to the native title legislation as there have, to date, been only 60 limited determinations by the 'white administrators' in the Native Title Tribunal. That determinations are made by such 'white' institutions highlights a more elementary problem with the Act, as in spite of the denunciation of *terra nullius* it firmly entrenches fundamental colonial assumptions and impositions. The assumption of legitimate settler state sovereignty, for example, results in the burden of proof for native title residing firmly with Aboriginal groups whose fate will continue to be decided by white settler institutions. The Act fails to adequately address the fact the settler state arbitrarily and illegitimately imposed its sovereignty on indigenous peoples, who were distinct political entities with land and sovereignty at the time of conquest and many indigenous nations still retain such status. Indeed, in order to claim native title indigenous groups, in effect, have to prove just that. They have to prove 'traditional and continuing connection to the land' and that they still abide by 'traditional laws and customs'.

The emergence of the Native Title Act should thus be understood as the Keating government's political solution to an unwanted problem created by a High Court intent on reforming some aspects of the imposed colonial structures that have dominated indigenous peoples. The Keating government, pressured by mining lobby propaganda, essentially treated the whole process as a land management issue. In contrast to the, albeit somewhat

superficial, morality of the *Mabo* decision, the Native Title Act was a political compromise in accordance with interested parties' relative *political* rather than moral weight. Thus, as Coombs (1994: 209) suggests, 'it is not surprising that indigenous peoples around the world continue to deny the legitimacy of legislation and agreements which purport to recognise or grant them native title to land they believe has always been theirs. This is especially the case when a primary purpose has in fact been to validate earlier dispossessions and to ensure that remaining land continues to be subject to alienation by compulsion.'

Beyond Native Title

As we have seen, in states like Australia indigenous peoples become recipients of rights conferred by policy-makers who first assume the legitimacy of settler state sovereignty and second act to protect colonial structures and existing inequalities often behind a veneer of agrarian reform. The assumption of settler state sovereignty is also a problem within liberal theory where even those writers who might be considered champions of minorities, like Taylor (1995) and Kymlicka (1991, 1995, 2000), skip over the 'first step in questioning the sovereignty of the authoritative traditions and institutions they serve to legitimate' (Samson, 1999; Tully, 1995: 53; 2000). Such writers, while recognizing the importance of culture to indigenous peoples, talk in terms of participation *within* liberal institutions, and their solutions to collective disadvantage are framed in a liberal discourse of rights that is ultimately the product of force. Kymlicka (1991, 1995, 2000), for example, concedes that indigenous peoples' special relationship to land is significant enough to justify recognition via the notion of 'group rights' and 'differentiated citizenship', but he exposes the colonial underpinnings of such liberalism by denying indigenous peoples full political autonomy. By presuming the legitimacy of the liberal settler state's jurisdiction over indigenous nations, such an approach presupposes exactly what is in question (see Tully, 2000: 55).

Indigenous peoples at the national and international level strongly resist classification as 'minorities'. They emphasize their uniqueness both culturally and via the issue of 'consent', which is perhaps the most distinctive aspect of indigenous-settler state relations. While voluntary immigrant minorities have chosen to become citizens of European diaspora nations such as those in the former British Empire, many indigenous peoples have never willingly ceded their lands or political autonomy. Indigenous peoples hold distinct moral claims as *dispossessed first nations*, whose 'forebears will usually have been massacred or enslaved by settlers, or at the very least cheated out of their land, to which they will often retain a . . . spiritual attachment' (Robertson, 1999: 183).

It is here that the liberal politics of 'recognition' fail to accord indigenous peoples the equal recognition it espouses. The distinct moral claims of

indigenous peoples *as peoples* are frequently trivialized by liberal 'recognition' theorists (see Kukathas, 1992; Kymlicka, 1991, 1995, 2000; Taylor, 1995) when they combine discussion of indigenous peoples with minorities and largely focus on internal citizenship-based 'solutions' to 'indigenous problems'. Indigenous authors Taiaiake Alfred and Kevin Gilbert have highlighted the continuation of a colonial relationship within their respective liberal 'multi-cultural' states despite the institutionalization of indigenous rights to land and other 'recognition' initiatives. For Gilbert (1994), land rights, while a move in the right direction for the victims of a colonial system, fail to question the legitimacy of settler state sovereignty over indigenous peoples. Accordingly, he emphasized the necessity of negotiating a 'sovereign treaty' in Australia to grant political rights, return available land and provide freedom from the colonial reality. The indigenous sovereignty challenge is particularly strong in Australia as the 'settlement' of the continent was achieved by pure assertion and brute force: there is no negotiated agreement for the settlers to invoke when their sovereignty is challenged. According to Gilbert (1994: 67), the Australian state will never be legitimate until it gains the consent of indigenous peoples by way of an internationally recognized legally binding sovereign treaty.

Mohawk scholar, Taiaiake Alfred (1999: 58), suggests that settler state granted 'rights' (such as 'native title') should be viewed as *part of* colonialism *and not a remedy to it* since such rights are invariably controlled and regulated by the state. Furthermore, he questions their remedial quality:

. . . defining Aboriginal rights in terms of, for example, a right to fish for food and traditional purposes is better than nothing. But to what extent does that state-regulated 'right' to food-fish represent justice for people who have been fishing on their rivers and seas since time began? (Alfred, 1999: 58)

To frame the struggle to achieve justice in terms of indigenous 'claims' against the state is implicitly to accept the fiction of state sovereignty and the colonial reality (Alfred, 1999). For Alfred (1999: 59) acceptance of 'indigenous rights' in the context of state sovereignty represents the culmination of white society's efforts to assimilate indigenous peoples.

The now common grounding of such settler state granted indigenous rights, in the politics of difference, may have ushered in a somewhat higher degree of internal autonomy for indigenous peoples within colonial systems, but it denies indigenous peoples the right to appeal to 'universal' principles of freedom and equality¹⁰ in struggling against injustice, precisely the appeal that would call into question the basis of internal colonization (Tully, 2000: 47). As Asch (1999: 436) observes, the underlying premise of such indigenous rights is that they are 'not to be defined on the basis of the philosophical precepts of the liberal enlightenment, are not general and "universal" and thus categorically exclude any fundamental

political right, such as a right to self-determination, that could be derived from such abstract principles'.

When concerned with an internal colonial situation,¹¹ the question should not be how can we deal with indigenous 'claims' against the state, but rather how can the colonizers legitimately settle and establish *their* own sovereignty (Tully, 2000: 52). Tully (2000: 53) suggests that for the settler state to gain legitimacy in this regard it is necessary to hold negotiations with indigenous peoples on a 'nation' to 'nation' basis. Indigenous peoples would be 'recognized' as nations equal in status to the settler state and consequently the ensuing treaties would be 'international treaties'. Under this model, the indigenous nation in question has the right to appeal not only to domestic courts for redress of infringement, but, if this fails, to international law, like any other nation (Tully, 2000). Tully argues that such negotiations have the potential to resolve the problem of internal colonization, and describes the approach as a form of *treaty federalism*.¹²

This method responds to the fact that indigenous peoples have not legitimately surrendered their pre-colonial status as 'independent political entities' (Short, 2005). It also challenges the erroneous assumption that jurisdiction cannot be shared, advocating two indigenous principles: free and equal peoples on the same continent can mutually recognize the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination (Tully, 2000: 53). In essence, Tully's formula recognizes 'prior and existing sovereignty not as state sovereignty, but, rather, a stateless, self governing and autonomous people, equal in status, but not in form, to the (settler) state, with a willingness to negotiate shared jurisdiction of land and resources' (Tully, 2000: 53).

It is often suggested by politicians, media commentators and some liberal academics, that since genuine decolonizing treaty negotiations are currently off the political radar in countries like Australia, indigenous peoples should be pragmatic and accept the (colonial) 'reality' before them and limit their aspirations to purely *internal* solutions. Yet, as Maori lawyer Moana Jackson observes, 'the colonial mind is always inventive, and its final resort is always a political reality which either permits or denies the right to self-determination. But reality, like law, is a changing human construct' (cited in Lam, 2000: 62). The work of the international indigenous peoples' movement and the broad indigenous support for the Draft Declaration, which does not limit the right to self-determination to *internal* self-determination, suggests that indigenous peoples do not accept the colonial reality. On the contrary, they are mobilizing to change it (Short, 2005 see also Morgan, 2004).

Conclusion

In contrast to formal legalistic perspectives, viewing settler state indigenous rights sociologically involves analysing them as socially constructed phenomena constrained by entrenched colonial structures.¹³ Taking a broad sociological approach, this article has highlighted the colonial assumptions made by the Australian High Court in its recognition of indigenous rights to land and placed the subsequent institutionalization of such rights in the context of political battles for control of resources. It showed how seemingly beneficial 'native title' land rights actually maintain existing inequalities and perpetuate a colonial relationship. In this sense, the article highlights a gulf between settler state granted indigenous rights and their normative benchmark: the Draft Declaration.

The extra-governmental nature of human rights regimes has ensured that they are used to counteract the repressive capacity of states (see Turner, 1993). Thus many indigenous peoples have accepted the 1994 Draft Declaration as an articulation of their rights, rather than rights regimes, such as 'native title', constructed by settler states. The Draft Declaration's rights to self-determination (Articles 3 and 31) and land (Article 26) are perhaps the most important to indigenous peoples, because of the centrality of land to indigenous culture (see Daes, 1999) and because self-determination is viewed as a remedial political right of distinct dispossessed 'peoples' and 'nations'.

In this context, the broad interpretation of self-determination refers to the right to political autonomy, the freedom to determine political status and to freely pursue economic, social and cultural development. Consequently, the right is viewed as central to a 'just' response to colonial dispossession and the resultant political and social subordination of indigenous peoples (see Short, 2005). In this sense, the institutionalization of indigenous land rights in Australia, which did not even include a right of veto over development let alone a political right to self-determination, is a prime example of the tension between national rights regimes and international human rights norms. Inspired by the insights of indigenous writers such as Gilbert (1994) and Alfred (1999), this article has also suggested how the tension could be alleviated through genuine decolonizing 'nation' to 'nation' negotiations along the lines formulated by Tully (2000).

Notes

The research for this article was conducted while an ESRC postdoctoral fellow at the University of Essex and a Visiting Fellow at the Centre for Cross-Cultural Research, Australian National University and is part of a larger research project on Australian reconciliation.

1. For example see the edited collection, *Rights: Sociological Perspectives* (Morris, 2006) and Morgan (2004) and Wilson (1997).
2. I am using the term 'standards' here as indigenous rights to land are not fully entrenched in international law as yet. They are, however, an intrinsic part of the UN Draft Declaration on the Rights of Indigenous Peoples (UNDD): see indigenous rights to land (Articles 26 and 27 of the UNDD) and consequently they have, what in legal terms is known as, strong 'persuasive authority'. Furthermore, freedom from racial discrimination is included in Article 2 of the UNDD but is also an established international norm (for a discussion of such points see Anaya, 2004). In deciding the *Mabo* case the High Court, especially Judge Brennan, felt the weight of the international moral code, in particular the rule against racial discrimination.
3. The Draft Declaration represents the human rights of indigenous peoples and includes the right to self-determination (see Anaya, 2004).
4. Claimants would have to prove traditional and continuing connection to the land to be successful.
5. Payment of just compensation is the standard legal remedy invoked when a bona fide good faith purchaser has inadvertently purchased a defective title.
6. The legislation was the Northern Territory Aboriginal Land Rights Act 1975 enacted by the Whitlam government after the Woodward Commission of Inquiry.
7. See for example, AMR:Quantum (1993).
8. Throughout my research I have frequently heard community elders express dismay at what they see as self-appointed leaders making important decisions with governments but without the requisite community mandate.
9. 'Validation' would be achieved by extinguishing native title possibilities on land that was acquired by non-indigenous interests prior to *Mabo* and by paying retrospective compensation.
10. The rights are not grounded in universal principles, such as the freedom and equality of peoples; see Tully (2000: 46).
11. Where the colonizing society is built on the territories of the formerly free people who refuse to surrender their freedom of self-determination over those territories; see Tully (2000: 39).
12. Tully insists, however, that three broad principles must be adhered to for this solution to be truly legitimate; see Tully (2000: 53).
13. For a more detailed treatment of these points, see Samson and Short (2006).

References

- Alfred, T. (1999) *Peace, Power, Righteousness: An Indigenous Manifesto*. Don Mills, Ontario: Oxford University Press.
- AMR:Quantum (1993) 'National Opinion Survey on Aboriginal Issues', 10–15 June 1993, commissioned by AMIC and CME Western Australia, press release 11 June.
- Anaya, S. J. (2004) *Indigenous Peoples in International Law*. New York: Oxford University Press.
- Asch, M. (1999) 'From Calder to Van der Peet: Aboriginal Rights and Canadian Law, 1973–96', in P. Havemann (ed.) *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, pp. 428–46. Oxford: Oxford University Press.

- Bachrach, P. and Baratz, M. S. (1962) 'The Two Faces of Power', *American Political Science Review* 56: 947–52.
- Bennett, S. (1999) *White Politics and Black Australians*. Crows Nest, NSW: Allen and Unwin.
- Chomsky, N. (1999) *Profit over People: Neoliberalism and the Global Order*. New York: Seven Stories Press.
- Coombs, H. (1994) *Aboriginal Autonomy: Issues and Strategies*. Cambridge: Cambridge University Press.
- Daes, E. (1999) 'Indigenous Peoples and Their Relationship to Land', Second Progress Report on the Working Paper, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/ Sub.2/ 1999/18, 3 June.
- Edelman, M. (1998) *Constructing the Political Spectacle*. Chicago, IL: University of Chicago Press.
- Edelman, M. (2001) *The Politics of Misinformation*. Cambridge: Cambridge University Press.
- Freeman, M. (2002) *Human Rights: An Interdisciplinary Approach, Key Concepts*. Cambridge: Polity.
- Gilbert, K. (1994) *Because a White Man'll Never Do It*, 4th edn. Pymble, NSW: Angus and Robertson.
- Goot, M. (1994) 'Polls as Science, Polls as Spin: Mabo and the Miners', in M. Goot and T. Rowse (eds) *Make a Better Offer: The Politics of Mabo*, pp. 133–56. Leichardt, NSW: Pluto Press.
- Kukathas, C. (1992) 'Are there any Cultural Rights?', *Political Theory* 20(1): 105–39.
- Kymlicka, W. (1991) *Liberalism, Community and Culture*. Oxford: Clarendon Press.
- Kymlicka, W. (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press.
- Kymlicka, W. (2000) 'American Multiculturalism and the Nations Within', in D. Iverson, P. Patton and W. Sanders (eds) *Political Theory and the Rights of Indigenous Peoples*. Cambridge: Cambridge University Press.
- Lam, M. C. (2000) *At the Edge of the State: Indigenous Peoples and Self-Determination*. Ardsley, NY: Transnational Publishers.
- Lavelle, A. (2001) 'The Mining Industry's Campaign Against Native Title: Some Explanations', *Australian Journal of Political Science* 36(1): 101–22.
- Locke, J. (1970) *Two Treatises of Government*, 2nd edn. Cambridge: Cambridge University Press.
- Lukes, S. (1980) *Power: A Radical View*. London: Macmillan.
- Mabo and Others v. Queensland* (1992) 175 CLR 1 F C 92/014.
- Manning, I. (1997) *Native Title, Mining and Mineral Exploration: The Impact of Native Title and the Right to Negotiate on Mining and Mineral Exploration in Australia*. Canberra: National Institute for Economic and Industry Research and ATSI Office of Public Affairs.
- Morgan, R. (2004) 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law', *Social & Legal Studies* 13(4): 481–500.
- Morris, L. (ed.) (2006) *Rights: Sociological Perspectives*. London: Routledge.
- Niezen, R. (2003) *The Origins of Indigenism: Human Rights and the Politics of Identity*. Berkeley: University of California Press.

- O'Faircheallaigh, C. (1986) *The Economic Impact of the Northern Territory Mining Industry: A Report to the Northern Land Council*. Darwin: North Australian Research Unit, Australian National University.
- Robertson, G. (1999) *Crimes against Humanity: The Struggle for Global Justice*. London: Allen Lane.
- Samson, C. (1999) 'The Dispossession of the Innu and the Colonial Magic of Canadian Liberalism', *Citizenship Studies* 3(1): 5–26.
- Samson, C. and Short, D. (2006) 'Sociology of Indigenous Peoples Rights', in L. Morris (ed.) *Rights: Sociological Perspectives*, pp. 168–86. Abingdon: Routledge.
- Short, D. (2003a) 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project', *Citizenship Studies* 7(3): 291–392.
- Short, D. (2003b) 'Reconciliation, Assimilation and the Indigenous Peoples of Australia', *International Political Science Review* 24(4): 491–513.
- Short, D. (2005) 'Reconciliation and the Problem of Internal Colonialism', *Journal of Intercultural Studies* 26(3): 267–83.
- Taylor, C. (1995) *Philosophical Arguments*. Cambridge, MA: Harvard University Press.
- Tickner, R. (2001) *Taking a Stand: Land Rights to Reconciliation*. Crows Nest, NSW: Allen and Unwin.
- Tully, J. (1995) *Strange Multiplicity: Constitutionalism in the Age of Diversity*. Cambridge: Cambridge University Press.
- Tully, J. (2000) 'The Struggles of Indigenous Peoples for and of Freedom', in D. Iverson, P. Patton and W. Sanders (eds) *Political Theory and the Rights of Indigenous Peoples*, pp. 36–59. Cambridge: Cambridge University Press.
- Turner, B. S. (1993) 'Outline of a Theory of Human Rights', *Sociology* 27(3): 489–512.
- Turner, B. S. (2006) *Vulnerability and Human Rights*. University Park: The Pennsylvania State University Press.
- Turner, B. S. and Rojeck, C. (2001) *Society and Culture: Principles of Scarcity and Solidarity*. London: Sage.
- Wik Peoples v. Queensland* (1996) 141 ALR 129.
- Wilson, R. A. (1997) 'Human Rights Culture and Context: An Introduction', in R. A. Wilson (ed.) *Human Rights, Culture and Context: Anthropological Perspectives*. London: Pluto Press.
- Wilson, R. A. (2001) *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post Apartheid State*. Cambridge: Cambridge University Press.
- Woodward, A. E. (1994) 'Land Rights and Land Use: A View from the Sideline', *Australian Law Journal* 59(8): 413–26.

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