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WHEN WORLDS COLLIDE IN LEGAL DISCOURSE. THE ACCOMMODATION OF INDIGENOUS AUSTRALIANS' CONCEPTS OF LAND RIGHTS INTO AUSTRALIAN LAW

Abstract. The right of Australian Indigenous groups to own traditional lands has been a contentious issue in the recent history of Australia. Indeed, Aborigines and Torres Strait Islanders did not consider themselves as full citizens in the country they had inhabited for millennia until the late 1960s, and then only after a long campaign and a national referendum (1967) in favour of changes to the Australian Constitution to remove restrictions on the services available to Indigenous Australians. The concept of *terra nullius*, misapplied to Australia, was strong in the popular imagination among the descendants of settlers or recent migrants and was not definitively put to rest until the Mabo decision (1992), which also established a firm precedent for the recognition of *native title*.

This path to equality was fraught and made lengthy by the fact that the worldviews of the Indigenous Australians (i.e. Aborigines and Torres Strait Islanders) and the European (mainly British and Irish) settlers were so different, at least at a superficial level, this being the level at which prejudice is typically manifested. One area where this fact is particularly evident is in the area of the conceptualisation of property and especially the notion of land "ownership" and "use".

In this paper, we will focus on these terms, examining the linguistic evidence of some of the Australian languages spoken traditionally by Indigenous Australians as one means (the *only* one in many cases) of gaining an insight into their worldview, comparing it with that underlying the English language.

We will show that the conceptualisations manifested in the two languages are contrasting but not irreconcilable, and indeed the ability of both groups of speakers (or their descendants in the case of many endangered Australian languages) to reach agreement and come to develop an understanding of the other's perspective is reason for celebration for all Australians.

Keywords: possessives, conceptualisation, Indigenous rights, native title.

1. Introduction: Background to the status of Aborigines and Torres Strait Islanders in Australian Law

The status of Aborigines and Torres Strait Islanders[1] in Australia presents a special case among ex-British settler colonies because elsewhere (e.g. New Zealand, Canada, South Africa before apartheid) the Indigenous[2] peoples were typically granted more rights and greater legal recognition, even though, paradoxically, the area of lands reserved by various Australian state governments for Aborigines and Torres Strait Islanders was typically much larger than Indigenous peoples were given in other countries.[3]

The harsher treatment which was meted out to Indigenous Australians can be traced to many different factors that combined to amplify tendencies found in other colonies in the nineteenth century, which is the period in which first intensive contact between Europeans and Indigenous Australians first occurred. Initially, the first settlers typically saw little of merit or value in the cultures of the scattered Indigenous societies that they may have happened to encounter in the vast, apparently largely empty, bushland. In fact, for the Indigenous peoples, the spiritual life tended to take precedence over material possessions, and technological innovations were of almost no importance at all (indeed what technology they had mastered was superficially reminiscent of the Mesolithic period in Europe).[4] Later on in the late nineteenth century, the pseudo-scientific theory of so-called social Darwinism preached that groups like the "Aboriginal race" were inferior and better left to their fate: assimilation or extinction.

Secondly, the first colonies in Australia, in particular New South Wales (still the biggest and richest state in the Commonwealth of Australia, and which originally comprised virtually the entire eastern half of Australia) were set up as penal colonies and thus contained very high concentrations of Europeans (mainly British and Irish) in specific areas. This meant that contact with traditional fully functioning Aboriginal societies was rare.

Finally, it was common practice for imperial and colonial authorities to set rules for the treatment of Indigenous peoples and, in accordance with established international practices,[5] for the expansion of settlements by Europeans. However, how far these were adhered to depended on the local context. In the hinterland of Australia, powerful pastoral settlers took possession of crown lands (hence they were called "squatters", from which: *squattocracy*[6]) and generally flouted such rules with impunity. In British North America, a Royal Proclamation by George III (1763) and the Treaty of Niagara (1764), signed between the British and representatives of various Indigenous peoples, stipulated that tribal lands could only be ceded

to the Crown, and not directly to settlers. Similarly, in New Zealand, an equivalent treaty was signed with the Maori (Waitangi 1840). In Australia, no such arrangement was ever made, partly because the various Indigenous groups were not organised into recognisable tribes or nations, with a clear social hierarchy with leaders or representatives that the colonial authorities would recognise and thus negotiate with. Part of the reason for this was that traditional Indigenous society largely collapsed with the arrival of Europeans as a result both of the death, destruction, and dispossession that the newcomers caused, and also because of the alien diseases that they carried, such as influenza, measles, and smallpox. Consequently, many of the groups of Aborigines that Europeans made contact with were mere remnants of more traditional social systems, which had previously been far more numerous.[7]

Furthermore, and most importantly perhaps, in Australia, as opposed to New Zealand or North America, the balance of military power was overwhelmingly in the settlers' favour, and the Aborigines could rarely put up concerted organised resistance to European settlers. As the ethnologist, Horatio Hale, who visited Australasia and the Pacific islands with a US expedition (1838–42), noted about Aborigines:

> They are, in general, silent and reserved, and appear to look upon the whites with a mixture of distrust and contempt. To govern them by threats and violence is impossible. They immediately take to the "bush," resume their wandering habits, and retaliate by spearing the cattle of their persecutors, and sometimes murdering the men. They never, however, carry on any systematic warfare, and their dread of the whites is so great that large parties of them have been dispersed by the resistance of a few resolute herdsmen. (Hale 1846: 109)

Indigenous Australians were, in effect, accorded only a few or restricted legal rights. In theory, they were subject to, and punishable under, British and later New South Wales (etc.) and Commonwealth of Australia law, but they were not always protected by it.[8] Before 1967, according to the Australian Constitution, Aborigines were excluded from the law-making power of the national parliament and from official censuses of population:

> Section 51, Part xxv1: The Parliament [of Australia] shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth [of Australia] with respect to:
> The people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws.
>
> Section 127: In reckoning the numbers of the people of the Commonwealth [of Australia], or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The referendum[9] was not just important because it gave them legal subjectivity on a national level, but it also gave the central authorities in Canberra the power to overrule the states, which sometimes were less liberal and more conservative in their attitude to Indigenous peoples. To quote the *Australian Geographic* site:[10]

> The constitutional referendum allowed the Australian government to devise laws to benefit indigenous Australians and was the building block for later victories in indigenous rights such as native title claims.

The popular myth that, until 1967, Aborigines were officially classified as part of the fauna of the country (like wildlife) survives because it does indeed sum up the attitude of those in power to the specific ethnic groups covered by the term *Aborigine*.[11] They were deemed incapable and too primitive to participate in the socio-economic and political life of a modern "Western" state.

Adopting this stance towards Indigenous peoples and refusing to treat them as completely human were convenient in that these allowed one to all but ignore them when it came to land rights, which is a topic we shall turn to in the next section.

2. Indigenous land rights and *native title* in Australia

For much of the time since the arrival of the British, the legal concept of *terra nullius* was assumed as applicable to the whole continent of Australia. Accordingly, the land was treated as unoccupied. This assumption gave the Crown control over all the land occupied by the various Aboriginal groups. The *terra nullius* principle was used by Gov. Bourke of New South Wales as early as 1835 in relation to the so-called "Batman Treaty".[12]

Indeed, Australia's status as *terra nullius* was, for many years, never actually enshrined in any legal act or document and was contested at various times even in the nineteenth century. Notably, it was not endorsed by the Judicial Committee of the Privy Council until 1889.[13]

However, in practice, Australia was, for all intents and purposes, treated as if it had been free of all human habitation before the arrival of the British. For example, in his ruling on the famous Gove Case (1971),[14] the (single) presiding judge, Justice Blackburn, rejected the Aboriginal claimants' case, concluding that there was no legal precedent for the recognition of *native title* in Australia law because:

> On the foundation of New South Wales, [...] every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown. The plaintiffs, who cannot point to any grant from the Crown as the basis for the title which they claim, cannot succeed [...][15]

This decision was controversial and problematic as it highlighted a key *impasse* in Australian law: Indigenous Australians' land had been taken by the Crown, and no legal means for reinstatement existed. Successive Australian governments were committed to recognising native title by one means or another. This was achieved finally with the landmark Mabo decision (1992)[16] in which the applicability to Australia of the concept of *terra nullius*, in any of its incarnations, was finally rejected, providing the rationale for the recognition of Aboriginal and Torres Strait Islander *native title*,[17] i.e. land rights based on their prior occupancy and traditional customs.

Christiansen (2010) examines in depth the contrasting concepts of land rights in the worldview of the European settlers on the one hand, and on the other, that of the various Aboriginal groups (or what we can assume they were, based on their modern descendants). He shows that the two groups had different, but not irreconcilable, conceptions of possession which differ most in the specific area of land and humankind's relation to it: in essence, whether such a thing could be viewed as a commodity (something to be controlled and exploited) or as a habitat (something to be shared and looked after). We will turn to each of these in the next section.

3. Possession and Property in European and Indigenous Australian Culture(s)

Possession and property are more problematic concepts than they may, at first, seem, even in capitalistic Western society. As one British Lord Chancellor has remarked, "In truth English law has never worked out a completely logical and exhaustive definition of possession."[18]

Following the Roman law distinction between *corpus* (physical control) and *animus* (the intention to exclude others), English law recognises two elements to property: *possession* and *ownership*, the former being a *de facto* state of affairs, the latter, *de jure*. In Western society, the owner of something has rights to control the use of it, and who has access to it.

It is not so easy to generalise about Aboriginal and Torres Strait Islander cultures as it is about so-called Western ones, because as Thieberger and

McGregor point out (1994: xiii), by no means have they ever constituted a homogenous ethnic group:

> Before the invasion which began in 1788 Aboriginal people did not belong to a single political unit such as Australia is now; they were divided into something like 700 different political groups that have traditionally been called 'tribes'. There were approximately 250 different languages spoken on the Australian continent when Europeans first arrived on the shores.

Bearing in mind this need for caution, we can generalise that traditional Aboriginal and Torres Strait Islander societies are organized around "tribes" constituting different communities made up of two individual descent groups or *moieties* (either by the patrilineal or matrilineal line). Individuals are assigned to one or the other by birth, with marriages taking place usually only between members of each of the two *moieties*. Food to feed the group was secured through hunting and gathering,[19] with an onus on cooperation and the sharing of labour and its fruits. Resources, where these were abundant enough, could be shared with other groups. It can be imagined that, as in other hunter gather societies, warfare or armed struggles between groups was usually limited to such things as score-settling or establishing which group was stronger, and generally avoided any large scale loss of life.[20] Title to a given piece of land rarely entails exclusion of others in Aboriginal society (except in the case of certain sacred sites to which access is restricted only to the initiated). As Attwood (2009: 49) states:

> They [the Indigenous Australians] also had a sense of ownership in regard to the land but they conceived of that prerogative as a right to use the resources on particular parts of the landscape for a particular purpose – to fish, gather, hunt and so forth – and they did not necessarily regard these rights as being exclusive or permanent.

Land, but not *territory* in the European sense, was central to Indigenous Australia because knowledge of a particular area and its wildlife and fauna were crucial to their survival in a society whose economy was largely based on self-sufficiency. Indeed, the entire religious belief system of Aborigines and Torres Strait Islanders revolved around the idea that the group and the land that they inhabited were inseparable: see Broome (2001: 18–19):

> The essence of this religious belief was the oneness of the land and all that moved upon it. It was a view of the world in which humans and the natural species were all part of the same ongoing life force. In the Dreamtime when the great ancestors had roamed the earth, they were human, animal and bird at one and the same time: all natural things were in a unity. The ancestors still existed in the here and now.

Even though Aboriginal peoples mainly lived in temporary, semi-permanent, or naturally-formed shelters, and so followed a partially nomadic lifestyle, they restricted their movements to well-defined areas, which may have included long seasonal treks across areas inhabited by other groups for whatever reason (e.g. to gather certain foodstuffs, hunt specific animals, or to perform ceremonies at particular sacred sites).

The inseparability of the group from its land is also underlined in the creation myths of diverse Aboriginal peoples. These will often tell how often specific groups were created to live in a particular place. As Broome (2001: 18) explains:

> During the creation time, the ancestral heroes performed great deeds and gave life and form to the tribe's local territory. These ancestral beings still lived in the local community in spiritual form, continually generating life. Across the north of Australia one of the most important ancestors was the Rainbow Snake which was associated with rain, spirit children and fertility. Each tribe believed that its boundaries were fixed and validated by the stories about the movements of their ancestors, and therefore there was no reason or desire to possess the country of another group.

The European concepts of ownership of, control of, and the exclusion of others from land were irrelevant in that the idea of territorial expansion, or migration, were almost inconceivable within a fatalistic worldview that saw specific groups created on and destined to inhabit a specific piece of land.[21] This constitutes a form of inalienable possession, a part to whole relationship in which, furthermore, it is difficult to distinguish between *possessum* (possessed) and *possessor* (i.e. whether the land belongs to the Indigenous people, or vice versa).

This attachment between a given group and its land often manifests itself linguistically in the fact that; although Australian languages typically have a rich lexis, they will commonly only have terms for fauna and natural phenomena found in their particular zone: groups in northern tropical areas (closer to the equator) will lack words for snow, and those living in the vast interior may lack words for the sea or shellfish (see Thieberger and McGregor 1994: xxii).

In such a society and belief system, formal means of showing land ownership are often redundant, and occupancy in itself constitutes title. Possession can be recorded and displayed by a wider variety of semiotic means than the traditional Western system would recognise, including such diverse things as ceremonies, story-telling, and even artwork. For European settlers, too, as Attwood (2009) points out, title involved not just legal documenta-

tion but also certain procedures, which an anthropologist might define as rituals. The performance of these constituted the individual's taking control of the land, for example, walking and marking the boundary, giving names to landmarks. This, in effect, but on a grander scale, is what nineteenth century explorers and surveyors like Oxley (see §5) or Burke and Wills were trying to do: to catalogue and leave a mark on the terrain as a way of taking possession of it.

4. Possession in English

The *possessive case* in English is, as in most languages, complicated. The range of its uses leads to the conclusion that there exists no underlying single concept of *possession*. Indeed, as much was concluded by the presiding judge in the Gove Case (see §2). He dismissed the arguments supporting the land claims of the Yolngu peoples that rested on the fact that their language, Yolŋu Matha, contained possessives, countering that the mere existence of possessives did not necessarily indicate that the speakers of such a language conceived of property in a sense recognised by existing Australian law. The judge, although presumably not a trained theoretical linguist, correctly pointed out that possessives in English express a variety of meanings that cannot all be categorised as involving proprietorial relationships.[22] Coincidentally, Langacker (2000: 175), who discusses in depth the conceptual grammar of English, gives the following examples of structures to illustrate the variety of relationships covered by the general label of *possessive*: *my watch*; *her cousin*; *your foot*; *the baby's bib*; *his rook*; *our host*; *their group*; *Sara's office*; *the book's weight*; *your anxiety*; *our neighbourhood*; *its location*; *my quandary*; *Lincoln's assassination*; *Booth's assassination*; *their candidate*; *my bus, the cat's fleas.*

For Langacker (2000: 175–6), the common element in all the examples just quoted is that the existence of an asymmetrical relationship between the possessor and possessum:

> I ascribe the basic and universal nature of possessives to the pairing of an essential cognitive ability with a fundamental conceptual archetype, in fact with several such archetypes. The ability is not that of mere association (conceptual co-occurrence) but rather the intrinsically asymmetrical reference point relationship. What all possessive locutions have in common, I suggest, is that one entity (the one we call possessor) is invoked as reference point for establishing mental contact with another (the possessed) [...].

In Langacker's analysis, the asymmetry stems from the fact that the one concept (possessum) is accessed cognitively via the other (possessor): that is to say, one item is located within a conceptual frame by reference to some other element. This reference can stem either from the fact that there is a spatial relation between the items or because one element controls the other in some way. Langacker (2000: 176) states:

> There are two main diachronic sources of possessive elements, namely locatives (such as spatial prepositions) and verbs of control (with meanings like 'grasp', 'hold', and 'keep'). Their original content involves two experientially basic ways in which we locate objects physically: we either find them because we know their spatial location, i.e. their position within a spatial frame or in relation to some reference object; or else we actively control them and determine their position.

In this way, there is a link between some kinds of possession and control which is reflected in the Western legal concept of *corpus* (physical control – see §3).

5. Possession in Australian languages

Today, there is evidence of 250 Australian languages, falling into 26 different loose family groupings. One of these families, the Pama-Nyungan, is spread over 90 percent of Australia.[23] How many such languages may have existed before the arrival of the British is difficult to know and estimates vary greatly.[24]

Running contra so-called *linguistic relativity* (the discredited Whorfian hypothesis), and in line with the notion that languages and cultures in general share many universal features,[25] it can be seen that something comparable to the basic distinction between inalienable (a part-whole relationship) and alienable possession as found in English and other languages applies also to the various Australian languages that exist today.[26] Alienable possession can be equated with property in the legal sense: items, the ownership of which can be transferred from person to person. However, as Dixon points out, while alienable possession is marked by a dedicated genitive case, in Australian languages, inalienable is not really marked at all, morphologically-speaking. Instead, it involves the use of what could be called noun chains (bare nouns used to modify other nouns). This, as it happens, is a distinction also possible to a degree in English, especially in technical registers (e.g. "passengers' compartment" / "passenger compartment": the

compartment designed for the passengers), but in Australian languages, it is more rigidly applied and may involve other syntactical changes, as Dixon (2003: 59) explains:

> It is generally said that Australian languages make a distinction between alienable and inalienable possession. This is true, but in a rough and ready way, but such a formula essentially misses the point. Alienable possession is shown by genitive marking of the NP [noun phrase] (which can be just a noun or pronoun) referring to the possessor; the possessor phrase modifies the possessed noun which is head of the whole NP. That is, in '[old woman]-genitive dog' ('the old woman's dog') it is 'dog' which is the head of the phrase and will be cross-referenced on the verbs in languages with cross-referencing.
>
> Australian languages show a whole-part relationship – this is what is often called inalienable possession – by simply apposing the noun referring to the whole and that referring to the part; the former functions as head of the NP. In Elbl, Yir-Yorunt (Alpher 1991), an NP can be just *pam* 'person' or *pam yor* 'person hand'. Parts of parts can be specified by further apposition e.g. *pam yorwel* 'person hand nail' ('person's fingernail'). Note that the 'possessor', *pam*, is head of each of these NPs.

Complications aside, the examples that Dixon gives are, in essence, similar to the examples from English considered by Langacker. Regarding Langacker's observation that the conceptual archetype of possession is linked to the notions of location and control (see §4), Christiansen (2010: 294–295) points out that there is evidence that the same thing appears to be true in at least some Australian languages. He looks at the list of possessive pronouns in Meryam Mir,[27] given by (Thieberger and McGregor 1994: 347–8) and observes that, on the basis of the glosses in English provided by the same Thieberger and McGregor, the concept of being at "the possessor's place with them" is recurrent. This implies the idea of occupation and/or ownership and of a person being in physical control of some item. To cite one example, according to the gloss provided by Thieberger and McGregor (1994: 347), the Meryam Mir 1st person possessive pronoun 'kari' means:

> me, my: *karidoge* at my place or with me; *karim* to/for me; *kariyalam* from me; *karitkem* with me; *karitkak* without me.

Christiansen (2010) goes on to examine other word lists from a sample of the 17 different Australian languages (including Torres Strait Creole and the so-called "Sydney Language"[28]) that feature in Thieberger and McGregor (1994). He finds that Pama-Nyungan languages (which Meryam Mir is not) generally lack such an explicit link between location and possessive pronouns/determiners.

Thieberger and McGregor compiled their wordlists by inviting informants/scholars to provide lexical items that were divided into groups of items according, where possible, to a standard grouping of 26 separate categories. Among these were: body parts and products; kin relationships; human classification; human artefacts; insects and spiders; location, direction and time. Christiansen (2010: 295) argues that another way to examine the nature of the concept of possession in languages is to search for the existence of related lexis in such wordlists. Adopting this methodology, he obtains the following results (Christiansen 2010: 295):

> The words that occurred in most separate wordlists (a maximum of 17) were so-called possessive pronouns, and the lexical items, 'hold', 'steal', with 'have' and 'own' in joint-third place. The first of these entails possession but not ownership, but the second does, indirectly[29]. 'Owner' obviously entails the concept of property. The relatively low figure for 'have' is particularly interesting as this is a word in English that has a variety of meanings and functions (not only the denotation of possession)[30] and is thus relatively frequent. Other words such as 'abandon', 'barter' etc. were found in one wordlist each.
>
> The mean for the group was 3.23 and the standard deviation was only 2.68, indicating that divergence from this average was relatively low. By contrast, the mean for a sample of 72 items taken at random from the wordlists (the first item in the second column of even-numbered pages[31]) was 7.81 (standard deviation, 6.61). On average, words relating to possession were found less often than words in general in the word lists of Indigenous Australian languages.

From these results, he concludes that it is not that *possession*, in the proprietorial sense familiar also to speakers of English, finds no expression in Australian language, but that it is of less importance (in terms of frequency) than it is in English.

> One can draw two conclusions from this: firstly, that a concept of possession, similar in at least some aspects to that found in English, exists in at least some Indigenous Australian languages; secondly, that it is not particularly prevalent, however, in comparison to other concepts in general. The difference then would not seem to be in the semantics or in the linguistic system as such but rather in the importance attached to the concept within the different cultures: Anglo-Australian and Indigenous Australian. (Christiansen 2010: 297)

This confirms the popular stereotype of pre-industrialised traditional societies being less oriented towards material matters, and less obsessed with the idea of ownership and property, and with making sure that other people cannot take possession of it.

That said, it would be naive to conclude that, with their different priorities from Europeans, worldly material concerns did not sometimes govern

the actions of at least some Aborigines. The surveyor and explorer John Oxley in the journal of his two expeditions (1817 and 1818: together lasting about 10 months) along the Lachlan and Macquarie Rivers[32] into the interior bushland of New South Wales, reports only one isolated episode of violence towards his expedition on the part of the Aborigines (significantly perhaps, on the coast north of Sydney, where previous contact with Europeans would have been far more likely than inland). Revealingly, especially in the context of the discussion of whether Aborigines had a similar concept of land ownership to Europeans and whether indeed they understood the concept of personal property at all, he puts this attack down to mundane robbery, not to any desire to defend territory or to assert land rights:

> One of the men, William Blake, had entered the brushes about a hundred yards from the rest of the people on the north side, with the design of cutting a cabbage palm: he had cut one about half through, when he received a spear through his back, the point of it sticking against his breast bone. On turning his head round to see from whence he was attacked, he received another, which passed several inches through the lower part of his body: he let fall the axe with which he was cutting, and which was instantly seized by a native, the only one he saw; and it was probably the temptation of the axe that was the principal incitement to the attack. (Oxley 1820: 342)

6. The process towards the recognition of Indigenous Land Rights in Australia

At the beginning of the colonial period, there were few effective formal or legal-like ways for Aborigines to seek redress for loss of land/habitat. Indeed, records may never have been kept of any of their attempts even if there had been any.[33] Attwood and Markus (1999) discuss examples of petitions of one sort or another dating as far back as the mid-nineteenth century. A petition, a direct plea to someone in authority,[34] was doubtless the most economical and perhaps the most comprehensible means for Aborigines to participate in some kind of discourse with those in power.

As Christiansen (2011) points out, petitions constitute *directive*[35] macro-speech acts[36], although, at the level of individual utterance, they are, like any text, composed of a whole variety of speech-act types. In the collection of authentic historical documents that Attwood and Markus (1999) collected, Christiansen (2011) identifies 16 (dating from between 1846 and 1988) that can be classified as petitions of one sort or another re-

garding, specifically or partially, issues related to land rights. In only three of these petitions, are the petitioners individual Indigenous Australians;[37] in the rest, they are collectives.

From his analysis of the various categories of discourse moves[38] related to the establishing and supporting of a claim for native title that he lists (e.g. *basis of claim*; *land use*; *assimilation with the settlers*; and *the setting of conditions*), Christiansen (2011: 221) is able to declare that "a picture emerges of both continuity and evolution in the set of strategies used by Aboriginal petitioners."

The continuity, he argues, is found in the insistence, from the earliest to the latest petitions, on using the notion of *prior occupancy* as the chief justification for the claim for a piece of land, or for asking for compensation for its loss.

An evolution can be seen in a gradual progression from, in the earliest petitions, making claims based principally on British perceptions of the relevant criteria for property rights: *current occupancy* and *land use*. There is a period between 1881–1938, where *promoting assimilation with settlers* is also cited as a justification for land claims in petitions. Coupled with this development, there is the emergence of a desire to set conditions, even those that commit the petitioner to some *quid pro quo* arrangement, which is also apparent in specific sections of the corpus, in the middle to late period (1886, 1890 and then 1967). Present also in some petitions at the end of the nineteenth century and then again in the later stages (i.e. every petition examined after 1963), there is the additional move of citing traditional Aboriginal criteria for title: *spiritual attachment* (claiming that access to and protection of the land in question is of religious importance to the group). This latter has been perhaps one of the most successful arguments because an appeal to religion or to the spiritual is admissible even in the eyes of Westernised Australians (at least those who practice some faith) as it alludes also to the notion that there is something higher than "the law of man," also in keeping with the idea of *natural law*, as discussed by philosophers such as Cicero, Thomas Aquinas and John Locke.[39]

What is also interesting is that it is only in the petitions from the very beginning of the period examined (1846) and towards the end (1971) that one of the most salient points, from a legal procedural point of view, is made: namely the failure on the part of the colonial authorities and the settlers to conclude negotiated settlements with the Indigenous Australians (as it happens, something stipulated in the written instructions given to Capt. James Cook himself and in the establishment of the colony of South Australia, 1834).[40] That fact that most Aboriginal petitioners, albeit often ad-

vised by European Australian supporters, did not make more of this point may stem from the fact that the very idea of reaching an agreement over who owned or controlled the land was alien to them.

7. Conclusions

The general pattern seen in the petitions examined in Christiansen (2011) is illustrative of the wider progression of relations between Indigenous and Westernised Australians, and also in their growing understanding of and appreciation for each other. On the part of the Aborigines and Torres Strait Islanders, there is a period of initial incomprehension followed by a slow learning curve punctuated by attempts to master and conform to the legal discourse norms of the Europeans in authority. This strategy is changed when it fails to achieve the desired effects. There is subsequently an attempt to frame a discourse around Aboriginal concepts of land rights. The development and the history of the various Aboriginal Rights movements, like many such successful movements the world over, show a process of growing political expertise on three fronts: firstly, that of dealing with authorities and rival political forces; secondly, that of raising the profile of one's cause; and thirdly, of fostering public support especially among the majority, i.e. the descendants of the settlers themselves (see: Attwood 2003).

Without wishing to take away anything from the gargantuan efforts of the Aboriginal and Torres Strait Islanders themselves (and astute political figures like William Cooper – see §6), the support of non-Indigenous Australians (and of sympathisers further afield) was not only important in itself but because these supporters could act as lingua-cultural mediators thereby providing valuable insights into the approaches most likely to be successful.

Seen also in the petitions is a move from a focus on cases regarding individual groups of Indigenous peoples to one concentrated on demands for some kind of settlement that involves the establishment of universal principles (e.g. *native title* see §2) that could be applied to Indigenous groups all over Australia. The demands and wider debate around Indigenous rights are accompanied by a marked change of tone. In the two landmark collections of petitions, the Yirrkala petitions (1963–2008)[41] and the Northern and Central Land Council petitions (1988) – see Attwood and Markus: 2004, we find a series of demands; in the former: "the people of Yirrkala want ..." and, in the latter, "We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights". This shows a marked contrast with the brief sketches of the passive

and reclusive Indigenous Australians given by early Western explorers like Oxley and Hale (see §5 and §1 respectively). The fact that in the post-war period, especially after the cultural revolution of the 1960s, minority and civil rights have taken centre stage in many settler democracies around the world (e.g. the USA, Brazil, Canada, New Zealand, Greenland), and this has laid the groundwork not only for greater awareness on the part of the more liberally-minded among the descendants of the settlers, but also for the possibility for cooperation between Indigenous rights activists internationally. This broad movement culminated in the adoption by the UN General Assembly of *The United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2007.

In some quarters, there have even been calls for some kind of negotiated settlement or treaty between the Aboriginal "nation" and non-Aboriginal "nation" (i.e. the Commonwealth of Australia). As part of this trend, the land rights movement adopted its own "Aboriginal flag" (a yellow circle on a field divided into a red lower portion and black upper one) and embarked upon the so-called tent embassy protest in 1972 when activists set up an "Aboriginal Embassy" outside the Parliament of Australia (see Attwood and Markus 1999, Attwood 2003).[42] This development is paradoxical because, by adopting such a European notion of *nationhood* (a concept that, as we say in §3, would have been foreign to Indigenous Australians before the arrival of Europeans) and the accompanying symbols, the Indigenous Australians are embracing the Western worldview of the descendants of the settlers, at the same time as proclaiming their rejection of it and separation from them.

However, in other ways, Indigenous Australians have managed to make their voices heard within the Australian legal system without renouncing their own traditional practices. In this way, they have been instrumental in changing that same system as is only right and proper within a mature and functioning liberal democracy. The Yirrkala bark petitions (1963–2008)[43] are notable in this respect. They combined a written petition, very much in the Western tradition, with their local Yolgnu art forms and symbolism (i.e. the margins were decorated with images of animals and spirits, and the document itself was mounted on bark, underlying the connection with the land).

Since at least ancient Mesopotamia (the code of *Ur-Nammu* c. 2100–2050 BC), Western legal discourse has been dominated by the written word: hence, the popular expression the *letter of the law*. Indigenous Australian societal culture codifies conventions, practices and customs in a wider variety of semiotic means, as opposed to solely linguistic means. As a conse-

quence, with their growing confidence, Indigenous Australians have learnt to challenge Western legal norms, partially making use of the time-honoured English legal concept of uncodified common law (i.e. custom and legal precedents), in order to introduce ways of documenting their title to land that are acceptable in their own traditional culture: e.g. carvings, paintings and sacred totems. Such non-linguistic artefacts were to prove decisive in the landmark Mabo decision (1992)[44] where the obstacle to native title, the persistent myth of *terra nullius* as a doctrine applicable to the whole of Australia, was finally debunked.

The accommodation of Indigenous Australians' concepts of land rights into Australian law constitutes an example of how initial incomprehension, alienation, and raw oppression can be transformed (albeit at a snail's pace, as it must often have seemed to the Indigenous Australians) into comprehension, acceptance, equal rights and opportunity (the last, in theory, at least). More than this, however, the process has also left its mark on mainstream Westernised Australia, contributing also non-Western indigenous symbols, concepts and traditions to the Commonwealth of Australia's own national narrative. It adds in this way new (or rather ancient) elements to the very concept of Australia and of Australian-ness. The Aboriginal and Torres Strait Islanders once given only limited citizenship and legal subjectivity have thus found a way, without compromising their own traditions and sense of identity, to put themselves firmly at the centre of Australian political and legal discourse, to the undoubted benefit of all Australians, whatever their ethnic or cultural heritage.

NOTES

[1] *Aboriginal and Torres Strait Islander people* has, since the late 1980s, been the official nomenclature for Indigenous peoples in Australia. It was adopted, among other reasons, because it distinguishes between Aboriginal peoples principally on the mainland, and Torres Strait Islanders on the northern tip of the Northern territories and the islands in that area: two ethnic groupings that consider themselves distinct.

[2] We use this term with reservation. The terms *aborigine* (usually now capitalized in the form *Aborigine* when referring to specific ethnic group), *Indigenous*, or *Native* especially as opposed to migrant, all imply that one group "belongs" somewhere and another group has left where they "come from" to occupy another group's "homeland". In fact, humanity shares one common homeland somewhere in the south or east of Africa. That said, *Aborigine*, *Indigenous*, and *Native* (as well as *First Nations* in Canada) are the conventional terms used to refer to groups who are long established in a certain territory (for centuries or millennia as in the case of Aborigines and Torres Strait Islanders in Australia). In any case, such terms are certainly an improvement on some widely used and less accurate terms, such as *Indian* in the Americas.

[3] Maddock (1983) cited in Russell (2005: 157).

[4] That said, the Aborigines in Australia mastered many aspects of complex "stone age" technology long before their contemporaries in Europe. Furthermore, it has been argued that they continued to use it because it worked well for them in a specific environment in which they had learnt not merely to survive but also to *thrive*. See: *The Conversation* website (https://theconversation.com/australian-archaeologists-dropped-the-term-stone-age-decades-ago-and-so-should-you-47275)

[5] E.g. *Le droit des gens* (Emerich de Vattel 1758) published in English as the *Law of Nations* (1760). The work is known to have been influential on figures such as Benjamin Franklin and George Washington.

[6] A term that can be traced back to the 1860s at least (See *Macquarie Dictionary* 7th Edition 2017).

[7] Estimates of the numbers of Indigenous peoples living in Australia prior to colonization have suggested a figure as high as 750,000, which would still be relatively small given the sheer size of the island of Australia (see Mulvaney and White 1987). The online edition of *The Encyclopedia Britannica* states that estimates range from 300,000 to 1,000,000. https://www.britannica.com/topic/Australian-Aboriginal

[8] For example, as late as around 1960, in one the last recorded instances of inter-Aboriginal group violence, in the Great Sandy Desert (WA), four brothers of the Mandjildjara tribe went on a rampage, kidnapping some Walmajarri women and murdering other members of their community indiscriminately. Although two of their number were later arrested and released on an unrelated offence (killing a bullock), they were never charged for this heinous crime.

[9] It is often assumed, even by Indigenous Australians themselves that the 1967 referendum marked the day when they obtained citizenship. In fact, legally, in most Australian states, Aborigines had been allowed to vote since the 1850s. This right was extended to federal elections in 1902, 1949 and 1962. Indigenous peoples, typically, did not exercise their right to vote, either through ignorance, through indifference, or through an inability to complete the necessary paperwork. Likewise, automatic citizenship was granted to all Australians previously deemed British subjects, which included Indigenous people, by the Nationality and Citizenship Act 1948. However, it was not until the changes in the constitution brought about by the 1967 referendum and the campaign leading up to it that there was a sea-change in attitudes in Australia, both amongst Indigenous peoples and amongst descendants of settlers, regarding the status and role of Aborigines and Torres Strait Islanders in Australian society. See https://www.sbs.com.au/news/myths-persist-about-the-1967-referendum

[10] https://www.australiangeographic.com.au/blogs/on-this-day/2013/11/on-this-day-indigenous-people-get-citizenship/

[11] As Attwood points: "The peoples living here prior to British Colonisation were not a homogeneous group implied by the name 'Aborigines'. Instead they only came to have a common, Aboriginal consciousness in the context of colonisation." (2003: xii).

[12] A dubious document reportedly signed by elders of the Kulin people in the Port Philip area of what is today Melbourne and by one John Batman, an opportunistic entrepreneur (see Attwood: 2009).

[13] By contrast, Connor (2005) has argued that *terra nullius* is a modern myth and has sustained that the concept was hardly ever cited in the nineteenth century and only came to public awareness when the noted historian Reynolds (1987) brought it up. It was not used at all in the Mabo judgements. In fact, Henry Reynolds played a major part in the Mabo case: the plaintiff, Eddie Mabo, was a groundsman on the campus of James Cook University in north Queensland, where Reynolds was teaching, and the two struck up a friendship. It was Reynolds who encouraged Mabo to take his people's land claims

to court (see Reynolds 2000: his autobiographical account of his own journey towards realisation of the need for better Indigenous rights in Australia).

[14] This was the first case when the recognition of pre-existing Aboriginal land rights was deliberated by any Australian court (i.e. the Supreme Court of the Northern Territory). The judge conceded that during the trial it had been shown that the Yolgnu plaintiffs did have a system of law. However, he famously concluded "the doctrine [of native title] does not form, and has never formed, part of the law of any part of Australia." See The Mabo Native Title Revolution website http://www.mabonativetitle.com/info/goveCaseIssues.htm

[15] Cited on The Mabo Native Title Revolution website http://www.mabonativetitle.com/info/goveCaseIssues.htm. For a full discussion of Native Tile and the way the concept gradually took hold Australian legal discourse and law, see Sarre (1994).

[16] According to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) website: "The Mabo Case was a significant legal case in Australia that recognised the land rights of the Meriam people, traditional owners of the Murray Islands (which include the islands of Mer, Dauer and Waier) in the Torres Strait." https://aiatsis.gov.au/explore/articles/mabo-case

[17] According to the Kimberley Land Council website: "Native title is the recognition that Aboriginal and Torres Strait Islander people have rights and interests to land and waters according to their traditional law and customs as set out in Australian Law. Native Title is governed by the Native Title Act 1993." https://www.klc.org.au/what-is-native-title

[18] Viscount Jowitt (1945–51) see Smith and Keenan (1985: 391).

[19] Recently some scholars, based on evidence also in early settlers' journals, have argued that some Aboriginal groups did indulge in a kind of "fenceless agriculture" and did also, on occasion, dig wells and dam waterways. Such things indicate that their relationship with their environment was not entirely passive nor non-interventionist. See Pascoe (2014).

[20] See Allen and Jones (2014).

[21] That said, on occasion, it seems that the title to a piece of land can be transferred to another group, even in some rare cases to an individual, but only according to complex criteria that are often perplexing to outsiders and even to trained anthropologists (see Hiatt 1996: 13–35).

[22] See Hiatt 1996: 29.

[23] See Dixon (1993), Thieberger and McGregor (1994).

[24] During the nineteenth century (the critical period), little in the way of systematic and well-informed research was done into Australian languages with the exception of that of the German missionary Reuther into the Diyari language of South Australia (see Reuther 1981). On the specific issue of the modern-day movement for the revival of various indigenous languages in Australia, see Zuckermann and Walsh (2014).

[25] Sperber (1982) and Brown (1991) identify a so-called *metaculture*. This is a set of basic concepts, shared by all human societies, which presumably derive from features that evolved long before humanity split into many different groups.

[26] See Christiansen (2010) who analyses the wordlists (via their English translations) provided by Thieberger and McGregor (1994).

[27] A Melanesian, non-Pama-Nyungan, language from the Torres Strait on the northernmost tip of Australia. It is particularly relevant because it was people from this area that were successful plaintiffs in the seminal case leading to the Mabo decision (1992).

[28] A reconstruction based on contemporary witness accounts and records of the Australian language originally spoken in the area around what would become Sydney.

[29] This word may, however, be a concept acquired from almost 200 years of contact with Europeans and may reflect the current status of many Aboriginal people, living on the margins of society.

[30] See Christiansen (2009).

[31] These included: 'all'; 'blood pudding'; 'frightened'; 'intimate'; 'kill'; 'mud crab'; 'nothing'; 'parrot'; 'rock'; 'smoke'; 'tell'; 'urine'; 'why'; 'yesterday'.

[32] Both named rather prosaically by a previous explorer, George Evans, after the then Governor of New South Wales, Lieutenant-Colonel Lachlan Macquarie.

[33] See Attwood and Markus (1999: 3).

[34] Russell (2005: 130) discusses the important part played by petitions in the legal discourse between Aborigines and those in power.

[35] i.e. designed to cause the addressee to take some action (See Searle 1975, 1976).

[36] See van Dijk, Teun A. (1977, 1980).

[37] Among the individuals is one William Cooper (1860/61–1941), a Yorta activist and persistent petitioner (see Attwood and Markus: 2004). He was instrumental in a series of petitions on the part of residents of the Maloga mission station in NSW (1881, 1887, 1890). In 1933, he personally petitioned King George V, but the document was "mislaid" by the authorities and never forwarded to Buckingham Palace. In Sydney in 2010, one of Cooper's grandsons, the elderly Uncle "Boydie" Turner, tried to present a copy of the petition to King George's great-great-grandson, Prince William, but was prevented. The Governor General of Australia undertook to forward it himself to the Queen, which he later did in person. Her Majesty herself issued no formal reply.

[38] This is a term borrowed from genre analysis: see Swales (1981).

[39] For example: Cicero, *De Officiis*; Aquinas, *Treatise on Law* (*Summa Theologiae*); Locke, *Two Treatises of Government*.

[40] "[...] with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain; or if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and inscriptions as first discoverers and possessors" (Russell 2005: 42).

[41] One of a series of "bark petitions" (1963, 1968, 1988, 1998 and 2008), presented by the Yolngu people resident in Yirrkala to successive Australian Prime Ministers, so called because they consisted of type-written sheets (in English and in the group's language, Yolngu Matha) pasted onto tree bark.

[42] This flag is the work of an Aboriginal artist, Harold Thomas, who designed it in 1971 for his people's civil rights movement. Although widely used, it is copyrighted and licensed for use by some companies. There is a campaign to have this removed https://www.bbc.com/news/world-australia-49315063

[43] Images of some of these documents are available at: https://aiatsis.gov.au/collections/collections-online/digitised-collections/yirrkala-bark-petitions-1963

[44] The Mabo Case was the first case to recognise the traditional land rights of an Indigenous people, the Meriam (traditional owners of the Murray Islands in the Torres Strait). The plaintiffs (led by one Eddie Koiki Mabo – friend of the historian, Reynolds – see note 13) sued the State of Queensland and, on appeal in the High Court of Australia, successfully challenged the assumptions that: 1) prior to the arrival of the British (1788), Aboriginal and Torres Strait Islander peoples had had no concept of land ownership; 2) on establishment of the new colony, ownership of all land was transferred to the Crown, effectively abolishing in perpetuity any existing rights. See the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) website https://aiatsis.gov.au/explore/articles/mabo-case

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