

*OF "SOCIAL TIES" AND "SAVAGE HORDES":
THE DENIAL OF INDIGENOUS SOVEREIGNTY IN AUSTRALIA*

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ABSTRACT:

This paper addresses issues arising from the denial by the Australian Government of a Treaty with the Indigenous peoples of Australia. In particular, it attempts to explain why such a Treaty was never signed with the Indigenous peoples during the period of British colonial rule, and why it has consistently been denied by successive post-colonial governments. The starting point of many arguments for a Treaty between the Indigenous peoples of Australia and the Australian Government is that such a document would finally consolidate recognition of Indigenous sovereignty. Such sovereignty, it is argued, consists in the fact that this continent was not a *terra nullius* when it was 'discovered' by white men, but was already occupied, and that the assertion of British sovereignty was based on the denial of a prior Indigenous sovereignty. This sort of explanation however, overlooks the crucial feature of the modern discourse of sovereignty, namely that sovereignty only inheres in those peoples who have formed themselves into a properly constituted society. The 'sovereignty' of the Indigenous peoples of Australia was not recognised, in other words, because it was believed that they had not so constituted themselves, and this belief has continued to shape the administration of Indigenous peoples by both colonial and post-colonial governments well into the twentieth-century. What is significant about this view is that the denial of a Treaty indicates not simply a refusal to acknowledge any Indigenous sovereignty, but an unwillingness to recognise the collective identities, customs, traditions, cultures, and indeed the survival and revival of the Indigenous peoples of this land.

“Australia is a very ancient land that for long ages past has been shut off from the rest of the world so that its animals certainly, and probably man himself to a large extent, lived in blissful ignorance of anything taking place in other parts of the world.... Hence it is that Australia became the home of creatures, crude and quaint, that had elsewhere passed away, in the struggle for existence, and given place to higher forms. This, at least in large measure, applies equally to the aboriginal as to the kangaroo and platypus. Just as the platypus, laying its eggs and feebly suckling its young, reveals to us a mammal in the making, so does the aboriginal show, at all events in broad outline, what early man must have been like before he learned to read and write, domesticate animals and use a metal tool. He affords, in fact, as much an insight as we are ever likely to gain into the manner of life of men and women who have long since disappeared in other parts of the world and are known to us only through their stone implements...”

- Baldwin Spencer, *Wanderings in Wild Australia*, Vol 1, London, Macmillan, 1928, p. 205.

*INTRODUCTION**

In his finding against the State of Queensland in the *Mabo* case which upheld the validity of Native title to ancestral lands Justice Brennan claimed that the common law in Australia would,

...perpetrate an injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.¹

Two things are significant about this finding, the first being that Justice Brennan correctly identified the assumed social primitiveness of the Aboriginal people as providing the rationale for their dispossession by Europeans. The second feature is that he did not refer to the indigenous inhabitants of this land, but to the ‘indigenous inhabitants of the Australian colonies’, colonies that he (and Justices Gaudron and Deane) believed had

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¹ Brennan J., *The Mabo Decision*, Butterworths, Sydney, 1993, p. 41.

been validly and legitimately established.² What is significant about this is that the *Mabo* decision, while thankfully overturning the doctrine of terra nullius in Australian law, did not at any time challenge the basis of the sovereignty of the state established on these shores in 1788, nor acknowledge that the Indigenous people were sovereign in their own land prior to that date.³ No acknowledgement of such sovereignty was ever made, nor treaty signed between Indigenous people and representatives of the British Crown, why? When Cook took possession of Australia, both he and Banks thought it thinly populated by a people they regarded as possibly the least civilised people on earth. They did not live in villages, they did not till the soil, they did not build huts, they seemed indifferent to private property, they appeared to have no conception of chieftainship, and they had no society, no matter how primitive, but only tribes or extended families.

Joseph Banks, whose words have been taken as evidence in support of the view that the British actually did think New Holland a *terra nullius*, did not in fact deny that the land was already inhabited.⁴ More significant by far than his supposed verification of the ‘emptiness’ of New Holland however, was his assumption that the Aborigines, like all “Indians ignorant of the arts of cultivation” lived mainly from the produce of the sea.⁵ What he clearly meant here was not simply that the land was unused and uncultivated, but that the Indigenous inhabitants were thought to be inherently primitive in merely subsisting on the uncertain ‘fruits of the chase’. In spite of Banks’ “conjecture” that the inland of New Holland may be “uninhabited”, the British formula of annexation and colonisation expressly called for ‘the consent of the natives’, clearly indicating that the British *did* acknowledge prior occupation. The issue seems to have been that the British appeared to regard the difficulty of *obtaining* their ‘consent’ to annexation was

² *Ibid.*, pp. 51 and 58.

³ Webber argues that the decision in *Mabo* at least entails a “mediation of sovereignty” (62) based on greater recognition of the survival and continuation of Indigenous ‘societies’ separate from white society (84). Webber, J., “Beyond Regret: Mabo’s Implications for Australian Constitutionalism”, in D. Ivison, P. Patton and W. Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge, Cambridge University Press, 2000, [pp.60-88].

⁴ Banks in fact noted that this “immense tract of land” was “thinly inhabited even to the point of admiration, at least that part of it that we saw”. Joseph Banks, *The Endeavour Journal of Joseph Banks, 1768-1771*, edited by J.C. Beaglehole, Vol 2, Trustees of the Public Library of NSW and Angus and Robertson, Sydney, 1962, p. 122.

⁵ *Ibid.*, p. 123.

insuperable, and indeed Cook gives us little reason to suspect that it was obtained, or even requested. The relevant entry in his official log simply notes,

At 6 possession was taken of this country in his Majesty's name and under his colours; fired several volleys of small arms on the occasion, and cheer'd 3 times, which was answer'd from the ship.⁶

What this meant was that by being annexed in this manner, the Indigenous peoples across the whole vast continent automatically became 'subjects of the Crown'. That is, they were all accorded the status of 'subjects' under British law, entitled to the protection of those laws, but entirely 'subject' to the sovereign fount of those laws, His Britannic Majesty, George III. In other words, by being made 'subjects' in this manner, the Australian Aborigines were effectively being declared a 'subject people', a people without sovereignty, a people wholly and entirely under a foreign sovereignty.

The British then, did not just ignore native sovereignty, they denied it outright - why? Among the most common explanations these days, especially since the publicity given to the doctrine of *terra nullius* in recent years by the Mabo decision, is to blame it all on European dishonesty, or the naked self-interest of the British.⁷ So the claim is made that it was simply in the interest of the British to pretend that Australia was a vacant land, and that the Indigenous people were not sovereign in their own land. It would be easy to regard the failure of the British and successive colonial and Australian governments to negotiate a Treaty with the Aboriginal people as just that, a 'failure' to acknowledge a prior Indigenous sovereignty. Such a view however, overlooks the fact that Europeans did not simply 'fail' to respect prior Indigenous sovereignty, they denied its very possibility from the start. For them, collective sovereignty was thought to inhere only in those peoples who had formed themselves into properly constituted societies. The

⁶ Cook's Secret Instructions, *Historical Records on New South Wales*, Vol 1, Government Printer, Sydney, 1893, p. 401; and Lieutenant Cook's Official Log, Wednesday, August 22nd, 1770, *ibid.*, p. 157. The relevant entry in Cook's rather more detailed *Journal* stipulates that he "once More hoisted English Colours" having satisfied himself that no "European before us" had already claimed the eastern coast of New Holland. *Captain Cook's Journal During his First Voyage Round the World*, edited by W.J.L. Wharton, Elliot and Stock, London, 1893, (facsimile edition, Libraries Board of SA, Adelaide, 1968), p. 312.

⁷ A slightly different account might be that such sovereignty has been denied in recent times due to the consolidation of 'parliamentary sovereignty' as a strategy to combat the judicial activism' of the High Court in granting recognition of Native Title (and an implied acknowledgement of prior sovereignty) in their Mabo and Wik judgements. See Yeatman, A., "Who is the Subject of Human Rights", *American Behavioural Scientist*, 43 (9), 2000, p. 1500 [1498-1513].

‘sovereignty’ of the Indigenous peoples of Australia was not recognised, in other words, because it was believed that they had not so constituted themselves, and this belief, though phrased and conceived in different ways, has continued to shape the administration of Indigenous peoples by both colonial and post-colonial governments well into the twentieth-century.

What I want to argue in this paper is that in order to understand the nature of Aboriginal dispossession and its consequences for subsequent aboriginal administration and policy we must examine this denial of Aboriginal sovereignty. It may be argued of course that this issue is not that significant since Aborigines now have rights to (limited) self-government. Whatever benefits it brings however, Aboriginal self-government in Australia does not entail any concession from Australian governments that the Aboriginal people are today or ever were a sovereign people.⁸ The discourse of sovereignty that informed colonisation and the later aboriginal policies of Australian governments was based on the view that sovereignty could never be exercised, claimed, or even granted to a people who did not live in properly constituted societies. While the Mabo decision in 1992 removed the stain of *terra nullius* from Australian law, the Australian state and its governments, despite the existence of limited Aboriginal self-government, continue to

⁸ For a sovereign government to cede self-government to Indigenous people is not in itself incompatible with the denial of Indigenous sovereignty. According to the scheme proposed by Fleras, Australian Aboriginal self-government may be seen as compatible with a kind of “functional” or “nominal” sovereignty based on greater recognition of Indigenous jurisdictions and decision-making structures. Important though this may be, it hardly amounts to an endorsement of effective sovereignty, namely, the recognition that Indigenous people constitute an independent nation or nations capable of and deserving acknowledgement of their right to determine their own affairs. As Christine Fletcher points out, this problems continues to bedevil ATSIC, currently the major institution of Indigenous self-government in Australia, an organisation intended to “serve its Aboriginal constituents” while also being accountable to a Commonwealth Government Department and Minister. It is for reasons such as this that Havemann concludes that Aboriginal self-government may offer little to those who seek recognition of Indigenous sovereignty, unless a broader notion of Indigenous “self-determination” encompassing the “the assertions of indigenous peoples, not the concessions that the State is prepared to make” is pursued. See, Fleras, A., “Politicising Indigeneity; Ethno-politics in White Settler Dominions”, p. 199 [187-234]; Fletcher, C., “Living Together but not as Neighbours; Cultural Imperialism in Australia”, p. 345 [335-350]; Havemann, P., “Indigenous Peoples, the State and the Challenge of Differentiated Citizenship; A Formative Conclusion”, p. 473 [468-475]. All in Haveman, P., *Indigenous Peoples’ Rights in Australia, Canada and New Zealand*, Oxford University Press, Auckland, 1999.

abide by the view that no Indigenous sovereignty has ever existed in the past, or ever can in the future.⁹

I. CONDITIONS OF COLLECTIVE SOVEREIGNTY: ABORIGINES AND SOCIETY

How are we to explain the seemingly inexplicable fact that when Europeans arrived on this land, they failed to recognise that the Indigenous people already here for thousands of years possessed any claim to the land or to sovereignty over it and themselves? According to one influential view, the answer lies in the doctrine of *terra nullius* and the consequent denial by Europeans that any recognisable system of property laws existed among the Indigenous people.¹⁰ Huggins goes further in arguing that “assuming the absence of people” on this land was simply advantageous for the British, but that once it became clear that there were substantial numbers of Indigenous inhabitants, Europeans simply argued that they were “too primitive to be regarded as the actual owners and sovereigns.”¹¹ According to Reynolds, the answer lies in the fact that the British annexation of Australia was buttressed by a notion of sovereignty in which acts of possession derived from the supreme authority of the state (or Crown), and that the Aborigines were thought to possess no correlate conception of political right.¹² On this view, the fallacy of British possession is to be challenged by showing that “the Aboriginal tribes exercised a form of sovereignty that could have been recognised by the international law of the late eighteenth century and early nineteenth century”.¹³ Both of these views are premised on the admirable conviction that the original inhabitants of this land possessed a sovereignty that those who came later did not recognise. Both also attribute this latter development to British (and European) dishonesty or self-interest, that

⁹ On this view, Indigenous self-government needs to be based on the firm recognition of Indigenous sovereignty, such that Indigenous and non-Indigenous peoples may “treat each other as equal, self-governing and coexisting entities” in order to negotiate “mutually binding relations of autonomy and interdependence”, rather than of superiority and dependence. Tully, J., “The Struggles of Indigenous Peoples For and Of Freedom”, in D. Ivison *et.al.* (eds.), p. 53 [36-59].

¹⁰ Hocking, B.A., and Hocking, B.J., “Australian Aboriginal Property Rights as Issues of Indigenous Sovereignty and Citizenship”, *Ratio Juris*, 12 (2), 1999, p. 200 [196-225].

¹¹ Huggins, J., “Cook and the New Anthropology”, in M. Lincoln (ed.), *Science and Exploration in the Pacific; European Voyages to the Southern Oceans in the Eighteenth Century*, The Boydell Press, Woodbridge, 1998, p. 202.

¹² Reynolds, H., “Sovereignty” in N. Peterson and W. Sanders (eds.), *Citizenship and Indigenous Australians; Changing Conceptions and Possibilities*, Cambridge University Press, Cambridge, 1998, pp. 209.

it was a “failure” or a mistake that they did not recognise an Indigenous sovereignty that could and should (even by the standards of the time) have been acknowledged.¹⁴

As appealing as it may be to emphasise European duplicity, I do not think that this provides an adequate account of why Aboriginal sovereignty has never been acknowledged.¹⁵ Nor, it must be said, does this view convey to complexity of the concept of sovereignty, its limitations and its relation to other concepts such as the state and society. To some degree at least, it would appear that relations between the British and the Indigenous Australians were shaped by the happenstance of the unexpected annexation of this continent by Lieutenant Cook in 1770. Cook of course had been ‘officially’ commissioned to observe the transit of Venus from Otahetie, but unofficially the *Endeavour* voyage was designed to fulfil the strategic designs of the Admiralty.¹⁶ Cook’s mission was to ascertain the existence and location of a presumed great southern continent, *Terra Australis Incognita*, and if unclaimed to annex it for his Britannic Majesty before the French got their hands on it.¹⁷ This massive southern continent

¹³ *Ibid.*, p. 210.

¹⁴ See also, Langton, M., “A Treaty Between Our Nations?”, Inaugural Professorial Lecture, University of Melbourne, p. 4. Web address: <http://www.indigenous.unimelb.edu.au/lecture1.html>

¹⁵ A similar critique is made by Attwood, B., “Aborigines and Academic Historians: Some Recent Encounters”, *Australian Historical Studies*, 24 (94), 1990, p. 130 [123-135].

¹⁶ Spate, O.H.K., *Monopolists and Freebooters*, Croom Helm, London, 1983, pp. 253-78; Harlow, V.T., *The Founding of the Second British Empire, 1763-1793*, Longmans, Green and Co, London, 1952, pp. 36-8. Cook’s mission owed much to Alexander Dalrymple, geographer, mercantilist, British East India Company administrator, and founder of the Company’s base at Sulu. Dalrymple had hoped to lead the expedition himself, and had been so nominated by Adam Smith and the Royal Society, but the Admiralty refused on the grounds that it would be repugnant to the service to appoint a non-naval officer (as they had earlier appointed William Dampier and Sir Edmund Halley with unhappy results) to lead such a mission.

¹⁷ Dalrymple clearly envisaged that this massive continent would be invaluable for its strategic location, its resources, and importantly as a market, and he optimistically predicted from the fact that surrounding islands were “swarming with people”, this continent must be “so full of civilised inhabitants, [and] must afford a very beneficial commerce...” for British merchants. He was however, less than consistent in his descriptions of the presumed inhabitants, at one point recommending himself for the mission as one who was free “from prejudice” and paid close “attention to the temper an disposition of men in their uncultivated state”, such that his, “consideration of the rights and value of man’s life... [would] secure a patient abstinence from the use of fire-arms against the native Indians, who must be ignorant of the intentions and language of the discoverer.” Dalrymple, A., *An Account of the Discoveries Made in the South Pacifick Ocean* [1767], Hordern House, Sydney, 1996, quotations from pp. xiii, xiv, xi. The plates accompanying Dalrymple’s Account are revealing here. Two show the islands of ‘Anamocka’ and ‘Amsterdam’, along with standard depictions of family groups representing the inhabitants. What is interesting is that the views of the islands show native villages with fences, long houses, and large canoes or proas. The inhabitants are shown clothed, holding implements or weapons, or wearing decorative items. In another plate showing ‘Murderers Bay on New Zealand’, the Maori are shown in large canoes under a distinct commander attacking the Dutch ships.

however, was not Australia – then fairly well known as a separate continent named New Holland – but a hypothetical continent lying somewhere south and east of New Zealand.¹⁸ Cook in fact found no such continent of course, but perhaps being unwilling to return home empty-handed, had claimed New Holland instead. From the start of Cook’s *Endeavour* voyage, if not before, the British were committed to the quest for a southern continent inhabited by peoples who were at least thought to be sufficiently capable of being dealt with in some kind of partnership. It was in this sense that Cook had been instructed to claim the presumed continent ‘with the consent of the natives’ therein. In the event, Cook claimed a land with inhabitants he seems to have thought were incapable of giving their consent; taking possession was thus to be an entirely peaceful annexation of a largely vacant land, and therefore neither a cession, and definitely not a conquest of a formerly sovereign people.¹⁹ If the British had embarked on a ‘conquest’, then British ‘subjecthood’ would extend only so far and no further than the extent of British might. Those who had been conquered would be accorded status as ‘subjects’, those who had not would be their own or the ‘subjects’ of another foreign or Indigenous power. But this is not how the British saw it in 1770, or in 1788, and despite later prevarication on the issue of whether they were engaged in conquest and warfare with the natives, the official position remained unchanged throughout the nineteenth-century (despite occasional queries from the courts).²⁰ Why was this? If the Indigenous in fact contested the arrival of Europeans, as they almost invariably did, and as even Cook admitted, why did the British not accord them the status as sovereigns in their own land?

The answer I think lies in the very discourse of sovereignty that Europeans applied and developed in New Holland and Australia, a discourse that provided ample scope for

¹⁸ In reviewing the records of all previous explorations and presumed sightings of the great southern continent, Dalrymple singled out Juan Fernandes from whose observations he drew the conclusion that *Terra Australis* was “very fertile and agreeable” and “inhabited by white people, of our stature, very well disposed, and cloathed with very fine cloths.” Dalrymple, *An Account*, p. 101.

¹⁹ This issue and its implications are canvassed in Buchan, B., “Subjecting the Natives: Aborigines, Property and Possession Under Early Colonial Rule”, 2001. Forthcoming.

²⁰ As Hookey has pointed out, the courts raised doubts (as far back as 1836) over whether New Holland had been peacefully settled, or conquered, and what this entailed for the legal status of the Indigenous inhabitants. At least one of these cases will be briefly discussed below. Hookey, J., “Settlement and Sovereignty”, in P. Hanks and B. Keon-Cohen (eds.), *Aborigines and the Law*, George Allen and Unwin, Sydney, 1984, pp. 1-18.

Indigenous dispossession. It is usually the case today, as Quentin Skinner has observed, that we commonly regard “the state as the holder of sovereignty”.²¹ There is thus a tendency to regard statehood as the precondition of sovereignty, that to speak of sovereignty is to speak of states as sovereign entities who interact with one another, fight wars against one another, make alliances and sign treaties with one another.²² One of the indelible signs of sovereignty it is asserted is that all such actions are undertaken in the interests of those sovereign entities.²³ The emergence of this (influential) account of sovereignty is often traced to the Treaty of Westphalia in 1648 and the development of the modern system of competing sovereign states.²⁴

This reading of sovereignty however, is partial at best and gives little idea of the complexities, not to say ambiguities, inherent in the development of the concept, and its particular application by Europeans in their dealings with non-European peoples.²⁵ Though often neglected, a crucial feature in early-modern thought was that sovereignty was treated as a quality inherent in a particular kind of collective structure, a society.²⁶ This understanding emerges from the work of Jean Bodin (1530-1596) who defined a commonwealth as “a lawfull government of many families, and of that which unto them in common belongeth, with a puissant soveraintie.”²⁷ The three central features of

²¹ Skinner, Q., “Hobbes and the Purely Artificial Person of the State”, *The Journal of Political Philosophy*, 7 (1), 1999, p. 2.

²² Hoffman, J., “Can we Define Sovereignty?”, *Politics*, 17 (1), 1995, p. 56 [53-8].

²³ See for instance, Strang, D. “Contested Sovereignty: The Social Construction of Colonial Imperialism” in T.J. Biersteker and C. Weber (eds.), *State Sovereignty as Social Construct*, Cambridge, Cambridge University Press, 1996, p.22-49.

²⁴ Murphy, A.B. “The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations”, in Biersteker and Weber (eds.), pp. 81-120. There is a tendency then, to see sovereignty, particularly in relation to treaty making, as a ‘modern’ phenomenon. See for instance, Frost, M., *Ethics in International Relations: A Constitutive Theory*, Cambridge, Cambridge University Press, 1996, pp. 106-107. This is disputed in Meron, T., “The Authority to Make Treaties in the Late Middle Ages”, *American Journal of International Law*, 89 (1), pp. 1-20.

²⁵ Windler, C., “Representing the State in a Segmentary Society: French Consuls in Tunis From the Ancien Regime to the Restoration”, *The Journal of Modern History*, 73, 2000, pp. 236-7 [233-74].

²⁶ Robert Latham has recently argued that the conventional understanding of ‘state sovereignty’ should be superseded by what he calls “social sovereignty” based on the “bodies of relations that effectively structure... social life”. Latham, R., “Social Sovereignty”, *Theory, Culture and Society*, 17 (4), 2000, p. 3 [1-18]. This approach, and his subsequent treatment of the early-modern theorists of sovereignty (pp. 5-7), overlooks the extent to which sovereignty was in fact defined by many of those same theorists as an attribute of ‘states’ founded on appropriately ordered civil society.

²⁷ Bodin, J., *The Six Bookes of a Commonweale*, (facsimile reprint of the English translation of 1606 by R. Knolles), Cambridge (Mass.), Harvard University Press, 1962, p. 1. See also, Hgo Grotius, *The Law of*

Bodin's political thought – commonwealth, family, and sovereignty - are here incorporated in such a way as to indicate that sovereignty is a quality of the rightly ordered commonwealth by which authoritative laws are pronounced and enacted and the common good of all ensured.²⁸ What is important about that sovereignty however, is that it is not simply a quality of the state or 'commonweal', but of a certain ordered association of individuals, groups, families and corporations. Sovereignty, Bodin suggested,

...is the true foundation and hinge whereupon the state of a citie turneth: whereof all the magistrats, lawes, and ordinances dependeth; and by whole force and power, all colleges, corporations, families, and citizens are brought as it were into one perfect bodie of a Commonweale: albeit that all the subjects thereof be enclosed in one little towne, or in some strait territorie...²⁹

What is worth noting here is that Bodin does not claim that sovereignty requires force of numbers, or extent of territory, but is a quality by which the collective, the social body or "civil society" organises itself in the form of a 'common-weal' or 'government' which is entrusted with sovereign power for the benefit of all.³⁰

We can distinguish in Bodin then, a conception of sovereignty as the domestically untrammelled exercise of the supreme legislative and executive power of a community. But we can also distinguish an account of its necessary preconditions, that is that sovereignty is a quality that inheres in a properly constituted collective entity, an ordered association of families or civil corporations. Thomas Hobbes (1588-1679), like other social contract thinkers, thought of sovereignty as a quality inherent in civil society, derived from the individual surrender of personal sovereignty which belongs to all in the state of nature, to form a collective sovereign body. This sovereign authority he famously described as,

...One person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.

War and Peace [1625], translated by F.W. Kelsey, Bobbs-Merrill, Indianapolis, 1925, Book II, Ch. 5, XXIII, p. 253. Grotius writes that an assembly of fathers of families united as "a single people" constitute "the most perfect society".

²⁸ *Ibid.*, pp. 160-1.

²⁹ *Ibid.*, p. 10.

³⁰ *Ibid.*, pp. 361-5.

And he that carryeth this Person, is called SOVERAIGN, and said to have *Sovereign Power*; and everyone besides his SUBJECT.³¹ Importantly, he did not recommend just any kind of association, but a civil society he conceived as relying on a series of mutual agreements (covenants) between individuals to establish one ruler (a sovereign) who exercises supreme power.³² It was John Locke (1632-1704) more than any other who elevated this conception of the relationship between civil society and sovereignty into an implicit justification for the dispossession of non-European indigenous peoples.³³ For Locke, the existence of associations in the state of nature is presumed from the fact that “*we are not by ourselves sufficient to furnish ourselves with competent store of things*” to live in a manner “*fit for the Dignity of Man*”, but all such associations lack “*any settled fellowship... [or] Solemn Agreement...*” among the members on how to regulate their common interests.³⁴ Locke is clear therefore that such associations in the state of nature are purely voluntary arrangements which provide for the pursuit of limited mutual interests. In speaking of this kind of society, Locke mentions “conjugal society” by which he meant the “...voluntary Compact between Man and Woman...” which realises a limited “Communion of Interest” between the two parties for their own care and preservation (and for that of their offspring).³⁵ But Locke is also quite clear that sovereignty or the “Power of Life and Death” is alien to this and other associations in the state of nature because within that state, each individual retains their own personal sovereignty.³⁶

³¹ Hobbes, T., *Leviathan* [1651], Harmondsworth, Penguin, 1968, p. 228. Italics in original.

³² *Ibid.*, p. 224. Raia Prokhovik argues that liberal notions of sovereignty, lifted from absolutists such as Bodin and Hobbes, are in tension with liberal aspirations to individuality and self-government. Prokhovnik, R., “The State of Liberal Sovereignty”, *British Journal of Politics and International Relations*, 1 (1), 1999, p. 70-1 [63-83]. My approach however, is that this ‘tension’, which is real enough when considering a literal interpretation of liberal and absolutist doctrines, expresses the deeper commitment in liberal thought to the existence of civil society as the foundation for the power and sovereignty of the state that protects it.

³³ This use of Locke owes much to the approach taken by Jim Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995, pp. 70-80. For Tully the crucial aspect of Locke’s argument is his use of ‘property’ as the distinguishing feature between ‘civilised’ Europeans and ‘primitive’ Americans. Without disagreeing with Tully’s interpretation, I would place more emphasis on the distinction in the attainment of ‘society’ implicit in Locke’s arguments.

³⁴ Locke, J., *Two Treatises of Government, Book II* [1704], Cambridge, Cambridge University Press, 1988, p. 277. All italics in original unless otherwise specified.

³⁵ *Ibid.*, p. 319.

This condition is opposed to life within political and civil societies, which are to be thought of as being based on the resignation of personal sovereignty to a common power which may adjudicate disputes and enforce laws binding upon all members.³⁷ The whole structure of Locke's argument hinges upon the surrender of this personal sovereignty (which belongs to us in the state of nature) to provide political society with the 'supreme power' it requires to guard and protect property in civil society.³⁸ Locke makes this clear in his account of the invention and use of money, which, he argued, was settled upon as a

³⁶ *Ibid.*, p. 322. Locke was reticent to speak of this collective sovereignty in any clear and emphatic sense, preferring the less absolute but more ambiguous term 'supreme power'. Scott, J.T., "The Sovereignless State and Locke's Language of Obligation", *American Political Science Review*, 94 (3), 2000, pp. 548-550.

³⁷ In his refutation of Filmer in *The First Treatise*, Locke spoke of Filmer's view that the "making of War and Peace" constituted "marks of Sovereignty". *Ibid. Book I*, p. 238. If this were so, Locke argued, then it could be said that any person who makes war can be described as sovereign, including pirates or mercenary captains. But Locke is here speaking of a very particular power, namely the power of war and peace, and it is clear that he is not speaking of the other power that is vital to the creation of political society, namely the power of making laws and punishing offenders.

³⁸ Much hinges here on the distinction between civil and political society, and rather frustratingly, Locke is not exactly clear on this. In Chapter VII of the *Second Treatise* Locke appeared to use the term 'political' society to refer to the governmental arrangements by which laws were made and controversies between citizens decided, while 'civil' society appeared to denote the union of individuals who had agreed to renounce their natural liberty (of being their own judge) and to establish an authority which was to act as the judge of controversies. In some other writings, he appeared to use the rubric of civility to describe the distinctly private, non-public and non-political considerations of individuals. This is the implication for instance of his reference to the "private civil concerns" of individuals in the *Essay Concerning Toleration* (Locke 1667: 188). In his later *Letter Concerning Toleration* of 1685, Locke expounded on the notion of the civil as coextensive with the private interests of individuals, "[c]ivil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like." (Locke 1685: 393). But Locke's use of the term was not entirely consistent, for he also used the term 'civil' to describe the considerations of the public magistrate with the maintenance of "public peace" while private "conscience" was the concern only of "the overseers of souls." (Locke 1685: 421). The distinction then, does not seem to be very clear, but resides, I take it, in the rather different connotations of the descriptions provided here, *to wit*, that 'political' society consisted in the institutional, legal and penal arrangements of society, but 'civil' society consisted in the union of individuals *who had such arrangements to appeal to*. Thus, Locke wrote, "because no *Political Society* can be or subsist without having in it self the Power to preserve the Property, and in order thereunto punish the Offences of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power, resign'd it up into the hands of the Community... And thus... the Community comes to be Umpire, by settled standing Rules..." (Locke, 1704: 324). Civil society however, is described slightly differently, not in terms of the institutional, legal, or penal arrangements of the union, but as the very substance of union itself, "Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies... and punish Offenders, *are in Civil Society* one with another..." (Locke, 1704: 324). Locke's distinction can be compared to the later Austinian definition of sovereignty, "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." Austin, J.L., *Lectures on Jurisprudence, or the Philosophy of Positive Law* [1879], Thoemmes Press, Bristol, 1996, p. 226. 'Society political' is opposed to natural society, "a society in the state of nature" comprising people "connected by mutual intercourse" (231), but political society is a society composed of those in subjection to a sovereign power (233).

means of exchange to remedy the inconvenience of perishability in the state of nature. Because the Laws of Nature stipulate that a person may make use of whatever will sustain his or her life, but has no right to allow such goods to spoil or go to waste, this meant that no person was entitled to hoard perishable goods, thus placing definite limits upon wealth creation and trade. The accrual of more property therefore required an imperishable and generally accepted medium of exchange (money) buttressed by law. Significantly, Locke describes this ‘invention’ as a transition intimately tied to the formation of societies and states. In other words,

...several *Communities* settled the Bounds of their distinct Territories, and by Laws within themselves, regulated the Properties of the private Men of their Society, and so, by *Compact* and Agreement, *settled the Property* which Labour and Industry began; and the Leagues that have been made between several States and Kingdoms, either expressly or tacitly disowning all Claim and Right to the Land in the others Possession, have, by common Consent, given up their Pretences to their natural common Right, which originally they had to those Countries, and so have, by *positive agreement*, *settled a Property* amongst themselves, in distinct Parts and parcels of the Earth: yet there are still *great Tracts of Ground* to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent and of the Use of their common Money) *lie waste*, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.³⁹

As Locke makes clear in remarks preceding and following this remarkable passage, such people who had not consented to the use of money were to be found in America, supplying him with an image of a veritable state of nature, “[t]hus in the beginning all the World was *America...*”⁴⁰ What is significant here is that Locke was not saying that America was a *terra nullius*, on the contrary it was clearly inhabited and those inhabitants had a title to the use of those things that sustained their lives. The important point was that they had not consented to the use of money and so quite clearly had not settled among themselves the agreements which bound civil and political society (such as laws and the delegation of authority). As a consequence, the Indians and people like them

³⁹ Locke, J. *Two Treatises of Government, Book II*, p. 299.

⁴⁰ *Ibid.*, p. 301. It is worth noting Vattel’s definition of a sovereign ‘nation state’ as a “society of men who have united together” for mutual benefit. Vattel, Emmerich de., *The Law of Nations or the Principles of Natural Law* [1758], translated by C.G. Fenwick, Carnegie Institution, Washington, 1916, p. 11. He argued further that sovereignty was intimately connected to the formation of “civil society” (p. 84), and that because natives who did not cultivate the soil could not be said to live in a civil society (85), there was a just claim that they may be confined “within narrower bounds” by those best placed to make better use of the soil (86).

were not entitled to be regarded as having any claim to collective sovereignty, but rather possessed only the personal sovereignty over their own lives that Europeans had renounced long ago in establishing civil and political societies.⁴¹

Early observations by the British of the Indigenous inhabitants of New Holland, despite some prevarication, conform very closely to this image of a people without ‘society’. Cook observed that the inhabitants lived in “small parties”, had “no fixed habitation, but move from place to place like wild beasts in search of Food”, living “wholly by fishing and hunting, but mostly by the former, for we never saw one Inch of Cultivated land in the whole Country.”⁴² Hawkesworth’s original edition of *Cook’s Journal*, although more literary creation than naval officer’s professional prose, was even more emphatic,

All the Inhabitants that we saw were stark naked; they did not appear to be numerous, nor to live in societies, but like other animals were scattered along the Coast, and in the Woods. Of their manner of life, however, we could know but little, as we were never able to form the least connection with them.⁴³

There was much debate at the time over the reliability of Hawkesworth’s rendering of Cook’s account, but more reliable first hand accounts of the colony, even those sympathetic to the Aborigines, tended to bear out rather than diverge from Hawkesworth’s judgement. As Watkin Tench put it, so far as “any civil regulations” were concerned, he did not know of any and did not “observe any degrees of subordination among them.”⁴⁴ Collins’ *Account* is even more explicit, referring to the indigenous inhabitants as “living in that state of nature which must have been common to all men previous to their uniting in society, and acknowledging but one authority.”⁴⁵ What is implied by such comments is that the natives merely ‘associated’, that there was no structure of authority, no political ordering of a distinct ‘society’, no permanent settlement and a requisite structure of superiority and inferiority necessary to a division

⁴¹ Illuminating comparisons can be made to the perceptions of non-Europeans by the French. See Jacques, T.C., “From Savages and Barbarians to Primitives: Africa, Social Typologies, and History in Eighteenth-Century French Philosophy”, *History and Theory*, 36 (2), 1997, pp. 203-6 [190-215]

⁴² *Cook’s Journal*, p. 320.

⁴³ Hawkesworth, Vol 3, p. 506, quoted in Dalrymple, A., *A Serious Admonition to the Public on the Intended Thief Colony at Botany Bay* [1786], D.S. Ford, Sydney, 1943, p. 25.

⁴⁴ Watkin Tench, *A Narrative of the Expedition to Botany Bay* [1789], in *1788*, edited by Tim Flannery, The Text Publishing Co, Melbourne, 1996, p. 57.

of labour. While the early observers noted the existence of quite large tribes, and even of relations between tribes, they also noted a general antipathy between and unwillingness of tribes in general to live together for any length of time. All these criteria lead toward the inevitable conclusion that the indigenous inhabitants of New Holland were a people who could not be considered to possess any collective sovereignty at all and were to be regarded as entirely within the legal category of ‘British subjects’ or ‘subjects of the Crown’.⁴⁶

II. NATIONS WITHOUT SOVEREIGNTY, SUBJECTS WITHOUT TREATY

It would be misleading however, to present a picture of British administration as uniform and carefully articulated. In reality, the question of the legal status of aborigines continued to bedevil British and colonial administrators throughout the nineteenth-century. While the ‘official’ line that all aborigines were ‘British subjects’ was continually reiterated, its implementation was inconsistent to say the least. By the 1830’s, problems in the British administration of the Indigenous peoples of Australia were nearing a point of crisis. The almost completely unregulated slaughter of Aborigines at all points of contact between them and the new settlers, official dissatisfaction with attempts to ‘civilise’ the natives, and the inability of the missionaries to bring about any amelioration of their condition were all conspiring to render British administration singularly ineffective. The crisis, when it came, took two forms, the first and most well known of which was the House of Commons Select Committee on the treatment of Aborigines in British settlements in 1836-1837 which established ‘the Protectorate’ (1837-1849) system of aboriginal administration.⁴⁷ The other was the far

⁴⁵ Collins, *An Account of the Colony in New South Wales* [1798], Vol 1., facsimile, Adelaide, Libraries Board of SA, 1971, p. 544.

⁴⁶ It may be worth noting here that as far as Dalrymple seems to have been concerned in his *Serious Admonition*, the question of sovereignty was only an issue between the British Crown and the East India Company. According the Company’s Charter, New Holland lay within its mandate, and he was at best unconvinced that the Crown could claim it back (pp. 17-18), especially for so base a purpose as the establishment of a convict colony which could not fail to become a source of piracy and smuggling injurious to trade (pp. 26-7), and where punishment would be ineffective (p. 24).

⁴⁷ In the words of the Select Committee Report, the aims of Aboriginal policy throughout the British Empire should be to recognise that Aborigines lived in a “less advanced state of society”. That the “supposition” that indigenes “are not capable of being reclaimed or elevated into a civilised or well ordered community” was unfounded. Nonetheless, in relation to Australian Aborigines, the Report stated that they were, “the least-instructed portion of the human race in all the arts of social life... and so entirely

less well known, but equally sensational aborted trial in 1841 of an Aboriginal man for the murder of another Aboriginal man. In this case, Justice J.W. Willis seemed about to make a finding that the case before him was not one of simple malice, but of the observance of native laws, and hence did not fall within his jurisdiction.

The chief and immediate problem with which the British and colonial authorities were preoccupied throughout the period of the Protectorate was the issue of the amenability of Aborigines to British law.⁴⁸ The problem here, as Willis J had adverted, was that if it were to be admitted that Aborigines possessed “laws and usages of their own”, the basis of British possession was called immediately in question unless “treaties should be made with them”.⁴⁹ In discussing the commission establishing the colony, Willis argued that it asserted “the sovereignty of the crown... over the whole of the territory comprised within the limits it defines” but did not provide “any specific recognition... of the claims of the aborigines, either as the sovereigns or proprietors of the soil”.⁵⁰ The conclusion toward which Willis was heading was not that there should be an end to British supremacy, on the contrary, it should continue, but must be securely and lawfully established.⁵¹ What

destitute... of civil polity” it recommended that Protectors be appointed who could form and manage native communities dedicated to “that species of industry which is least foreign to the[ir] habits and dispositions...”. Report from the Select Committee on Aborigines (British Settlements) With Minutes of Evidence, *British Parliamentary Papers, Anthropology, Aborigines*, 2, Shannon, IUP, 1968. Quotations from pp. 75, 46, 80, 82-3. (Subsequently *BPP*).

⁴⁸ In the mid 1840’s Edward John Eyre, then employed as resident Magistrate and Protector of Aborigines at Moorunde on the River Murray, gave a clear idea of the dilemma in writing, “In declaring the Natives British subjects, and making them amenable to British laws – they have been placed in the anomalous position of being made amenable to laws of which they are quite ignorant, and which at the same time do not afford them the slightest redress for any injuries they may sustain at the hands of Europeans. This arises from their being unable legally to give evidence in a Court of Justice, and from its rarely happening that any aggressions upon them take place in the presence of other Europeans who might appear as witnesses for them.” He went on to note that there were several cases of violence against aborigines that he was unable to take any action on because of “...my inability to receive their evidence, and from the impossibility of procuring any other than Native evidence.” Eyre, E.J., *Reports and Letters to Governor Grey From E.J. Eyre at Moorunde*, Adelaide, Sullivan’s Cove, 1985, pp. 48-9. Letter dated 1 Feb, 1843. On the 5th of June, Eyre wrote that more important than this difficulty, was the problem of using British law to ‘shield’ young Aborigines from the “brutal violence of the elder or the stronger” thus allowing them to enjoy ‘protection’ not only from Europeans but “from one another” as well (p. 61).

⁴⁹ *BPP, Colonies, Australia*, 8, Shannon, Irish University Press, 1969, p. 151.

⁵⁰ Willis even referred to the British destruction of their “existence as self-governing communities”. *Ibid.*, p. 152.

⁵¹ It is worth remembering that any treaty that may have been offered to Aborigines on the basis of their ‘dependent ally’ status would probably have had “potentially disastrous consequences” for them because any such recognition would more than likely have been an “Act of State beyond the jurisdiction of the ordinary courts”, thus rendering it immune to consolidation in the courts and liable to executive removal.

this entailed was the recognition of the collective status of Aborigines as “dependent allies”,

I repeat that I am not aware of any express enactment or treaty subjecting the aborigines of this colony to the English colonial law; and I have shown that the aborigines cannot be considered as foreigners in a kingdom which is their own. From these premises... I am at present strongly led to infer that the aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs.⁵²

The conclusion to be drawn from Willis’ arguments was that the Aborigines possessed their own form of society, which might be uncivilised and rude, but had its own internal laws of operation and development. The options this presented to colonial administrators were roughly two-fold, the first of which was to protect and preserve native tribes and communities as ‘nations’ or ‘dependent allies’ (as were the tribes of the Six Nations in Canada) which required some form of agreement or treaty.⁵³ Standish Motte of the Aborigines Protection Society made this the basis of his proposed legislation for “securing the protection of the aboriginal inhabitants of all colonies settled by Great Britain”. His plan was that Britain should recognise the rights of aborigines as “an independent nation” and that no country (even Britain) had a “right by force or fraud to assume the sovereignty over” them, but that “such sovereignty can only be justly obtained by fair treaty, and with their consent.”⁵⁴

Hookey, *loc.cit.*, p. 7. ‘Act of State’ doctrine rested on a view of sovereignty expounded by Sir George Cornwall Lewis, former Secretary of War, who argued that the measure of sovereignty was the “arbitrary” power of the state to make and brake whatever commands it chooses, from which he derived the view that there cannot be “anything in the form of any government, which will afford its subjects a legal security against an improper, arbitrary exercise of the sovereign power.” Lewis, G.C., *Government of Dependencies* [1841], M. Walter Dunne, Washington, 1901, p. 12. As the treatment of the Cherokees in the United States shows, recognition of Indigenous people as a “dependent nation” did not necessarily entail recognition of just land rights or lead to a fair and honourable treaty. Remini, R.V., “Andrew Jackson Versus the Cherokee Nation”, *American History*, August 2001, p. 48 [48-56].

⁵² BPP, *Colonies, Australia*, 8, p. 155.

⁵³ Herman Merivale took the time in his *Lectures on Colonization* to disparage such treaties (and the Treaty of Waitangi in particular) on the grounds that they cemented native rights to land which impeded colonisation and settlement. As an alternative, he suggested that Indigenous peoples should be “treated as clients for whom the British government was authorised to act” without even the pretence of affording them any recognition (in treaties) that they may make decisions for themselves. Merivale, H., *Lectures on Colonization and Colonies* [1839-41, revised 1861], London, Oxford University Press, 1928, footnote, p. 498.

⁵⁴ Motte, S. *Outline of a System of Legislation for Securing Protection to the Aboriginal Inhabitants of all Countries Colonised by Great Britain*, Aboriginal Protection Society, London, 1840, p. 14.

The other option, as recommended by Captain George Grey, was for the Aborigines to be entirely and totally subjected to British law, requiring the elimination of all native laws and customs. Grey was no ordinary administrator, he was an archetypical British imperialist, enthusiastically and energetically committed to the view that he (and his European colleagues) were in the best position to know what to do for the poor benighted savages under their control.⁵⁵ Grey's 'Report on the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia' was based in part on his own (disastrous) contacts with Aboriginal people during his two expeditions.⁵⁶ He began by noting that the great error of British policy was to regard the natives as British subjects, but to allow native laws to persist so long as they did not affect Europeans.⁵⁷ All aboriginal laws were, Grey asserted, merely "barbarous customs", and stated that it was his "full conviction" that,

...whilst those tribes, which are in communication with Europeans, are allowed to execute their barbarous laws and customs upon one another, so long will they remain hopelessly immersed in their present state of barbarism... I believe that the course pointed out by true humanity would be to make them from the very commencement amenable to the British Laws, both as regards themselves and Europeans...⁵⁸

One of the chief problems attendant upon allowing their own laws and customs to survive was that the aborigines would be rendered unable to appreciate the nature of 'crime'. In other words, prosecution for murder or rape or theft would only be pursued when such acts were committed against Europeans, but not when perpetrated upon other aborigines. As a consequence, they would be lead to believe that "their criminality consists not in

⁵⁵ At the time he submitted his 'Report', he had recently managed to survive two less than successful expeditions of 'discovery' in Western Australia, and on the strength of this was to be appointed as Governor of SA, serving subsequently (twice) as Governor of New Zealand (once during the period of the Maori Wars), and Governor of the Cape Colony in South Africa. Rutherford, J., *Sir George Grey, K.C.B., 1812-1898: A Study in Colonial Government*, Cassell, London, 1961. Pp. 18-20; 52-61. A rather less sympathetic account of Grey as a self-publicist and seeker after "imperial fame" emerges from Cameron, J.M.R., "Agents and Agencies in Geography and Empire: the Case of George Grey" in M.Bell, R.Butlin, and M.Heffernan (eds.), *Geography and Imperialism 1820-1940*, Manchester University Press, Manchester, 1995, pp. 13-35.

⁵⁶ The journals he produced from this experience were to provide the most detailed 'ethnological' account of Indigenous social structure since the early sketches of Collins and Tench, and informed the work of figures such as Lubbock, Tylor and Morgan. Spriggs, M., "Who Taught Marx, Engles and Morgan About Australian Aborigines", *History and Anthropology*, 19 (2-3), 1997, p. 190.

⁵⁷ *Historical Records of Australia*, vol XXI, October 1840-March 1842, p. 34. Report dated 1840. (Subsequently *HRA*)

⁵⁸ *Ibid.*, pp. 34-5.

having committed a certain odious action, but in having violated our prejudices.”⁵⁹ Grey’s proposals therefore recommend the complete and universal subordination of aborigines to British Law, but in order to accomplish this end he recommended a policy of cultural obliteration, suggesting the payment of bounties to any settlers able to prove that they had “reclaim[ed]” an aboriginal from their ‘wild state’.⁶⁰

Administrative reaction to Grey’s proposals provides a neat example of the difference in perspective of those in Britain from those in Australia.⁶¹ Lord Russell at Westminster latched on to them immediately as a way of advancing British administration recommending them to colonial governors.⁶² Governor Gipps in NSW however, diplomatically paid homage to the author’s good intentions, but rejected them as a slight on his administration and as unworkable. Gipps maintained that whatever Grey had asserted, he (Gipps) was committed to upholding the sovereignty of British Law, and that “no Law, save English law... the Law of the Colony founded on English Law, is recognised as being of any force in it.”⁶³ Governor Hutt’s reaction reflected the realities of white settlement in WA in which there were even closer limits on the capacity to enforce British law than in NSW. Hutt’s claim therefore was that it was unwise to regard all aborigines as British subjects,

I conceive that the aborigines are not in a position to be treated in all points as British subjects; that we have not the means to supervise and control their dealings with one another in the bush and in the wild districts... and that to attempt to make them at all times and under all circumstances in their habits and customs amenable to our laws, would be frequently next to impossible, and might have the effect of a teasing and tiresome persecution, estranging them from us, and rendering them only more tenacious of their own rude and barbarous observances.⁶⁴

⁵⁹ *Ibid.*, p. 36.

⁶⁰ *Ibid.*, pp. 38-9.

⁶¹ Herman Merivale approvingly cited Grey’s proposals in his *Lectures on Colonization* in order to buttress the view that “It will be necessary... that the colonial authorities should act upon the assumption that they have the right in virtue of the relative position of civilised and Christian men to savages, to enforce abstinence from immoral and degrading practices, to compel outward conformity to the law of what we regard as better instructed reason.” (p. 502-3).

⁶² *BPP, Colonies, Australia*, 8, Shannon, IUP, 1969, p. 99-100, 392.

⁶³ *HRA*, vol XXI, pp. 312-315, quote from p. 312. Dispatch dated Jan 24, 1842.

⁶⁴ *BPP, Colonies, Australia*, 8, Hutt to Russell, 10 July 1841, p. 392.

Hutt thus proposed that Aborigines living beyond effective white control be left to their own customs, until by gradual influence they be brought under more rigorous ‘subjection’.

While such a policy could fit the expediencies of governing a remote and widely dispersed population, the recognition of native customs and laws in the courts (as Justice Willis proposed) threatened the foundation of British sovereignty.⁶⁵ Gipps proposed to introduce legislation to settle the matter, and instructed the Colonial Secretary, Edward Deas Thomson, to compile a brief precis of the colonial government’s position on the issue of British sovereignty. This letter was sent to Chief Justice Sir James Dowling and the other judges of the Supreme Court, in order to elicit their advice, without, he claimed, “any view to biasing the opinion of the Judges”.⁶⁶ Thomson’s letter stipulated five grounds upon which British sovereignty rested,

1. The Sovereigns of Great Britain have for more than half a Century assumed unqualified dominion over... New Holland... and have exercised unqualified dominion wherever their authority has been established.
2. It has been ordained by an Act of Parliament... that, within the Colony of New South Wales, British Law shall be established without reference to any other Law or Laws...
3. That, in numerous official documents issued under the immediate sanction of Her Majesty, the Aborigines of this Country are called Her Majesty’s subjects...
4. That, upon British Territory, no Law save British Law can prevail, unless by virtue of some Treaty or Enactment; and no such Treaty or Enactment has ever been made, either with or in respect to the Aborigines of New South Wales.
5. That, even if the Aborigines be looked upon as a conquered people... still no argument in favour of a separate Code of Laws for the Aborigines... can be drawn therefrom, first, because the Aborigines never have been in possession of any Code of Laws intelligible to a Civilised People, and secondly, because their Conquerors (if the Sovereigns of Great Britain are so to be considered) have declared that British Law shall prevail throughout the whole Territory of New South Wales.

⁶⁵ On the use of ‘native laws’ by imperial administration see Fisch, J., “Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion” in W.J. Mommsen and J.A. de Moor (eds.), *European Expansion and Law: The Encounter of European and Indigenous Law3 in 19th- and 20th-Century Africa and Asia*, Oxford, Berg, 1992, pp. 15-38.

⁶⁶ *HRA*, vol XXI, p. 655. Quotation following also from this page. Letter dated 4 Jan, 1842.

Thomson's letter makes it clear that the claim to British sovereignty rested on no more than the practice of British sovereignty. But as the colonial administrators knew, their ability to exercise that sovereignty only extended so far, and beyond a few days ride from each centre of settlement, HM's Aboriginal subjects were invariably maintaining their own customs and laws. While the persistence of native customs had to be admitted, the continuing crisis in British administration marked by the collapse of the Protectorate in 1849 was that despite all efforts, no way had yet been found to incorporate native tribes into the structure of white rule.⁶⁷ As Lord Russell had observed in 1840, "[w]e should run the risk of entire failure" to govern Indigenous peoples properly,

...if we should confound in one abstract description of aborigines the various races of people, some half-civilised, some little raised above the brutes... One tribe in Africa often differs widely in character from another at 50 miles distance; the red Indian of Canada and the native of New Holland are distinguished from each other in almost every respect. We indeed, who come into contact with these various races, have one and the same duty to perform towards them all, but the manner in which this duty is to be performed must vary with the varying materials upon which we are to work. No workman would attempt to saw a plank of fir and cut a block of granite with the same instrument, though he might wish to form each to the same shape.⁶⁸

The apparent "inaptitude" of the Aborigines to "change their desultory habits, and learn those of settled industry" lead Russell to believe that the "unequal contest" between the natives and Europeans (with their "superior civilisation") must lead to the 'disappearance' of the former.⁶⁹ Consequently, he recommended that the "best chance of preserving the unfortunate race of New Holland lies in the means employed for training their children", and he thus recommended that the Governor be made guardian of the

⁶⁷ The attempt to do so elsewhere, notably in Africa, culminated in Lord Lugard's policy of the 'Dual Mandate' resting on "indirect rule", which, as he explained it, entailed that the "object in view is to make each "Emir" or paramount chief... an effective ruler over his own people. He presides over a "Native Administration" organised throughout as a unit of local government [incorporating] districts under the control of "Headmen", who collect the taxes in the name of the ruler... A province under a [British] Resident may contain separate "Native Administrations", whether they be Moslem Emirates or pagan communities. ... The Resident acts as a sympathetic adviser and counsellor to the native chief... His advice on matters of general policy must be followed, but the native ruler issues his own instructions to his subordinate chiefs and district heads – not as the orders of the Resident but as his own...". Lord Lugard, *The Dual Mandate in British Tropical Africa* [1922], Frank Cass, London, 1965, pp. 200-1. No such system was ever employed in Australia, but continual efforts to administer 'tribalised' Aborigines according to their own customs were made in the early part of the twentieth-century (see Section IV below).

⁶⁸ Lord J. Russell to Governor Sir G. Gipps, 25 August, 1840, *BPP, Colonies, Australia*, 8, Shannon, IUP, 1968, p. 73.

⁶⁹ *Ibid.*, pp. 73-4.

“more promising” children, thereby facilitating their removal and institutionalisation.⁷⁰ The policies of the ‘Protectorate’ period thus aimed to shape Aborigines in such a way that they could be harnessed to white rule, their tribes were to be subjected to constant observation and control; they were in short to be the subjects of a policy designed to fit an entirely subjected people.⁷¹ The effort to conceptualise why this should be the case occupied the minds of a series of administrators, pioneer ethnologists, anthropologists and even eminent legal theorists throughout the remainder of the nineteenth-century.

3. ABORIGINES IN LATE NINETEENTH-CENTURY THOUGHT

The almost universal admission in the (often prolix) reports of Protectors of aborigines and the more cursory Reports of the Commissioners of Crown Lands throughout the 1840’s was that the Aborigines were unable to submit to civil or political arrangements, and no advance in their ‘social condition’ could be evinced.⁷² The ‘official’ discourse of the time reflected a growing sense of division between the attainment of ‘society’, and the social arrangements of the Aborigines. The two most detailed contemporary accounts of Indigenous social structure were compiled by explorers who subsequently became colonial administrators, namely George Grey’s *Journals of Two Expeditions of Discovery* (1841), and Edward John Eyre’s *Journals of Expeditions of Discovery* (1845). Unlike earlier observers, Grey in particular was willing to concede that the Indigenous tribes possessed some “social habits”, engaged in “social intercourse and conversation”, and even had “institutions”.⁷³ But both Grey and Eyre’s journals confirm that whatever ‘social habits’ the aborigines possessed they did not have any kind of recognisable ‘society’. Eyre, for instance, who also incorporated the observations of Grey and the South Australian Protector of Aborigines Matthew Moorhouse, spoke of the present inability of savage Aborigines making “social ties and connections” because the power of

⁷⁰ *Ibid.*, p. 74.

⁷¹ As Russell described it, regular reports were to be submitted to Parliament by Protectors and Commissioners of Crown Lands relating to “their numbers, their residence at any particular spot, the changes in their social condition, the schools, and all other particulars, including the state and prospects of the aboriginal races.” *Ibid.*

⁷² See for example, *HRA*, vol XXI, p. 745; and vol XXII, pp. 64, 170, 172, 648-54.

⁷³ Grey, G., *Journals of Two Expeditions of Discovery...* [1841], Libraries Board of SA, Adelaide, 1964, pp. 219-20, 251, 253.

the elders drives them back “among the savage hordes”.⁷⁴ What distinguishes these ‘hordes’ from ‘society’ was the fact that the former did not possess “any form of government” and any member of the tribe “is at liberty to act as he likes, except, in so far as he may be influenced by the general opinions or wishes of the tribe...”.⁷⁵ This ‘general opinion’, unlike the civilised influences of civil society, had the force of “immemorial” custom which had “usurped the place of laws” and was “more binding”, exerting an “irresistible sway... a chain that binds in iron fetters...”.⁷⁶ ‘Society’ thus connoted an artefact of governmental activity held together by a delicate framework of norms toward which each individual member was able to orient their activity through their own processes of reason. The way in which the Aborigines lived prior to or beyond white contact was emphatically *not* society, because the individual aborigines were entirely subject to the thrall of custom or tradition. As Grey put it,

...to believe that man in a savage state is endowed with freedom either of thought or action is erroneous in the highest degree. He is in reality subjected to complex laws, which not only deprive him of all free agency of thought, but, at the same time by allowing no scope whatever for the development of intellect, benevolence, or any other great moral qualification, they necessarily bind him down in a hopeless state of barbarism, from which it is impossible for man to emerge, so long as he is enthralled by these customs... so ingeniously devised... [to resist] any effort that is made to overthrow them.⁷⁷

The relevant distinction here between savage ‘hordes’ and civilised ‘society’ was the predominant view of Aborigines (and their tribes) until well into the twentieth-century. It was a view that it was simply improper to even consider Indigenous sovereignty when their level of ‘social’ development was clearly so primitive that any ‘political’ consciousness could hardly be said to exist. This view was elevated to status of legal doctrine by the highly influential (one time) administrator of the *Raj*, and founder of British comparative jurisprudence, Sir Henry Maine. Maine is today most remembered for his dictum that modern “progressive” society had originated in the transition “from

⁷⁴ Eyre, E.J., *Journals of Expeditions of Discovery Into Central Australia* [1845], Libraries Board of SA, Adelaide, 1964, p. 430.

⁷⁵ *Ibid.*, p. 315.

⁷⁶ *Ibid.*, p. 384.

⁷⁷ Grey, *Journals of Two Expeditions...*, pp. 217-218.

Status to Contract".⁷⁸ What he meant by that was captured by his depiction of the "uniform" development of 'progressive societies' marked by

...the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account.⁷⁹

In other words, the 'ancient' condition of society is characterised by the solidity of 'status' underpinned by relations within the family unit. Each individual is born into a certain set of family relationships which bestow a certain status that predetermines their social role, duties and life expectations. The family is thus the basis of the social order, an order which is characterised by its conservatism, its inability to progress and develop through the free action of its members.⁸⁰ Progressive societies by contrast are those in which relations between individuals are organised not on the basis of 'status', but 'contract', the free agreements between autonomous individuals.⁸¹ As he put it elsewhere,

Each individual in India is a slave to the customs of the group to which he belongs; and the customs of the several groups, various as they are, do not differ from one another with that practically infinite variety of difference which is found in the habits and practices of the individual men and women who make up the societies of the civilised West.⁸²

What is important here is the association of 'status' with the family, 'contract' with autonomy; only this latter quality 'contract-autonomy' was compatible with the existence of political sovereignty, whereas status and the family were incapable of grounding true sovereignty. Maine illustrated this distinction with examples drawn from Indian and European history respectively in distinguishing his own conception of sovereignty from an Austinian account of the origins of sovereignty in the "authority of the Patriarch or Paterfamilias over his family".⁸³ Such authority could be found, Maine asserted, in

⁷⁸ Maine, H.S., *Ancient Law* [1861], Thoemmes Press, Bristol, 1996, p. 170.

⁷⁹ *Ibid.*, p. 168.

⁸⁰ *Ibid.*, pp. 135-8.

⁸¹ *Ibid.*, p. 169.

⁸² Maine, H.S., *Village Communities in the East and West*, 3rd edition, John Murray, London, 1876, pp. 13-14.

⁸³ Maine, H.S., *Lectures on the Early History of Institutions* [1888], William S. Hein, Buffalo, 1987, p. 379. See also here Austin, J.L., *Lectures on Jurisprudence*, Vol 2, p. 774. It is worth noting here that for Austin, every sovereign government is "free from legal restraints: or... every supreme government is legally *despotic*." (vol 1, p. 283). He goes on to disparage the distinction between 'free' and 'despotic' governments on the basis that they signify no more than a conceptually loose value judgement that the

recent Indian history in which the authority of rulers was purely ‘despotic’, that is, it expressed itself in extractive commands and not in the formulation of laws. Such examples, he asserted,

...may be taken as a type of all Oriental communities in their native state...

They have ever been despotisms, and the commands of the despots at their head, harsh and cruel as they might be, have always been implicitly obeyed.⁸⁴

In this sense, Maine contends that Indian rather than European history is a far more accurate view of the conditions that prevailed throughout human history. “The States of modern Europe” Maine attests, must be regarded “as having been formed in a manner different from the great empires of antiquity... and from the modern empires and kingdoms of the East...”.⁸⁵ In Western Europe only did the “Aryan race” develop “political communities” through processes of amalgamation, federation and confederation of smaller communities eventually creating ‘legislative’ authority.⁸⁶ Such authority was based on the recognition of sovereignty, the right to make laws, to legislate and thereby end the reign of custom and any other “habits having no sanction from law.”⁸⁷

Perceptions of Australia’s Indigenous peoples were thus coloured by the view that they exemplified a kind of ‘primitive’ condition illustrative of the origins of human kind. Such a view was to prove influential in the development of the evolutionary foundations of British and American social anthropology largely through the work of the two pioneers of Australian ethnological studies, Lorimer Fison and A.W. Howitt.⁸⁸ Their work was to serve as the ‘scientific’ foundation for the delimitation of the boundaries of native capacity to participate in society, and thus was to help buttress the assumptions that

former are popular and democratic (hence good), and the latter personal and autocratic (hence bad) (pp. 284-5).

⁸⁴ *Ibid.*, p. 382.

⁸⁵ *Ibid.*, p. 385.

⁸⁶ *Ibid.*, pp. 388-89.

⁸⁷ *Ibid.*, p. 390.

⁸⁸ Spriggs, M., *loc.cit.*, pp. 192-202; and Murray, T., “Aboriginal (pre)History and Australian Archaeology: The Discourse of Australian Prehistoric Archaeology” in B. Attwood and J. Arnold (eds.), *Power, Knowledge and Aborigines*, Melbourne, La Trobe University Press, 1992, p. 5. [1-19]. This is not to say that they alone, or even in particular, were responsible for what was done during this period. Rather, that the understanding of aboriginal development (and their present and future limitations) which one finds in their work provided the necessary back-drop to the policies of ‘welfare’ and ‘care’ of aborigines, which expressed themselves in policies of reservation, removal, child separation, and cultural obliteration.

informed the period of legislative control of aboriginal people in the late nineteenth and early twentieth centuries.⁸⁹ Howitt thought there was a clear delineation between ‘society’ and Aboriginal tribes, noting that in these tribes each ‘individual’ was entirely subject to a structure of invariable ‘corporate’ membership, whereas,

...civilised man is now an “individual”. He is no longer a mere member of a corporate community. His whole life’s training, his domestic and social relations, are strictly in accord with his individualised condition.⁹⁰

Referring to Maine as his authority, Howitt claimed that Aboriginal tribes provided the clearest example of the most primitive condition of human beings in which all social organisation was based on the communal family (consanguinity) with descent in the female line. Only when this structure was superseded by the “individual family” – as it had long ago among ‘Aryan’ peoples - with “descent through the father” was the solidity of the communal family weakened and the conditions created for the emergence of ‘individuals’.⁹¹ To illustrate the difference, Howitt used the example of the understanding of ‘crime’ or the nature of offence. Within aboriginal tribes, any offence is not suffered individually, he maintained, but is suffered by all as members of a ‘body corporate’; and similarly, redress may be sought not only against the particular perpetrator, but against any members of the perpetrator’s tribe.⁹² Here, Maine once again was the authority, whose reflections on India lead him to the conclusion that there is no

⁸⁹ As an example one may cite the *Aborigines of Victoria* compiled by R. Brough Smyth when he was serving as Secretary to Victoria’s Central Board for the Protection of Aborigines, the first centrally administered state agency responsible for Aboriginal administration, and the first to have its own legislative framework (in 1869). The work clearly shows the intimate association between the development of ethnological knowledge and the extension of administrative power. Among Brough Smyth’s correspondents was A.W. Howitt, along with others directly involved with Aboriginal administration (such as Board member A.C. Le Souef, and station manager and missionary F.A. Hagenauer). Much of the temper of the book is prefigured in the comment from the introduction to the effect that, “The customs of the natives of Australia are so like, in many respects, those of other existing savage or barbarous races and those of the people of ancient times, that one feels more and more the necessity of a classification, in which would appear every known custom and the place where it is practiced, exactly after the manner that the geologist elaborates his system of the classification of rocks.” R. Brough Smyth, *The Aborigines of Victoria* [1876], John Currie, O’Neill, Melbourne, 1972, p. xxv.

⁹⁰ Howitt, A.W., and Fison, L., *Kamilaroi and Kurnai*, George Robertson, Melbourne, 1880, p. 332.

⁹¹ *Ibid.*, pp. 334, 340. As Howitt described it, his and Fison’s research provided grounds for “...the belief that the individual family only came into existence when descent through the father had become a possible belief, through the breaking up of the communal family, with its female line of descent. The boundary line separating these two social conditions marks, I think, one of the most momentous stages in the progressive development of human society.” (334-5).

⁹² *Ibid.*, pp. 330-1.

“*right* or *duty* in an Indian village community; a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society.”⁹³

According to the celebrated American ethnologist, Lewis Henry Morgan, with whom Howitt and Fison had corresponded, their work provided evidence of an original and extremely primitive form of social organisation, namely, an “organisation on the basis of kin, with descent in the female line”.⁹⁴ Morgan’s claim was this structure was the universal social condition of human beings at the most primitive of stages, and had been superseded elsewhere by social organisations based on descent in the male line, before development into ‘political society’ among the ‘Aryan’ peoples, and especially in the period preceding the Roman Republic.⁹⁵ According to Morgan, the ‘idea of government’ evolved through three relatively discrete stages, the first characterised by the power of a council of elected chiefs of the tribe, the second of the council and a ‘military commander’, and the third and highest stage, of “a people or nation by a council of chiefs, an assembly of the people, and a general military commander.”⁹⁶ Only in this latter stage is it proper to speak of the beginning of the differentiation of distinct political institutions, and he is clear that what drove this evolution was the development of the notion of property. Prior to the development of property, all relations between individuals were mediated ‘socially’ by the immemorial customs of the tribe (or gens) on the basis that each member possessed roughly equal property. As the idea of property began to develop, it became necessary, Morgan asserted, for ‘primitive’ peoples to construct ‘political’ relationships which were capable of establishing and maintaining

⁹³ Maine, H.S., *Village Communities in the East and West*, 3rd edition, John Murray, London, 1876, p. 68. Maine went on to note the disruptive influence that codified British law was having on these unwritten communal laws. The expanded sense of individual right within British law would not be such a bad thing, he wrote, if the British had managed to instill in native Indians “a corresponding improvement in moral judgement” by which means “popular opinion could be brought to approve of the gradual amelioration of ... custom.” (p. 73). It should be noted that Maine referred to two types of evidence gleaned from the study of India and Indians, the first of archaic “aboriginal” peoples, the second to the “more advanced assemblages of men” elsewhere in India which appear to be at the stage at which the power of the “patriarchal family” asserts itself through the “village community” as a necessary step toward the creation of modern ‘society’ (pp. 14-19). It was in this latter sense that he referred to India as an example of the “arrested” development of “Aryan” institutions and ideas that had developed to full fruition in Western Europe (p. 220).

⁹⁴ Morgan, L.H., “Prefatory Note” in *Kamilaroi and Kurnai*, p. 6.

⁹⁵ Morgan, L.H., *Ancient Society* [1877], Cambridge (Mass.), Belknap Press, 1964, pp. 62-3, 305.

⁹⁶ *Ibid.*, p. 107.

distinctions on the basis of property (through laws and regulations). It was here that the Greeks (“the first” among the “Aryan family”) made the transition from the ‘gens’ to the ‘deme’ or township as the basis of organisation and thus began to develop sovereign political institutions which were separate from and began to act upon the ‘social’ relations of the tribe, thus initiating the distinction between ‘state’ and ‘society’.⁹⁷

Howitt and Fison applied Morgan’s framework to the Indigenous peoples of Australia, describing that section of a matrilineal Aboriginal tribe occupying a certain territory as a “horde”, a very primitive version of the ancient Greek ‘deme’.⁹⁸ What was significant about the ‘horde’ they argued, was that it represented the very first glimmerings of the emergence of father-right and patrilineal descent, and thereby the development of the state. The assumption on which this view was based was that all matrilineal ‘social’ organisation was entirely bound by custom, it was an invariant whole in which the status of one’s mother determined one’s membership of the tribe. Where the association of members of the tribe begins to be organised on the basis of territory or locality however, separate individuals or kin groups can begin to be distinguished from the vast consanguine family. Thus all local or territorial organisation (the horde) has within it a tendency to “modify and contract the range of social organisation, to usurp its authority, to bring about descent through males, to arrange society on its own basis, and finally to make itself paramount.”⁹⁹ Thus the ‘hordes’ that Howitt and Fison had begun to identify in Aboriginal tribes were a starting point for the development of the much more sophisticated “demes” of archaic Greece, territorial organisations of patrilineal families in which law, political authority and sovereignty begin to develop.¹⁰⁰ As they represented it, the ‘horde’ eventually develops into some form of ‘deme’ through which laws begin to supplant the sway of custom, and individuals begin to interact with one another on the basis of contract. In this way, the germ of the modern state (the incarnation of father-

⁹⁷ *Ibid.*, p. 189-190. On property within the gens see, p. 70. As Austin defined it, the ‘gens’ was equivalent to the looser term ‘nation’, denoting “an aggregate of persons, exceeding a single family, who are connected through blood or lineage... And, thus understood, a ‘nation’ or ‘gens’ is not necessarily an independent political society”, and therefore cannot be the crucible of sovereignty. *Lectures on Jurisprudence*, Vol 1, p. 250. See reference to Austin in note 33 above.

⁹⁸ Howitt, A.W., and Fison, L., “On the Deme and the Horde”, *Journal of the Anthropological Institute of Great Britain and Ireland*, XIV, 1885, p. 143.

⁹⁹ *Ibid.*, p. 144.

right) begins to separate from ‘society’ (the realm of mother-right), and in fact to subordinate, act upon, and shape the latter, giving rise to modern ‘society’ as a realm of individual interaction regulated by laws and political authority emanating from a separate sovereign state. “In our own day” they concluded,

...modern notions and institutions exist side by side with old beliefs and regulations – the one in civilisation, and the other in contemporaneous savagery – running merely in parallel lines, not touching or in any way affecting one another, so long as the superior race does not come into collision with the inferior.¹⁰¹

The fact that such a collision had occurred in Australia was a matter of the deepest import, as both were aware. The problem, as Howitt and Fison saw it, was that the ‘inferior’ Aborigines did not yet possess sufficiently evolved institutions (such as chieftainship) which could be used by ‘superior’ European administrators in the task of governing them.¹⁰² They were, as Fison observed in his Presidential address to the Australasian Association for the Advancement of Science in 1892, entirely trapped within the confines of custom which have “all the force of divine law, the breach of which will certainly be followed by terrible consequences...”¹⁰³ This innate conservatism, as others observed, rendered the Indigenous inhabitants of Australia ill adapted to meet the challenges of confrontation with the vigour and dynamism of superior races, and hence explained their ‘inevitable demise’.

IV. THE POLICY OF SUBJECTION: ABORIGINAL WELFARE

This perception of Indigenous social forms and of Indigenous people as entirely lacking any kind of sovereignty as a people informed the development of policies of ‘welfare’,

¹⁰⁰ *Ibid.*, pp. 150-1.

¹⁰¹ *Ibid.*, p. 167.

¹⁰² In his later *The Native Tribes of South-East Australia*, Howitt did in fact speak of “tribal government” to denote the fact there had to be “some authority and restraint” and even “executive power by which ... offences ... are dealt with and punished.” But he was by no means clear in identifying what that ‘power’ was, and went to some pains to differentiate ‘Aboriginal’ government from that of other Indigenous peoples, choosing “the term Headman as being less likely to be misunderstood than that of Chief, which has associations not applicable to the Australian savage.” The power of Aboriginal ‘headmen’ was described as “limited” by the power of other elders, and of the whole body of adult males in the tribe, indicating once again the view that the Aborigines had not progressed beyond the stage of primitive ‘equality’. Howitt, A.W., *The Native Tribes of South-East Australia* [1904], Aboriginal Studies Press, Canberra, 1996, pp. 295, 297, 320.

¹⁰³ Fison, L., “Address by the President, Section G, Anthropology”, *Report of the Australasian Association for the Advancement of Science*, 1892, p. 148.

‘care’, and ‘protection’ of Aborigines in the late nineteenth and early twentieth-centuries, that included child separation and cultural obliteration. Victoria was the first colony/state to develop a centrally administered aboriginal policy through the Central Board for the Protection of Aborigines (1863) and the Aborigines Protection Act (1869). The aim of the CBPA’s policy was to administer a series of Aboriginal stations designed to impart the physical and psychological features of an ordered village society.¹⁰⁴ As the manager of Coranderrk station, John Green, put it in his submission to the *Fifth Report*, the whole village “will become a very interesting, social, and industrious community, if rightly managed.”¹⁰⁵ The Board referred to Coranderrk as “an experiment”¹⁰⁶, while the *Sixth Report* is even more fulsome in its praise of the ‘experiment’ at Coranderrk, referring in particular to the “culture” prevailing at the station which had “brought many of the black children and half-castes” to live properly.¹⁰⁷ Elements of the model were also applied at Ramahyuck mission station which was referred to by a later Aboriginal administrator as a “model native village” offering labour, education, “European” housing, and even “Savings Bank accounts”.¹⁰⁸ The early reports of life on the stations was taken as evidence that different tribes could be made to live together “amicably”, that there was “conformity to progress, and active industry”, and the inculcation of habits of social life, “to labour and to expend their earnings judiciously”.¹⁰⁹ To facilitate this endeavour, the Board called for and received specific legislation (1869, amended 1887) enabling them to take half-caste women and children from their tribes. The CBPA’s *Sixth Report* claimed that “[p]ossessed of such powers” the Board would be enabled to “train and educate black and half-caste children” to “make them useful members so society” by removing the

¹⁰⁴ The Report of the 1877 Royal Commission emphasised that the “appearance of the grounds” of the stations be kept ‘tidy’, noting that the “effect of tidiness, and *per contra* of untidiness, on the Aboriginal mind, is very important; the inculcation of tidiness forms part of civilisation as well as of discipline.” *Royal Commission on the Aborigines*, 1877, Votes and Proceedings, Legislative Assembly, 1877-8 (3), p. viii-xvii. (Subsequently, VPLA)

¹⁰⁵ *5th Report*, CBPA, 1866, VPLA, 1866 (2), p. 6. The Report also gives descriptions of the interior of the native huts, their tidiness and presentation, the degree of comfort, quality of furniture, and even the use of ornamentation. Attwood, B., *The Making of the Aborigines*, Allen and Unwin, Sydney, 1989, p. 7

¹⁰⁶ *Ibid.*, p.7.

¹⁰⁷ *6th Report*, CBPA, 1869, VPLA, 1869 (4), p. 4.

¹⁰⁸ Bleakley, J.W., *The Aborigines of Australia; Their History - Their Habits - Their Assimilation*, Jacaranda Press, Brisbane, 1961, p. 93. The use of a savings bank was also noted by the Royal Commission in 1877.

¹⁰⁹ *5th Report*, CBPA, 1866, VPLA, 1866 (2), p. 8.

Aborigine's liberty to leave the stations.¹¹⁰ The separation of those of mixed from those of pure descent was not a simple matter, once separated, the 'half-castes' were to be subject to a series of new regulatory powers vested in the Governor including supervision of places of residence, supply of rations, monitoring the provision of assistance, the licensing and apprenticing of children, and the compilation of progress reports. The passing of the 1886 Amending Act marked a decisive shift in administrative thinking in relation to the 'half-caste problem' and its likely solution. This shift however, did not mark any let up in the view that administrative and legislative centralism was the key to the continuing successful management of either the Aboriginal or 'half-caste' population. Such centralism had and would continue to be based on the assumption that whatever was done by the Board *to* the Aboriginal population, would also be done *for* them in their best interests. Indeed, just as the Board's 24th Report in 1888 trumpeted the success with which they had farmed out many of those of mixed-descent from the stations, Hagenauer's report from Ramahyuck called upon the Board to "frame regulations for the better care and management of the blacks".¹¹¹ Hagenauer's reiterated call for an improved regulatory and legislative framework premised on the 'care' and 'protection' of Aborigines, and the Victorian experience of over twenty years of centralised Aboriginal administration provided the model that many of the other states were at that time on the verge of adopting.

While Victoria was the first state to pass its own Aboriginal Act, the other states eventually followed, Western Australia in 1886 and 1905, Queensland in 1897, New South Wales in 1909, South Australia in 1910, and finally the Commonwealth (for the Northern Territory) in 1911 and 1918. A brief perusal of these Acts reveals the substance of this 'protection' to have consisted in was the more effective white control of the intimate details of the lives of Aborigines.¹¹² In order to effect this control, the Acts and their formulators often made use of highly repressive techniques, none more ominous

¹¹⁰ 4th Report, CBPA, 1864, VPLA, 1864, p. 17; and 6th Report, p. 8.

¹¹¹ 24th Report, CBPA, 1888, VPLA, 1888 (3), pp 3, 10.

¹¹² Chesterman, B., and Galligan, B., *Citizens Without Rights; Aborigines and Australian Citizenship*, Cambridge, Cambridge University Press, 1997.

than that of child separation.¹¹³ Western Australia's 1905 Aborigines Act, drafted in 1900 by the Head of that state's Aborigines Department, Henry Prinsep, provides a clear example of this technique. The main provisions of the 1905 Act related to the augmentation of the powers of the Aborigines Department. Such powers were designed to be used to drive a wedge between those aborigines of mixed descent, who were encouraged to merge with the white population, and those of 'pure-descent' who were to be warded onto reserves and kept within the native settlements thereon. In his Report of 1902, Prinsep was in no doubt that his chief problem was that 'half-castes' had to be protected from the "wandering habits of their black mothers" or they would become a "disgrace" and a "menace to our civilisation", and though he had been trying to "get the consent" of the mothers to take their children away (for their "benefit and education"), he lamented that the "natural affections of the black mothers have stood very much in my way."¹¹⁴ Consequently, one of the main clauses of the Bill he insisted upon was that which made him as Chief Protector the legal guardian of all Aboriginal and half-caste children (clause 8).¹¹⁵ In his report of 1904, Prinsep had argued that this power was essential, commenting that,

This is a very important matter. By my report of last year I showed that there were now growing up in the State probably more than 515 half-caste

¹¹³ Haebich, A., *Broken Circles; Fragmenting Indigenous Families, 1800-2000*, Fremantle Arts Centre Press, Fremantle, 2000, p. 207-8. This particular policy had a long history, and though it did not become a settled policy until well into the twentieth-century, many had called for it well before that time. In doing so, those who made the call were fully cognizant of the hardships it would involve. To provide one example, a South Australian Select Committee Report from 1860 made the following recommendation, "The Committee, however, submit, as their strong conviction, that permanent benefit, to any appreciable extent, from attempts to Christianise the natives can only be expected by separation from children from their parents and evil influences of the tribe to which they belong. However harshly this recommendation may grate on the feelings of pseudo-philanthropists, it would in reality be a work of mercy to the rising generation of aborigines." *Report of the Select Committee of the Legislative Council of South Australia Upon 'The Aborigines'*, 1860, South Australian Parliamentary Papers, 1860 (3), paper no. 165, p. 6.

¹¹⁴ *1902 Aborigines Department Report*, Western Australia Votes and Proceedings, 1902 (2), p. 3. (Subsequently, WAVP). As he made clear in his evidence to the Roth Royal Commission in 1905, Prinsep held out no great hopes for the 'advancement' of the inmates of these institutions, claiming that "The instruction should be of such a nature as to bring them up as useful workers with merely such as amount of reading, writing and numbers as would be of service to them in their positions as humble labourers, the position which they cannot hope to rise from for at least two or three generations." *Report of the Royal Commission on the Condition of the Natives*, 1905, WAVP, 1905 (1), p. 40.

¹¹⁵ Other clauses empowered him to order the removal of Aborigines to reserves (clause 12), authorise movement onto or out of Aboriginal reserves (clause 14-15), regulate the terms and conditions of aboriginal employment and contracts of employment (clause 16-22), to control the property of Aborigines and half-castes (clause 33), to declare 'prohibited areas', remove aborigines from towns and native camps (clause 37-39), and regulate the movement of aboriginal women (clause 40-44).

children... and, unless action is taken, will grow up to be as wild, lazy, and dirty, and probably more criminal, than the aborigines hitherto dealt with. There is no law at present to enable me to withdraw them from the black race, and in nearly all cases persuasion fails to obtain the mother's consent. By the power which the new Bill will give me I shall be able to do so, but you may rest assured that it will be done gradually and with as much kindness as possible.¹¹⁶

Under subsequent administrators, and especially A.O. Neville, the legislative control of Aborigines, and their formation into 'native settlements' was carefully refined. In his Report of 1919 for instance, Neville spoke of the 'settlements' as a "sociological experiment" in which the inmates had 'settled down' to "a new life of peace, contentment, and usefulness" under Government control.¹¹⁷

Baldwin Spencer's landmark *Preliminary Report on the Aborigines of the Northern Territory* of 1913 represents the culmination of the policies of Aboriginal welfare. It was the first attempt to systematically apply the approach originally taken in Victoria to (re)create a kind of model of society aimed to shape native conduct not as individuals, but as members of a functioning whole held together by the introduction – especially through more rigorously regulated economic and employment relationships – of ideational norms of conduct.¹¹⁸ The central problem, as he saw it, was that the Aborigines were nomads, and possessed no indigenous "village or compound" structure in which they lived "permanently in association with one another", cultivating the soil or tending herds, which placed them much lower in the scale of civilisation than either Maoris or Papuans.¹¹⁹ The nomadic and tribal structure of Aboriginal life thus posed three general problems that confronted white government and administration. The first was that the

¹¹⁶ *1904 Aborigines Department Report*, WAVP, 1904 (2), 20, p. 4. The 1911 amendments to the Act provided that the guardianship of the Chief Protector superceded that of the mother of an illegitimate 'half-caste'. *1911 Aborigines Department Report*, WAVP, 1912 (1), 8, p. 7.

¹¹⁷ *Annual Report of the Chief Protector of Aborigines*, 1919, WAVP, 1919 (2), 23, p. ?? .

¹¹⁸ Elsie Masson, who later became Bronislaw Malinowski's wife, and was at that time the governess to the Northern Territory's Administrator's children, described this policy evocatively as an attempt to build "a bridge for the black man" to cross the "chasm of ages" between their primordial condition and white society. "At the best", she reflected, such settlements "can only be an imitation of civilisation", but if it can buy some time for the "aboriginal" to "survive for two or three generations, its savage instincts may be replaced by those of a civilised community." Masson, E.R., *An Untamed Territory; the Northern Territory of Australia*, Macmillan, London, 1915, p. 151, 152-3.

¹¹⁹ Spencer, H., *Preliminary Report on the Aborigines of the Northern Territory*, *Commonwealth Parliamentary Papers*, 1913 (3), p. 264-280. Unless otherwise stipulated, all quotations are taken from these pages.

traditional association with their own lands meant that removing them to another location was attended with severe difficulties. Second, they possessed “intensely communistic habits” with “very little idea of private property”, nor that “the lazy loafer is living at the expense” of the more industrious. Third, there was “mutual suspicion and distrust” between the tribes making any form of association between tribes difficult. Such problems would affect the techniques of government, but not its rationale. Spencer thus saw the chief task of Aboriginal administration as one of minimising contact between aboriginal and non-aboriginal populations, especially “Asiatics”, as it was quite clear to him that the Aborigines themselves possessed no way of regulating physical and sexual contact between their own and other ‘races’.

While he thought that those Aborigines living traditional lives beyond white contact (‘tribalised natives’) could manage their own affairs sheltered on large reserves, ‘detrivalised natives’ around the towns had to be ‘segregated’ so that they may be “preserved” while awaiting a “serious effort” for their “betterment”. Spencer’s report has very little to say about what that ‘betterment’ may consist in, outside of the now well-established practice of simple but insistent education in “industrial habits” and religious or moral training. In making this claim however, Spencer returned to the now universally accepted administrative maxim that any long-term change for the better would involve child separation,

...it is absolutely essential that all efforts should be directed towards the training of the younger generation. The children must be withdrawn from the native camps at an early age. This will undoubtedly be a difficult matter... and will involve some amount of hardship, so far as the parents are concerned; but if once the children are allowed to reach a certain age and have become accustomed to camp life, with its degrading environment and endless roaming about in the bush, it is almost useless to try and reclaim them.

As the subsequent Reports of the Territory’s Administrator indicate, the native settlement or compound established at Kahlin just outside Darwin was used as a barbed-wire enclosed presentation to ‘detrivalised natives’ of the “humane treatment” they would receive at the hands of the Commonwealth Government.¹²⁰

¹²⁰ *Report of the Administrator, Northern Territory, 1913, CPP, 1914-1917 (2), p. 33, Kahlin is described on pp. 37-8.*

CONCLUSION

Policies oriented to Aboriginal ‘welfare’ were based on, and reinforced the position of Aborigines as a people without sovereignty, a subject people whose destiny lay in the hands of a ‘superior’ sovereign people. When the policies of Aboriginal Welfare culminated in the explicit avowal of assimilation, it became clear that the major figures involved in shaping such policies saw it in terms of the complete cultural obliteration of the Aboriginal people. A.O. Neville took an active and prominent role in the development of a national policy of assimilation and was in no doubt that required Aboriginal cultural obliteration. He spoke frankly at the landmark 1937 Aboriginal Welfare Conference,

Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?¹²¹

In his report to the Commonwealth Government in 1928 on the Aborigines of central and northern Australia, J.W. Bleakley took the opportunity to pour scorn on the idea proposed by the Aborigines Protection League that Aborigines be entrusted with their own ‘native state’. To do this, Bleakley asserted, would be to foist upon Aborigines a “social machine they cannot understand”,

They have no conception of democracy as understood by civilised nations. Their native laws and customs seem to utterly fail to conceive any idea of combination or federation of tribes for mutual government or protection. Each tribe is a separate and distinct group, with its own language, customs, and laws environing its peculiar totem, and has interest in nothing outside of those associations.¹²²

¹²¹ *Aboriginal Welfare*, Initial Conference of Commonwealth and State Aboriginal Authorities, 21-23 April, 1937, Government Printer, Canberra, 1937, p. 11. In reflecting on his long involvement in state and national Aboriginal policy, Neville congratulated himself on his pursuit of native settlements on which “full-blood” children could be separated from ‘half-caste’ or “coloured” children and the latter educated to a higher standard. The settlements were to be highly disciplined environments, which Neville himself described as “utilitarian” insofar as they acted as “clearing centres” of young and able-bodied Aboriginal labourers, and ‘coloured’ children who could be moved on to specialised institutions. Neville, A.O., *Australia’s Coloured Minority: Its Place in the Community*, Currawong Publishing, Sydney, 1948, p. 77, 87-88.

¹²² Bleakley, J.W., *The Aborigines and Half-Castes of Central Australia and North Australia 1928*, Government Printer, 1929, p. 30. Some idea of the Aborigines Protection League’s proposal and the Chairman’s (Colonel C. Genders) response to Bleakley’s Report can be found in *Australian Aborigines, A Statement by the Aborigines Protection League*, Adelaide, 1929.

Bleakley's position was thus an affirmation of the basic principle of British and Australian Aboriginal administration, that the Australian Aborigines were a people without any conception of society, and hence no political or collective sovereignty as a people. As he was later to express the problem, the Aborigines could not be expected to renounce their "irresponsible wandering life" for that "of the settled village dweller in one step", but had to be led from their "savage mentality" to "think white as well as talk white."¹²³

From the perspective of the twenty first-century, our problem is the persistence of a view that whatever was done *to* aborigines in the past, was also done *for* them. Our current Prime Minister's position on the issue of reconciliation and an apology to the 'stolen generation' exemplifies this view.¹²⁴ The Prime Minister appears to believe that no apology is owed by the Government to those who have suffered due to policies of child separation, because the current Government was not responsible for practicing or supporting the policy. More to the point, it would be wrong for him, as Prime Minister, to apologise because he had nothing whatever to do with the policy and was therefore not responsible for its disastrous effects. This view goes hand in hand with the conviction shared by many non-Indigenous Australians, that no matter how much 'regrettable' suffering was caused by former policies, it was merely the unintended result of actions designed 'in the best interests' of aborigines, and 'for their own good'.

It is the persistence of this view that is the central problem confronting contemporary Australians. It is the persistence of a certain view, not so much about what was done, but why it was done to Aborigines. It is a view that the (especially recent) history of Aboriginal administration and policy is not a matter for shame, and that the persistent failure of the Government (and many of its citizens) to recognise this is not a matter for national disgrace. Rather, that no matter how bad things were, and no matter how genuine the suffering that may have been caused by those policies, they were well intentioned. At worst then, such policies were simply well meaning but misguided

¹²³ Bleakley, J.W., *The Aborigines of Australia*, Jacaranda Press, Brisbane, 1967, pp. 187, 319.

¹²⁴ For the PM's position consult *Hansard*, Commonwealth of Australia, House of Representatives, Tuesday, 27 May, 1997, pp. 4113-4114.

attempts to 'protect' or 'care for' Aborigines, to look after their 'welfare' and serve their 'best interests'. It is precisely here, in the persistence of the view that whatever was done was intended to be in the 'best interests' of the Aborigines of Australia, that the single biggest problem confronting the future prospects of reconciliation exists. It is here also that the strongest arguments in favour of a Treaty are to be raised. The 'welfare' that administrators claimed to pursue was based on the complete denial of Indigenous sovereignty. The Aborigines were the objects of welfare policies, they had no say in what was done, or how it was done, their fate was determined by administrators who felt that they knew what was in the best interest of the Aborigines, and not the Aborigines themselves. Such a policy framework could only be envisaged by denying the very substance of what it meant to constitute a sovereign people. This paper is not the place to discuss the nature and content of a Treaty, and such was not my intention. What this paper had been intended to present was the view that the prospects for reconciliation will require an admission that no Australian Government has ever made, that by denying Indigenous sovereignty, the Indigenous inhabitants of Australia were effectively rendered a subject people. A people whose continuing and distinctive cultural and social status can not be recognised, and whose present and future prospects hinge upon a sovereignty to which they have been subjected 'for their own good'.