澳洲原住民土地之發展

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中文摘要

原住民的土地權是全球原住民關切的主要問題之一。直到八〇年代末台灣原住民才透過土地運動來表示對此一問題的關切。政府的回應是增加對原住民生活改善的財政支出以及其他象徵性的行動。九〇年代台灣原住民爭取土地權的運動不再復見，然而相關的研究顯示台灣原住民對土地問題仍不滿意。若與他國相較（如澳州），台灣原住民土地運動的成效似乎有些相形見絀。本文主旨在試圖研究有關澳州原住民土地權發展的因素，俾利我們自澳州經驗中汲取教訓。

六０年代澳州原住民爭取土地權的運動，再加上七０年代工黨政府果敢的決定，因而有一九七六年有關北方領地（Northern Territory）的原住民土地權法案（Aboriginal Land Rights Act）的通過。該法案承認傳統原住民土地所有權的法律利益。在此之前，澳州法律拒絕接受此一概念。而此一法案的出爐爲原住民具有文化特性的主權奠立了基礎。這應歸功於人類學家。他們研究原住民的地方組織並主張原住民自上個世紀即擁有他們的土地。儘管如此，各州政府並未自動追隨聯邦政府承認原住民的土地權，因爲澳洲憲法允許各州有權對原住民土地權採取不同的態度與實踐。所以直到一九九三年聯邦國會通過 Native Title Act 後原住民頭銜始在澳洲全境獲得認同。法院有鑑於有必要符合國際標準與當代價值推翻了先前判例的原則。

由於自治政府被認爲是本土文化與法律的遺產，而且有助於強化與維持原住民社會與文化的傳統，因此一些學者辯稱各種形式的自決是原住民既要享有基本權利、決定未來，又要維持與傳遞其特殊認同給後代的基本先決條件。事實上自決權已成爲最近草擬完成的原住民權利宣言（Declaration of the Rights of Indigenous People）的主題。目前聯合國人權委員會（United Nations Commission on Human Rights）正在考慮採認此一宣言。吾人樂見澳洲聯邦政府自七０年代起即採取承認原住民主權的自決政策。

澳洲白人政權的提案實際上是回應長期以來原住民的奮鬥。這亦顯示出原住民是如何深切地關注其土地與如何渴望控制他們自己的生命。澳州原住民土地權的發展凸顯原住民的期望與執著終於獲得佔多數的白種人的認可與確認。這些白種人態度與思想的改變乃源於對原住民文化、社會與法律知識的改善。

Development of Australian Aboriginal Land Rights

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The rights of aborigines to land is one of the major issues concerned by aborigines throughout the world. Not until about the end of 1980s, Taiwan aborigines also expressed the concern through some land movements. Although governments responded to aboriginal problems with increased financial inputs and other symbolic actions and throughout 1990s one saw no aboriginal land movement in Taiwan any more, relevant studies show that dissatisfactions of Taiwan aborigines with land problems still remain.[1] Compared to other country such as the case of Australia, the effects of Taiwan aboriginal land movements appear less significant. This paper intends to study factors related to development of Australian Aboriginal land rights in order to learn teachings from Australian experiences.[2]

[1] Chang 1996:336.

[2] I originally intended to do a research on comparison of aboriginal land rights of the Australian and the Taiwanese cases. This paper should constitute the first stage of the project.

Loss of rights and struggle for rights in Aboriginal Australia

There was no doubt that before 1769 when Captain Cook landed Australia for the first time, and immediately claimed possession of east part of it in the name of His Majesty who then appointed its first governor to establish a government in New South Wales in 1788, the continent had been belonging to the Aborigines. Perhaps there is no need for us to discuss nature of the intrusions brought to Australian Aborigines under European colonialism, which to some extent could be regarded in the human histories as 'routine' expansions motivated by human desires of power and wealth. However, this time the expansion was distinctively equipped not only with overwhelming advanced weapons and technology but also some unique thinking such as so called 'Social Darwinism' and 'Modernism' to rationalize its behaviors.

Australian Aborigines reacted strongly against appropriations of their lands by the white intruders. But their weapons were no comparison to those of the whites, and their social organizations lacked a tradition of political alliance, the resistance was restricted to be guerilla-type raids upon white settlements. In return however they received severe and systematic retaliation. In the name of the policy called 'pacification' by the whites, what being acted out frequently was extermination. In this process, during 1820-50, the coastal areas and the suitable for sheep industry were taken over into hands of the whites. Not until 1880s when the north and center of Australia were also developed by the whites, the 'genocide' stopped as cattle industries were in need of labor from the gradually tamed Aboriginal remnants. As a result of destruction of the Aboriginal societies, their population decreased rapidly. Approximately during the nineteenth century the number of Aborigines had been reduced by 75 per cent. Even more peace in the north, the population dropped about

one-third.[3]

After conquest of Aborigines, the next-step treatment of them was 'segregation', which was named a policy of 'protection' by the Queensland government when legislated in 1897. It authorized the government to move Aborigines and confined them to reserves or 'institutions'. After 1911, all states in Australia actually had adopted this pattern as solution to management of Aborigines.[4] Besides, regulations were also established to restrict supply of weapons, alcohol and work etc. to Aborigines. Although colonies of the continent was united into a federal state separating from the British government and became an independent sovereignty in 1901, their attitudes toward Aborigines remained unchanged. Generally the federal and state governments followed one another's methods and practices regarding Aboriginal affairs. In this period, rights of Aborigines were actually deprived and restricted to such a degree as being without rights. For instance, the Northern Territory official of Aborigines was viewed as the legal guardian of Aboriginal children and had the power to take them away from their parents for the sake of education, female Aborigines could not marry non-Aborigines freely etc. Aborigines were regarded as a disappearing race, thus were excluded from the registration. The term 'Aboriginal native' even became like a standard exclusionary reference in many pieces of federal legislation establishing both rights and obligations for Australian people, [5] meaning that Aborigines were out of consideration of the state.

Naturally Aborigines could not endure the discriminations for long. They started protests and demanded for rights since 1930s. They

[3] Gumbert 1984:12-5.
[4] Ibid:16-7.
[5] Peterson 1998:6-9.

called for 'full citizenship' and national responsibility for their future development and suggested a policy of federal control of Aboriginal affairs to the government. During 1940s, to have equal rights and greater role of federal responsibility in Aboriginal affairs became the main appeals.[6]

In response, a new policy of 'assimilation' was proposed by federal and state governments in 1951. It was justified as being able to provide fairness and equality to Aborigines. Unfair restrictions on alcohol, inter-racial marriage, free movements were lifted, right to vote and duty of military service were permitted, but at the same time for Aborigines to change their cultures and to become subjects of social engineering so as to be integrated into the larger society were regarded as a necessity by the government. In this respect, isolated Aboriginal gatherings such as reserves were viewed as obstacles for their integration. Under the ideology of assimilation, and as formerly valueless reserves began to be found possessing mineral potential, dispossessing Aborigines of reserves became reasonable. Thus the term 'Aboriginal ' and 'reserves' were announced to be replaced by the name 'ward' in Northern Territory.[7]

Although Aborigines had been conferred equal rights in many respects, they were still allowed to have wages lower than the basic level of Australian workers in 1960s. It was regarded that due to their ill-efficiency, the wage level should be considered by cases rather than by one same standard. In 1965, the North Australian Workers' Union, with view of the changing climate of world opinions, supported Aborigines' protests in seeking equal wages. The strike of the

[6] Ibid:10-11.

[7] Gumbert 1984:19.

Gurindji at Wave Hill was thus able to maintain for one year.[8] In July 1966, a gathering of the Council for Aboriginal Rights held demonstration to the Legislative Council demanding full wages, better houses, control of land, and penalties on the use of derogatory expressions for Aborigines etc. They also sent a petition to the United Nations.

Aboriginal protests against inequality in 1960s gained general support of the public. While political consciousness were only weakly developed among Australian Aborigines, influenced by American civil rights movement of the same period, sympathetic non-aboriginal leftists and university students promoted actively for a change of the Commonwealth constitution in amending the two exclusionary references to aboriginal people, which became obstacles in involving the federal legislature with aboriginal affairs as the statues were employed as excuses to postpone conferring rights to Aborigines. Campaigns propagated the issue as of 'Aboriginal Citizenship Rights' and of national pride and identity for all Australians.[9] The constitutional referendum was held in 1967 and passed by 90.77 per cent voting in favor of the amendment.

Gumbert pointed out that Australia followed English tradition of unwritten law n which the parliamentary sovereignty was preferred to a written charter of rights in the constitutional declaration. The basis of traditions of freedom on which safeguard of civil liberties rested in Australia however was not as firm as in Britain. Therefore one could see no restraints in local legislation regarding Aborigines' liberties. Aborigines became losing rights actually in accordance with the law. Despite the constitutional amendment, the situations could not be improved much however as the constitution was modeled on

[8] Ibid :21.
[9] Peterson 1998:17.

that of the United States, having law-making power of the federal parliament strictly specified and leaving the states with the residual.[10] Therefore legislative battles regarding Aboriginal affairs between two levels of the government are still to be seen in the future.

Aboriginal land rights movements in 1960s

Besides achieving for equal rights, Australian Aborigines were particularly concerned with land rights in the meantime. The Gurindji, originally struck for wage issue at cattle station in Wave Hill, further made a move in 1967 from the location allotted to them by the government to settle on their traditional land called Wattie Creek, which actually had been leased legally for cattle industry to Vesteys company. They claimed it their land since the ancient time, and asked for a lease of it for 500 acres, otherwise the land should return to the government. They put up the prior claim as reason in calling into question the existing property relationship, saying 'Many of our forefathers were killed in the early days while trying to retain it. Therefore we feel that morally the land is ours and should be returned to us. . .We have never ceased to say amongst ourselves that Vesteys should go away and leave us to our land.'[11] The government of Northern Territory rejected the claim and regarded it as violation of laws and offense against rights of the lease holder. On the other hand, a legislation was passed in 1969, which allowed Aborigines and their cooperatives to lease land in reserves while with the rights being subject to priority of mining.

About the same time, land rights issues were also raised by Aborigines in other areas. In 1963, the federal government leased 140 acres of the Arnhem Land Aboriginal Reserve on Gove Peninsula to a

[10] Gumbert 1984:26-34.
[11] Maddock 1982:14.

company for bauxite mining. The people Yirrkala sent a petition to House of Representatives in Canberra saying that the places sacred to them and vital to their livelihood were under threat without consulting the traditional owners, and asking to appoint a committee to hear their views. To their disappointment, the committee's report affirmed that 'When Australia was settled, the Aborigines of Australia were considered at that time not to have title to the land. The whole of our system of land tenure is built on that assumption. . . .'[12] In 1968 when the government decided to issue a mineral lease to a company for a term of forty-two years, three Yirrkala Aborigines sued both parties in the Supreme Court of the Northern Territory, alleging an unlawful invasion of their land and interests. They argued that since 1788 they and their ancestors were subjects of the Crown, and that their rights to the land persisted unless terminated with the consent of the owners; they held the right to use and enjoy the land since ancient time, and it was a right of property. They thus asked the court to recognize their title to the Cove Peninsula and to compensate for land leased to a mining company in 1963 by the government.[13]

In response, the minister of Interior spoke against the appeal, 'It is wholly wrong to encourage Aborigines to think that because their ancestors have had a long association with a particular piece of land, Aborigines of the present day have the right to demand ownership of it'.[14] Mr. Justice Blackburn announced the decision that failed aborigines in 1971. The main reason was that, from 1788 when it was settled by the whites, Australia had been subject to English law which saw no concept of communal native title, thus was unable to recognize the Aboriginal ownership by their traditional land tenure.

The thinking was actually based on English traditions in

[12] Hiatt 1996:26.
[13] Hiatt 1996: 26-7, Maddock 1982:14.
[14] Maddock 1982:17.

establishing and governing colonies since the latter half of eighteenth century. If the colony was conquered, laws of the people continued to be valid in governing unless changed by the new sovereignty. If the colony was owned due to settlement of the English people, English law should apply directly. Australia was obviously regarded as a settled colony, meaning there was no people on the continent when being taken by the Crown.

Another relevant thought was a distinction between cultivated and uncultivated land. Uncultivated land was not considered as being owned, and could be occupied or settled without involving conquests. In their view, the territory occupied by 'uncivilized' people without any law, thus in a primitive state of society, belonged to the uncultivated land.[15]

The Yirrkala claimed that their patrilineal clan was the traditional landowner, but the Judge found it unacceptable in terms of the English definition of 'property'. Through the evidences provided by anthropologist and the Aboriginal claimants themselves, the Judge found the relationship between the patrilineal clan and the land could not constitute a property relationship, which consisted of the right to alienate and the right to exclusive use and enjoyment. The attachment of Aborigines to their territory was so profound as to make alienation unthinkable, and exclusive use and enjoyment was regarded as indecent by the Aboriginal ethic of generosity. Their values and thoughts were so different from those implied in the concept of property in the English law that their relationship to land could not be accommodated in the latter. It was hard to accept that Aborigines 'owned' the land in the ordinarily understood legal sense of the word.[16]

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[15] Hiatt 1996:30.

[16] Hiatt 1996:29, Maddock 1982:52.

On the other hand, the evidences also showed to the Judge that Aborigines indeed maintained a system of social order as he said, 'the social rules and customs cannot possibly be dismissed. . . .The evidence shows a subtle and elaborate system highly adapted to the country. . . , which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence'.[17]

Possibly the judgement was influenced by previous legal decisions made in the courts as in 1899 the Privy Council had ruled that New South Wales was unoccupied at its annexation. Usually decisions once made were felt better not to be moved lightly.[18]

As the Gove case involved the most well-known Aboriginal reserve in Australia, the judgement of the court aroused strong reactions and general disappointment, and showing drawbacks of Australian law. Aborigines then put up their protest by camping in front of the Australia Parliament and named it 'Aboriginal Ambassy' indicating that Aborigines were treated as aliens in the country. This action also attracted international favorable publicity to Australian Aboriginal problems.

The series of land rights movements constituted main causes for the legislation of the Aboriginal Land Rights Act (Northern Territory) 1976, and resulted significant changes in the history of Australian Aboriginal affairs. But before we move into 1970s, we should have some ideas about the traditional relationships between Aborigines and their land, which were finally recognized by Australian laws.

[17] Maddock 1982:54.
[18] Hiatt 1996:30.

Traditional society and land tenure

On the whole, the Aboriginal society did not have an institution of dominating power overriding local or kin groups. The social order was based on reciprocity, self-help, consensus and norms in the local communities. [19]

Aborigines who speak the same language did not constitute a legal-political unit or occupy a clear-cut territory. Usually people who intermarried or cooperated economically did not speak the same language, and multilingual was not a rare thing. As everyday living and economic activities were concerned, everyone was attached to a 'band', members of which were fluid and changeable. The band foraged over estates of several clans or a certain area termed as 'range' by scholars. Due to the advantage and convenience of being familiar with persons and resources on a piece of land, they usually confined their activities to a certain territory. But because of the seasonal constraints in supply of food and water, freedom of moving was a necessity. Frequently they also crossed out a territory to get spouses or to attend important ceremonies.[20]

In the eyes of Aborigines, all the noticeable features (waterholes, rivers, caves, slopes for example) on the land are acts of world-creative powers in the beginning of time. These powers are often called as totemic spirits or ancestors and are regarded as prototypes of various natural species, having animal, plant or human qualities. During the Dreamtime when the world attained the shape it has today, they descended from the sky, rose from the ground, and came across the sea, travelling around to form the earth. Due to these acts, which are described in detail in the lore and conveyed in song,

[19] Maddock 1982:54.
[20] ibid:46.

myth and ceremony, places are related to the various creative powers and natural species.[21]

Usually affiliation of an Aborigine to a place is decided by descent or conception.

It is regarded that the pregnancy of a woman must be resulted from entry of a power or by influences of the power into the woman' body. Therefore the species related to the power or the place where the contact happened become vitally significant to the child and provide basis for the child's social associations. Aborigines are frequently grouped in relation to the places and species, and through them to the powers or ancestor spirits. Members of a group are usually called by the names of a species.[22] The place and surrounding lands constitute the territory or estate of a group. Because of taboos related to the places, they often become like protected biological sanctuaries. In religious rituals, names of the places and their characteristics are recalled in order during singing journeys of these powers and dancing at places visited by them. Cultural knowledge of the land is transmitted to the younger generations in such a way as to make the world full of meanings to traditionally instructed Aborigines.

On the other hand, the interdependence due to marital and ritual relationships make these places relevant to Aboriginal people in an inclusive way. People usually have different kinds or degrees of relatedness to various places. One may act as 'boss' of a place while acting as 'manager' of another. Although it is a 'boss' who may wear certain designs, perform certain dances and 'sit down' at certain places for a ritual, it is a 'manager' who may choose the design, the place and supervise the dancing. The 'boss' and the 'manager' could

[21] ibid:35.
[22] ibid:38.

be relatives or kins formally belonging to different groups, for instance, the 'manager' could be sons of aunts of the 'boss'. Therefore any completion of ritual responsibility for a place does not rely on just the group affiliated to the place. Nor is entry into the sacred sites which are regarded so dangerous to a 'boss' that they could go there only by company of a 'manager'.[23]

It is clear that as Aboriginal social association is concerned, identity resulted from relating to a common place could be far more important than from other causes, and the relation to a place is defined through a religious thinking. Since the spiritual relation to land is well preserved in ritual and myth while the traditional economic connections to land having been replaced by other forms of economy and settlement already, the traditional man-land relationship of Aborigines is usually considered as of spiritual nature rather than of economic one. In consequence, continuity of the spirituality plays a significant role in defining Aboriginal traditional landowner in later legislation.

Reconstruction of Aboriginal land ownership

In 1972, the victory of Labor Party in federal election brought the problem of aboriginal land rights into a new stage. The Premier Gough Whitlam appointed Justice Mr. Woodward to investigate on the appropriate ways of conferring Aborigines land rights and protecting their land interests based on their traditions so as to satisfy reasonable pursuits of Aborigines. His recommendations became the foundation of the Aboriginal Land Rights (Northern Territory) Act 1976.

The Act enables land to be owned by Aborigines, provides a

[23] ibid:47.

design for land administrative management and land rights distribution. The main contents are :

(1) All the reserves in Northern Territory are transferred automatically to the occupying Aborigines, which is about 245,000 square kilometers and 18 per cent of the whole state. The title holding bodies are Aboriginal land trusts who are collective owners composed of Aborigines. Mining activities should obtain their permission beforehand and if they disagree with the state governor's consideration, final decisions should be sought in the two Houses.

Aborigines could also obtain land outside reserves through a legal procedure. It is however restricted to 'unalienated Crown land', and the decisive condition is that they have to prove to be traditional owners.

(2) The key concept 'traditional Aboriginal owners' is defined under influences of anthropological studies. In section 3 (1) of the Act, it is said, 'traditional Aboriginal owners', in relation to land, means a local descent group of Aborigines who (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for that land; and (b) are entitled by Aboriginal tradition to forage as right over that land.

(3) It establishes a legal machinery, the Aboriginal land court, for Aborigines to procure land ownership. It is acted by a Judge of the Supreme Court of Northern Territory. Although the legal process is required to be as in a normal court, evidences are to be heard by the Judge for legal decisions, basically, the Commissioner exercises only quasi-judicial functions. He must make reports and recommendations

for the Minister to make final decisions.[24]The hearings could be held in cities, countryside, or on the land under inquiry.

(4) In order to assist local communities to obtain necessary finance and proper preparations for the land suits, the Act also establishes regional bodies, the Aboriginal Land Councils. There are three: Northern, Central, and Tiwi Land Councils for the whole Northern Territory. They are composed of Aboriginal representatives and are financially supported by mining tax collected by the government. In order to play the role of legal agents for local land claimants, the Councils have to hire anthropologists and lawyers for collecting evidences and information in order to complete claim books for Aborigines.

(5) Any transfer of Aboriginal land should hear opinions of the Land Council, and obtain permission of the Minister beforehand. It is essential for landowners to understand fully the aim and nature of a transfer, and it can be done only when agreed unanimously by the owners. The Act also rules that other Aborigines or communities, if influenced, should be consulted and their opinions to be heard before any decisions.

Besides the Land Rights Act 1976, there are other significant federal legislation and measures passed in 1970s such as the Aboriginal Land Fund Act of 1974, which establishes the Aboriginal Land Fund Commission in 1975. The function of this federal body is to purchase lands for Aborigines from all over Australia (except the Capital area) and to finance Aboriginal corporations or trustees for land purchase or land lease. The lands obtained in this way were usually held by the Aboriginal Land Trustee of the state. Also the Aboriginal Land Ordinance 1978 prescribes that any entry into

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[24] Gumbert 1984:95.

Aboriginal land should get permission of the Land Councils.

Due to implement of the Act, nearly half of the whole Northern Territory, most of which are dry, barren, semi-desert lands, are now legally owned by the Aborigines.

The Act is a significant landmark in the history of Australian Aboriginal affairs as rights of Aborigines are concerned. A respect to the thoughts and customs of Aborigines was implemented in the law. It does not take the English definition of the term 'property', instead it considers the special character of the man-land relations of Aborigines by defining 'ownership' as having spiritual affiliations and responsibilities as well as forage rights over land. It also establishes a legal procedure for the court to make judgement in terms of required evidences as to who are to be conferred a particular piece of land. Aboriginal views and traditional land rights are thus recognized and accommodated into modern Australia law. In other words, intrusions without compensation or the owners' consent are no longer regarded as reasonable or legal. The previous myth of an empty land was replaced by the recognized historical fact of conquest and the idea of indigenous rights. It could be regarded as an embodiment of indirect rule and self-determination in the sense that Aboriginal order and sovereignty become accepted.

Other Aboriginal land tenure systems

The way lands were legally conferred and held by Aborigines in Northern Territory pioneered other states as far as Aboriginal expectation was concerned. The idealism and momentum carried by the Labor Party however were not necessarily accepted by other states. There were also other factors to be considered such as density of population, the weight of aboriginal population, and economic interests of the lands etc. Therefore, forms of aboriginal land ownership varied in different states.

As a matter of fact, the Aboriginal Land Trust Act 1966 issued by Labor South Australian government was the first state legislation which conferred Aborigines title to land. Under this act, Aborigines could hold reserves in a collective form of corporation or trust, and the total 43 reserves of the state were held by the Central Trust. The advanced attitude showed again in the Pitjantjatjara Land Rights Act 1981 announced by the Labor state government, which not only followed the spirit of the Land Right Act 1976 of Northern Territory in recognizing traditional Aboriginal ownership, but also extended its definition to meet broader needs of Aborigines.

Due to the Aboriginal protests in 1963, the Victoria government also issued the Victoria Aboriginal Lands Act in 1970, conferring the only two reserves to their Aboriginal inhabitants, and was the first to allow Aborigines to purchase lands.

Impediments were stronger in other states such as Queensland and West Australia whose attitudes were conservative and more economic-oriented.

The Queensland government did not lift confinement of Aborigines into the reserves until 1970s. It was the state government who held ownership and control of the reserves, and quite a number of lands in the reserves were transferred to mining companies. Due to Aboriginal protests and accusations, it legislated in 1985 to allow permanent lease of land in reserves to Aborigines. It was not until 1991 when Labor Party took power of the state, the state government started to modify its law to catch up improvements of other states in automatic transferring reserves to Aboriginal trustees and allowing Aborigines to claim other unalienated lands.

One saw disconcordance between the state and the federal governments over Aboriginal affairs when being led by different

political parties. For instance, the Premier Whitlam, with attempt to certify the 1965 International Convention on Elimination of All Forms of Racial Discrimination, wrote to the Queensland government asking for amendment of its Aboriginal and Torres Strait Islander Affairs Act as it was regarded discriminative. When the amendments passed by the Queensland parliament in 1974 were still regarded as discriminative by the Whitlam government, the federal parliament passed an Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act to override the Queensland Act to the extent of inconsistency. [25] In 1975 when Aborigines of Mornington and Aurukun tried to seek more autonomy, they encountered sever oppression from the state government, the federal government then intervened advising the state government to modify its law on Aboriginal affairs on the ground that Australia had signed the International Convention on Elimination of All Forms of Racial Discriminations. In order to prevent Aborigines from control of the Queensland law and enable the Queensland reserves to request self-management from the federal government, the federal government passed the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act in 1978. Shortly afterwards, the Queensland government passed the Local Government (Aboriginal Lands) Act in reaction, which replaced reserves into 'shires' as public places thus avoiding control of the previous federal legislation. The behavior of the state government however could still be constrained by other law. Take the case of Koowarta v. Bjelke-Peterson and Others as example, the Land Fund Commission purchased a piece of pastoral land for Aborigines in 1977, but the state government refused to issue any certificate. Aborigines sued to the court for its violation of the Racial Elimination Act announced in 1975 by the federal government. The result was that the High Court

[25] Peterson 1998:19.

delivered its judgement against Queensland government in 1982.[26]

The Aboriginal Affairs Planning Authority Act 1972 of West Australia established an Aboriginal land trust, which was composed of Aborigines appointed by the Minister, to assist management of the reserves, the ownership and ultimate control of the reserves however were still in the hands of the Minister of Aboriginal affairs.

As the state government was keen on mining development, it legislated in 1978 to enable free entry into reserves without Aboriginal consent. This resulted into many conflicts between Aborigines and the government and an accusation to the United Nations by Aborigines. Disputes between Aborigines and the state government over mining rights on Aboriginal reserves continued in 1980s. It was not until the proposed Aboriginal act of the state government was rejected by the Upper House, another legislation became possible in conferring Aborigines the lease of reserves for a term of ninety-nine years. Even in1990s, the West Australia state government still attempted to extinguish native title by law, it however was rejected by the federal government in terms of the Racial Elimination Act 1975.[27]

Aborigines were actually dissatisfied with the forms of land ownership offered by the state governments described above. Even Aborigines were conferred title to land in the form of central land trust, local wishes and opinions could be neglected by or not reach to the central land trusts and state governments. Their main aspirations were recognition of the special relationship between Aborigines and land, and allow Aborigines to lead a separate development. If in terms of equal rights and opportunities, Aborigines were subject to ordinary

[26] Gumbert 1984:46-9.
[27] ibid:49-51.

laws of Australia, which enabled pastoral lease not to be granted to non-pastoral use and free entry access to mining company not to be blocked as illegal offense, no protection was actually provided to the distinctive character of the relation of Aborigines to land.[28]

The drawbacks were amended in the Act 1976 which was however applicable only in Northern Territory. It was in 1990s that legal basis was finally laid down for the whole Australia to be able to make recognition of traditional man-land relations of Aborigines.

Native title in 1990s

In 1982, three Mer living on Murray Islands of Torres Strait, northeast of Australia sued to the court claiming that the sovereignty of Australia should be subject to their traditional land rights. Merray Islands were annexed to Queensland in 1879, the inhabitants are called Meriam, who are Melanesians and their ancestors probably came from Papua New Guinea. They are horticulturalists planting yams mainly, farm lands are privately owned and inherited patrilineally. The Queensland government passed the Queensland Coast Islands Declaratory Act in 1985 with the attempt to extinguish the native title, which however was refused by the High Court in terms of the Racial Discrimination Act. In 1993 the High Court delivered its judgement by the majority of six to one in favor of the Meriam's appeal.

The judgement of the case (which is called Mabo) affects the Aborigines on the continent because the High Court actually took the opportunity to examine the issue of native title. In Mabo, the Judges recognized native title as legal interest in land which has always been denied in the history of Australia. They pointed out that the natives in the case have been connected with the land continuously for a long

[28] Maddock 1982:18-20.

time, the legal relationship thus has to be acknowledged, even though effective exercise of sovereignty could extinguish it. Namely native title could persist if no valid actions from the government were ever taken to extinguish it.[29]

An implication of the Mabo decision was that the once claimed sovereignty over the whole continent by the British or Australian government was an exaggeration. The thinking exists as never being questioned by other sovereignties from the outside, therefore what being claimed might be accepted as an external sovereignty. As to internal sovereignty, the extinguishment of Aboriginal sovereignty happened only by gradual expansions of the British rule, some native communities thus could be still following their traditional laws and exercising their sovereignty by now.[30]The previous assumptions that Aborigines had no law, authority and any form of sovereignty, and Australia was a continent without sovereignty before the colonial government was thus overthrown.

This revolutionary judgement was compared to a constitutional alteration but without participation of both the public and the parliament, and aroused continuous criticism. What the Judges replied was that, the Mabo case distinguished itself from previous ones so as to make it possible for them to re-examine the propositions that had been endorsed as a basis of the real property law of Australia for more than one hundred and fifty years. The extent of the wrong forced the reappraisal of the laws as the law is a fluid, changing collection of principles, which changes and develops to meets new situations and circumstances.[31] The contemporary values of the Australians and expectations of the international community can no longer accept the

[29] Chesterman 1997:206-7.
[30] Reynolds 1998:210.
[31] Chesterman 1997:207-8.

previous discriminative doctrine in refusing to recognize the aboriginal rights and interests in land on a settled colony.[32] The Australia law should be modified to meet the contemporary notions of justice and human rights. Although the sovereignty of the Crown holding the ultimate title could automatically extinguished all pre-existing native titles, the Judges agreed that where indigenous proprietary interest in land held by individual or a community was capable of recognition by the common law, 'there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory'.[33]

The Premier Keating argued that the Mabo decision provided the nation the opportunity to negotiate a new relationship between indigenous and other Australians,[34]and his Labor federal government took the judgement as reason to enforce a new legislation for rights of Aborigines. It was pointed out that the oppression and devastation brought to Aborigines by the history of colonial settlement could not be denied. Despite the injustice in the origin of the state, the legitimacy of the state however could be justified by the way their present people behave and whether it upholds the rights of its citizens.[35] What followed was a political process in the form of a national debate throughout 1993, and the collective mind of the white majority were exercised vigorously and at length on the matter of its rights and responsibilities in relation to the indigenous minority.[36] In the end of 1993, the Native Title Act was finally passed by both Houses of the federal parliament.

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[32] Nettheim 1998:198.
[33] Hiatt 1996:34.
[34] Chesterman 1997:208.
[35] Peterson 1998:24.
[36] Hiatt 1996:34.

The native title was defined in the Act as a group's communal, group or individual rights to land or waters under its indigenous laws as now recognized by the common law of Australia. The Act established the National Native Title Tribunal to deal with legal claims, settlements of opposed claims and compensation. Decisions are to be subject to a review and take effect as orders of the federal court. The Act also sought to validate in certain way some actions of the government that could be regarded as extinguishing native title to make them immune from the operation of the Racial Discrimination Act. The state parliaments then followed the federal lead in the legislation with a purpose to decrease anxieties of the people. While it affirmed the native title, such rights however could have been extinguished by valid grants of private interests, and persisted only based on spiritual affiliations and special responsibilities in remote areas of Australia. Therefore, there have been few claims established since the Act.[37]

In 1996 the High Court made a decision in the Wik case that a pastoral lease did not necessarily extinguish a native title over the same land. This aroused reactions again from the conservatives. After thirteen years of Labor government, in 1996, the first year of the Howard government, it proposed some major changes to the Native Title Act 1993 due to court decisions of the Wik case. Here one can see that prospects for indigenous land rights could be no longer positive as before.[38]

Reflections

Expansions of power through conquests among peoples were not rare in the human history. The destruction and loss brought to the

[37] Chesterman 1997:211.
[38] Nettheim 1998:205.

conquered were often tremendous and sometimes irretrievable. The victory seems to be privileged of depriving what people once owned and enjoyed. It actually could be regarded as offense of human rights. Conquerors however could always employ various ideologies to rationalize their behaviors so as to proceed without a sense of guilty. In colonial Australia and elsewhere we see same things occurred. Perhaps one blessing out of all the miserable is the idea and practice of indirect rule. In the British colonial empire, the rule is to respect the existing laws and customs of the conquered. In this way, destruction could be tempered, and rights of peoples were somehow retained.

Australian Aborigines however encountered another rule which was directly imposing on, and ignorant of their existing social order. Their primitive mode of subsistence and lack of larger groupings might be unfavorable causes for that ignorance. Being regarded as having no law, Aborigines thus had no choice in obeying the intruding English law.

The English law with its admirable tradition of freedom, when transplanted in Australia, however became losing restraints of conscience of the society. Laws were created as means of government for control of the people and exploitation of the resources. Rule of law was practiced as a convenient tool and a justification of behaviors of the government, which were in fact at whims of the government. In performing the legal ritual of modern nations, a dominant legal order swept over actually underpinned by a legal centralism and racial discriminations.

It appeared almost impossible for Aborigines to change this political reality brought by the dominant law. But as Maddock pointed out, Aboriginal resistance and reactions toward intrusions actually never ceased in the early period, they were however expressed in traditional forms unrecognized by the whites. It was the assimilation

policy, with official attempt to prepare them for entering the larger society, made it easier for them to use methods as strikes and rights demands, which white people understood, [39]otherwise they would have been less able to defend their culture or to fight for conditions in which it might survive.

The land rights movements in 1960s and the great determinations of Labor federal government together finally achieved the Aboriginal Land Rights Act 1976 (Northern Territory). It overturned previous premises by recognizing the legal interests of traditional aboriginal land ownership, which were originally unaccepted by the Australia law. In this way, it laid a basis for culturally distinctive aboriginal sovereignties.[40]The anthropological profession could be credited for the development, since they started the study of Aboriginal local organization and asserted that they own land since the last century. The prolific anthropologists succeeded in conveying to a wider public the knowledge about what land and 'sacred sites' could mean to Aborigines.[41] The anthropological knowledge showed that the previous conviction —Aboriginal society was so primitive as to be almost without any form of law, authority and sovereignty was wrong. It indicated that Australia was to be guided by a new aboriginal policy of indirect rule or self-determination.

Despite the model set up by the federal government in the Northern Territory, it was not automatically followed by the states. State governments with power sanctioned by the Constitution held different attitudes and practices toward the matter of Aboriginal land rights. It was until 1993 when the Native Title Act was pass by the

[39] Maddock 1982:13.
[40] ibid:23.
[41] ibid:1.

federal parliament that native titles were to be acknowledged across Australia. The arguments were confined to questions of law.[42] The Judges overturned the basis of previous principles of judgement, with aspirations to meet international standards and contemporary values.

It is perhaps worthwhile to note that, it is not unusual for anthropologists to find that the very concept of 'law' could not find counterparts in the small-scale societies they have traditionally studied. In their view, the institutional arrangements which we associate with law in the West—the differentiation of legal norms, a specialized judiciary within a governmental structure, and the emergence of a legal profession — are all specific to a particular social-political context. The ideas of law are bound up with Judeao-Christian beliefs on the one hand, and the development of secular government in Europe on the other. Therefore a new jurisprudence enlarging the legal studied to embrace formerly 'suppressed discourses' of 'non-state law' is provided by legal anthropologists in the West. Their new insights bring a move away from 'legal centralism' and treating national law as unproblematically determinative of social forms. And it is significant that this field has become colonized by lawyers since 1960s, and been treated as an area of 'legal' scholarship.[43]Under these circumstances, it was not surprising that the Judges should make such a forward move in acknowledging customary laws of indigenous people.

On the other hand, underlying the recognition of land rights included another consideration as Mr. Justice Woodward noted in 1974, 'the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which

[42] Hiatt 1996:33.
[43] Roberts 1994:962-3,978-9.

lies at the heart of his spiritual beliefs'.[44]It was expected that through the Land Rights Act 1976, the core of Aboriginal cultures could be preserved. In other words, it was regarded that the acknowledgment of aboriginal customary law could actually bring a more general protection to indigenous cultures. In Aborigines' mind, their law includes beliefs, customs and rules derived from the past, namely the whole complex of traditional values, which in fact are referred as a culture by anthropologists. According to anthropological definition of culture, culture and cultural context are actually basic interests to individuals, which give meanings and guidance to their choices in life. The uniqueness and creativeness of individuals actually result from their integration, reflection and modification of their own cultural heritage and that of other people. Therefore, recognition and equal treatment of cultural differences and identities became universal needs and primary goods. [45] Under influences of the spread of Multiculturalism, we saw that the legislation of Australia in 1970s strove to keep up with the trend. I

In order to supplement traditional human rights principles, which are regarded as inadequate in dealing with cultural diversities among peoples, and collective interests of indigenous people to retain their distinctiveness as peoples, recently scholars of political science have tried to develop theories of minority rights or multicultural citizenship. It is a kind of collective right that intends to protect small groups or societies from being determined or harmed by the power from the outside, and for them to be able to interact with other peoples on an equal base.[46] As conferred to Aborigines in 1990s, some scholars interpreted it as a belated recognition of indigenous rights, indicating that justice requires more than for aborigines to be treated as white

[44] Maddock 1982:25.
[45] Gutmann 1992:1-7.
[46] Kymlicka 1995:5,7,9,36. Nettheim 1998:201.

citizens. In reconciling the equal rights to all citizens with the special group rights demanded by indigenous people, Reynolds suggests that the unique status for Aboriginal people 'relates to their membership of the first nations, not to special rights acquired from the state. They are citizens of the state, not of the nation. . . the paradox is that their commitment to the state my be enhanced by the fact that it alone can underwrite and protect indigenous nationalism and self-government from inimical forces both within Australia and without'.[47]

Nettheim has grouped the claims made by indigenous peoples worldwide under four headings: peoplehood, autonomy, territory and equality. Peoplehood, autonomy and territory are based on difference and collective identity and belong to indigenous rights. They are actually established in international laws such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenant on Civil and Political Rights (Article 27)(1966), the International Covenant on Economic, Social and Cultural Rights(1966), the Universal Declaration of Human Rights (Article 17)(1948), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5)(1965). Throughout the Aboriginal attempts to achieve their aspirations, increasing reliance has being placed on international law principles and processes.[48] Under supervisions of international bodies and common values of international community, there appears no choice but for the Australian government to modify itself.

Since self-government was regarded as an inherent part of indigenous cultural and legal heritage which has contributed to their cohesion and to the maintenance of their social and cultural tradition, it was argued by some scholars that self-determination in its many

[47] Chesterman 1997:211, Reynolds 1998:214.
[48] Nettheim 1998:201-3.

forms, is a basic pre-condition if indigenous peoples are to enjoy their fundamental rights and determine their future while preserving and passing on their specific identity to future generations.[49] The right to self-determination has actually become a central theme in the recently completed draft Declaration of the Rights of Indigenous People which is currently be considered by the United Nations Commission on Human Rights. We are pleased to see that since 1970s the Australia federal government has adopted a policy of self-determination in recognizing aboriginal sovereignty.

The initiatives offered by the whites were responses to a long-term struggle of Aborigines which showed how widespread and deeply rooted was their concern about land and the control of their lives.[50] Development of Australian Aboriginal land rights showed that their aspirations and insistence are finally approved and confirmed by the white majority, whose attitudes and thoughts have been changed through a broader vision resulting from improved knowledge of Aboriginal culture, society and law.

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[49] Reynolds 1998:213.
[50] Maddock 1982:26-7.

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