

2006

Philosophical justification and the legal accommodation of Indigenous ritual objects; an Australian study

Andrew G. Hunter
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**Philosophical Justification and the
Legal Accommodation of Indigenous Ritual Objects; an
Australian Study.**

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Abstract

Indigenous cultural possessions constitute a diverse global issue. This issue includes some culturally important, intangible tribal objects. This is evident in the Australian copyright cases viewed in this study, which provide examples of disputes over traditional Indigenous visual art. A proposal for the legal recognition of Indigenous cultural possessions in Australia is also reviewed, in terms of a new category of law. When such cultural objects are in an artistic form they constitute the tribe's self-presentation and its mechanism of cultural continuity. Philosophical arguments for the legal recognition of Indigenous intellectual 'property' tend to assume that the value of Indigenous intellectual property is determinable on external criteria. Lockean approaches defend or deny Indigenous possessions on such an external criterion of labour. Alternatively, Stenson and Gray's adoption of Kymlicka's liberal philosophy of minority rights attaches the possibility of the legal recognition of Indigenous possessions, to rights distributed by states on liberal individualist grounds, thereby losing sight of the cultural nature and significance of those possessions. Both of these views obscure the traditional and sacred values already present in positive, intangible Indigenous property in the form of customary obligations and rights, whereas much Indigenous property, including sacred objects and knowledge, already has an institutional nature.

Getting the justification for the accommodation of Indigenous property wrong can affect the success of claims for protection, as well as the quality and appropriateness of the protection where provided. An alternative philosophical argument admits and affirms the cultural contours of Indigenous property in sacred forms in their role as

clan self-representation. The problem of Indigenous intangible cultural possessions is also surveyed from the perspective of native title in Australia in so far as 'cultural knowledge' was considered as an incident of native title, but was rejected along with the sui generis theory of native title.

Declaration

I certify that this thesis does not, to the best of my knowledge and belief:

- (i) incorporate without acknowledgement any material previously submitted for a degree or diploma in any institution of higher education;
- (ii) contain any material previously published or written by another person except where due reference is made in the text; or
- (iii) contain any defamatory material.

Signed _____

Acknowledgements

The consistent critical guidance of my supervisor Dr Alan Tapper was, I believe, a condition of my completion of this project. Alan's reliability and broad scope of learning were reassuring, his commitment and integrity were appreciated. In addition, during the period of his supervision of my work Dr Tapper opened several doors to me that have contributed invaluable to my intellectual and practical development relevant both to sustaining and maximising this research project and for the longer term.

Dr Gail Lugten was an initial supervisor until her move to a posting at the University of Tasmania, late in 2001. Dr Patricia Baines was my supporting supervisor from Dr Lugten's departure until her retirement at the end of 2002.

Dr John Duff hosted the Post-Graduate Social Science Seminars at the School of International, Cultural and Community Studies, Edith Cowan University. These seminars have provided me with the valuable opportunity to present papers on the various stages of my work. All the participants in these seminars deserve acknowledgement. Emeritus Professor Basil Sansom of the University of Western Australia allowed me to receive, as a sessional student, his sessional lectures on Aboriginal Anthropology at Edith Cowan University.

I would like to dedicate this work to patient friends, and chiefly Marcella, whose patience would seem to be infinite.

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UNESCO Convention for the Preservation of Intangible Cultural Heritage (2005)

Australia

Northern Territory

Administration and Probate Act 1967

Sentencing Amendment (Aboriginal Customary Law) Act 2005

Commonwealth

Aboriginal and Torres Strait Islander Heritage Protection Act (1984)

Aboriginal Land Rights (Northern Territory) Act 1976

Copyright Act 1968

Copyright Amendment (Moral Rights) Act 2000

Designs Act 1906

Native Title Act 1993

Native Title Amendment Act 1998

Patents Act 1990

Plant Breeders Rights Act 1994

Trademarks Act 1995

Abbreviations

AAA	Aboriginal Artists Agency (Limited)
AAMA	Aboriginal Arts Management Association
ACC	Australian Copyright Council
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIS	Australian Information Service
ANG	Australian National Gallery
FCA	Federal Court of Australia
ATSIC	Aboriginal and Torres Strait Islander Commission
ICCPR	International Covenant on Civil and Political Rights
ICIPR	Indigenous Cultural and Intellectual property Right
ILO	International Labour Organisation
IMA	Indigenous Moral Right
IPR	Intellectual Property Right
IRG	Indigenous Reference Group (ATSIC)
OAS	Organisation of American States
PGR	Plant Genetic Resource
TRIPS	Trade Related Aspects of Intellectual Property Rights (Agreement)
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Economic Social and Cultural Organisation
WGIP	Working Group on Indigenous Populations (United Nations)
WIPO	World Intellectual Property Organisation (United Nations)

CHAPTER ONE:

INTRODUCTORY

Introduction

Copyright laws do not reflect or protect the collective aspect of traditional Indigenous art.¹ They were never intended to do so. Rather, the basis for the protection of traditional Indigenous art and knowledge must be found in the tribal institutional context of such forms.² This must be considered when entertaining the possibility of the protection of Indigenous cultural and intellectual property. However, included in the set of objects proposed for protection, are those which do not share this institutional character, and so distinguishing between institutional and non-institutional Indigenous objects is critical in such a project. For otherwise the ritual totemic can be treated as ‘aboriginal art’, as it now tends to be in general and at law.

Claims as to the institutional context of certain Indigenous knowledge can also be seen in several recent native title cases, where cultural knowledge as an incident of native title was argued, though ultimately unsuccessfully.³ The unsuccessful claims were based on the notion that native title law aims to recognise Indigenous traditional rights as a *sui generis* whole, where land rights are integrally related to and sourced in tribal knowledge and knowledge rights.⁴ Traditional Australian Indigenous art often depicts the dreaming settings of sacred sites. The sources of such depictions are also

¹ See Ch. 2 below.

² *Ibid.*

³ See Ch. 8 below.

⁴ *Ibid.*, and e.g. *Ben Ward & Others v The State of Western Australia & Others* [1998] 1478 FCA.

the sources of the tribal interest in land, and its affirmation by tribal elders as the responsibility of successive generations.⁵ Therefore, a clan's paintings are culturally identified with the clan. The clan has an abiding interest in the painting that transcends the mere set of the interests of the members, but the paintings exist rather at the conventional, cultural level and are controlled by senior clan members, or by official tribal custodians.⁶

The efforts to protect Indigenous cultural possessions present a problem in that much relevant cultural material falls outside current Intellectual property regimes.

Indigenous groups are in competition with corporations for the ownership and control of botanical types that are the traditional possessions of those cultural groups. Stories and songs are copyrightable by the person who reduces these to a material form whether that person is their cultural owner or not. Indigenous cultural heritage does not include intangible heritage, and it is subject to the discretion of the officers of the state. This leaves a great deal that Indigenous people call 'ours', and that they called 'ours' long before the moment of their colonisation. Such a state of affairs has raised the prospect of law reform, to accommodate Indigenous possession in the jurisdictions of states. Such accommodation could include legislative amendment, to expand existing categories of law so as to encompass Indigenous forms. Otherwise, or additionally, it could include the creation of a new category of law, for the protection of Indigenous forms on their own terms, and in their own unique legislative act. Aside from the question of whether to accommodate Indigenous possessions, there is also the related question of the scope and diversity of Indigenous objects to be selected for protection. How much to protect, what to keep separate from other categories and

⁵ See the discussion in Ch. 2 below of the cultural evidence presented *Bulun Bulun & Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513, and other cases as in Ch. 8 below.

⁶ *Ibid.*

who to consult are all at issue. Many states contain sometimes many Indigenous peoples, each of which may raise a number of separate demands. So, the picture is already complex before considering the international dimension. The further the discussion of possible remedies is abstracted from locally specific problems, the more overgeneralised and ineffective rulemaking is likely to become.

Philosophical speculation on this topic is not merely 'academic'. It is implied in or invited by Indigenous peoples' claims for the legal protection of their possessions. The style of justification employed in a given claim, the reason given for it, is likely to affect the quality of the implementation. Rightly or wrongly, one type of protection may be prioritised over another or chosen to the exclusion of another. An inappropriate or weak justification could hide the critical issues at stake, and lead to the failure of significant potential protection. It is with this concern in view that the present dissertation examines two philosophical positions that have been applied separately to the problem of the lack of protection of Indigenous intellectual possessions.⁷ The first of these is Canadian philosopher Will Kymlicka's theory of minority rights. Anthony Stenson and Tim Gray use the theory to defend Indigenous intellectual property rights. This theory is dependent upon the prioritisation of the value of liberty over other values, including cultural and institutional ones, and the tying of individual autonomy to minority cultural identity. An alternative philosophical position, considered and rejected by Stenson and Gray, is the Lockean

⁷ These two positions are the Lockean theories affirming or denying Indigenous property, and liberal individualist theories of cultural rights. The first group is represented by J. Locke (1993) *Two Treatises of Government*, London, Dent and Sons; A. Kolers (2000) 'The Lockean Efficiency Argument and Aboriginal Land Rights,' *Australasian Journal of Philosophy* 78(3): 391-404; and S. V. Shiffrin (2001) 'Lockean Arguments for Private Intellectual Property,' *New Essays in the Legal and Political Philosophy of Property*, S. R. Munzer, Ed., Cambridge, Cambridge University Press: 138-67. The second group is represented by W. Kymlicka (1989) *Liberalism, Community and Culture*, Oxford, Oxford University Press; A. Stenson & T. Gray (1999) *Politics of Genetic Resource Control*, Basingstoke, Macmillan Press Ltd., and (1999) 'An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,' *Environmental Ethics* 21: 177-90, Ch. 4.

‘labour’ theory of property acquisition.⁸ Like the previous theory labour theory employs a criterion external to Indigenous culture, namely, ‘labour’ spent in the acquisition of ‘property’ from a state of nature. Both of these theories ‘work’ to some degree, in that they provide accounts of how the accommodation of Indigenous property might be justly argued. Nonetheless, they rest on untenable assumptions.

After considering some Australian Indigenous copyright cases, it becomes evident that that which is claimed for protection in those cases is a purely cultural and institutional notion of collective ‘property’. This is a part of a cultural inheritance, and subject to cultural obligations.⁹ This means that the philosophical alternatives considered thus far are incommensurable with the particular local instance examined. It does not make any sense to say that liberty or labour might justify the accommodation of Indigenous possessions, when the meaning, identity and normative context of these traditional Indigenous artworks, is entirely cultural. In addition there is both a ritual and a political aspect to these works. These cultural meanings are obscured by the appeal to the extra-cultural values of the respective cultural positions. This problem could be remedied, by removing the philosophical justifications altogether, and allowing the cultural objects to stand for and justify themselves, in their context of state activity. That leaves them open, however, to interpretation through theories based upon values external to the Indigenous objects at issue, and that obscure the values attached to those objects. The purpose of this thesis is to

⁸ *Ibid*; Stenson and Gray, in *Politics of Genetic Resource Control*, *ibid.*, also attack proprietorism, being the extreme end of Lockean property theory, concerned with established rights rather than labour-based entitlement, as discussed in P. Pettit (1980) *Judging Justice: An Introduction to Contemporary Political Philosophy*, London, Routledge & Kegan Paul, and somewhat differently in P. Drahos (1996) *A Philosophy of Intellectual Property*, Aldershot, Dartmouth Publishing Company Limited. Stenson and Gray follow Drahos’ more recent discussion.

⁹ *Bulun Bulun & Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513; *Milpurrruru and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

challenge these theories, and to supply an alternative theory which avoids criteria foreign to the tribal Indigenous context of meaning, which recognises the cultural value of the Indigenous objects, which recognises the role of the state in establishing the conditions of misrecognition, and relates Indigenous institutions to the institutions of the modern state, in which the Indigenous institutions seek accommodation.

Problem and Significance

This dissertation argues that the very attempt to justify Indigenous cultural property rights on the basis of theories devised for philosophically other purposes threatens to obscure what are arguably the most important rights and objects in that range, those manifesting themselves as of cultural obligation. The level of accommodation likely to be supplied by states to Indigenous peoples will never be complete; it is the nature of the Indigenous situation that it be incompletely resolved. The ‘autonomy’ and ‘entitlement’ justifications obscure the cultural and institutional dimensions of at least some Indigenous claims (the tribal set of claims). It is the cultural and institutional aspects of Indigenous claims that will therefore be sacrificed to autonomy or labour. But it is precisely cultural and institutional types of property that would constitute the greatest loss, as with this goes culture and institutions and groups that support them.

Indigenous art, ceremony, religion and society surely have *intrinsic* value, value that should be recognised by anyone, but it is not primarily *this* value that is at issue here. Rather what is at issue is the value of these institutions in terms of their cultural function. Counter to this, prejudice and ignorance are compounded by a culture of

political pragmatism. This culture seeks to protect that which is of most use, or is otherwise most valued according to existing Western criteria. So, biological diversity and the genetic material of plants are more easily offered special protection, and those things valued on culturally Indigenous terms are obscured, even when those things have an institutional status, and even though states have voluntarily adopted the Indigenous societies they now host.

Therefore, it is important to assert the value of Indigenous cultural objects and institutions in this wider debate; to ensure that in the realm of abstract argument the concrete and cultural are not forgotten at the expense of intellectual and political expediency, and insufficiently informed abstraction. Part of this battle has been fought in Australian courts. Such legal debates are a starting point from which the philosophical argument can proceed. The reverse is also true. The working through of the philosophical problem sheds light on the Australian legal situation. That cultural dialogue is a central part of this practical and theoretical situation means that this research is therefore necessarily also cross-cultural and interdisciplinary; conducted between least ill-matched categories, and ongoing. The law reforms sought and advocated here, to be properly educational, must also be just, and to be just must be truly educational.

Review of the Literature

Introduction

This literature review is divided into three sections according to discipline: legal, philosophical, and anthropological. The review begins with the legal literature, because this is the closest to a starting point for the research. The question of legally accommodating Indigenous cultural and intellectual property already suggests a certain amount of argumentation. This includes legal materials, as well as secondary legal sources. The next section covers the relevant philosophical literature, from attempts to justify or deny Indigenous property or intellectual property, through particular approaches to multiculturalism, with particular reference to Indigenous peoples, and more general works on theories of property, intellectual property and liberalism. The final section, concerning anthropology, includes literature on the beginnings of anthropology to contemporary anthropology of Australian art, law, and religion, and modern political anthropology.

The Legal Literature

The legal literature supports the notion that there is, in Australia, a subset of the full global range of Indigenous cultural and intellectual objects that could be proposed for accommodation. This legal literature supports the notion that this subset warrants special treatment. This Australian subset includes an important further subcategory of the traditional tribal art subject to customary rules. This narrower issue, with which

the thesis is ultimately concerned, is illustrated initially in several Australian cases. These cases set the scope of the secondary legal literature. The first three cases¹⁰ are primarily concerned with breaches of copyrights held by Indigenous people, in traditional artworks. The remainder¹¹ are native title cases, wherein, *inter alia*, the protection of cultural knowledge is at issue as a native title right. In *Yumbulul v Reserve Bank of Australia*,¹² traditional Indigenous art was held to be subject to copyright held by the individual Indigenous artist, despite such works being made to conform to a cultural pattern. In *Milpururru v Indofurn*,¹³ damages were awarded for ‘culturally based harm’,¹⁴ and several artists were awarded this relief in such a way as to allow for its distribution according to Indigenous principles.¹⁵ Then in the *Bulun Bulun* case,¹⁶ Von Doussa J held that in different circumstances, such as the absence and failure of an Indigenous traditional artist to secure copyright, ‘... the court would permit remedial action by the clan’.¹⁷ In each of these works, traditional cultural evidence was considered in making the determinations.

These cases show the extent of the law of copyright and equity in their ability to entertain Indigenous cultural claims. There is a sympathetic hearing given by the Australian Courts to Indigenous customary claims, but it ends there; there is no legal capacity to recognise traditional Indigenous cultural and intellectual property for what

¹⁰ *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpururru and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659; *Bulun Bulun & Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513.

¹¹ *Ben Ward & Others v The State of Western Australia & Others* [1998] 1478 FCA; *Yanner v Eaton* [1999] HCA 53; *State of Western Australia v Ward* [2000] FCA 191 (or, *The Miriuwung and Gajerrong Case* (2000) 199 FCR 316); *Commonwealth v Yarmirr*; *Yarmirr v Northern Territory* [2001] HCA 56; *Western Australia v Ward & Ors* [2002] HCA 28.

¹² *Op. cit.*, n10.

¹³ *Ibid.*

¹⁴ *Ibid.*, at 695.

¹⁵ *Ibid.*, at 688.

¹⁶ *Op. cit.*, n10.

¹⁷ *Ibid.*, at 532.

it is on its own terms. Even on the basis of these cases alone, the law could go much further in articulating this accommodation, if the legislature willed it.

The remaining cases reviewed here are native title cases. The possibility of native title to protect cultural knowledge was initially considered in *Yanner v Eaton*,¹⁸ *Yarmirr v Northern Territory*¹⁹ and the Ward cases²⁰ (at first instance in the Federal Court of Australia,²¹ on appeal before the Full Court of the Federal Court,²² and in the High Court of Australia²³). The notion of the protection of cultural knowledge as an incident of native title was excluded on appeal in the Full Court of the Federal Court, and when Ben Ward, on behalf of the Mirriuwang and Gajerrong people, was given leave to pursue this matter in the High Court of Australia, the Full Court's decision to exclude the protection of cultural knowledge was upheld in the highest court also.²⁴ The cultural knowledge referred to in the Ward case is arguably the same 'corpus of ritual knowledge' or '*Madayin*' referred to in Mr Bulun Bulun's evidence in the Bulun Bulun case.²⁵ Its connection to native title, irrespective of legal recognition, is that it is this knowledge that constitutes the conceptual basis for native title, and therefore, that it constitutes 'rights' in relation to land. These cases show that native title, as it is presently recognised, has a special relationship to *traditional* Indigenous cultural and intellectual property, like two adjacent pieces in a jigsaw puzzle, in that they constitute two complementary elements in a set. The proposed reform that would recognise Indigenous cultural and intellectual property would also be a response to the

¹⁸ *Op. cit.*, n11.

¹⁹ *Op. cit.*, n11.

²⁰ *Op. cit.*, n11.

²¹ *Op. cit.*, n11.

²² *Op. cit.*, n11.

²³ *Op. cit.*, n11.

²⁴ See Ch. 8 below; also, *ibid.*

²⁵ *Op. cit.*, n5, p.518.

failure of native title, as a creature of statute and as a bundle of rights, to accommodate the protection of cultural knowledge as an element of native title. These cases further justify the narrow focus in this thesis on the deeply traditional elements of Indigenous cultural and intellectual property.

Following these primary materials, the most important document in the legal literature is *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*,²⁶ written by Terri Janke for the Aboriginal and Torres Strait Islander Commission (ATSIC). The report, together with Indigenous copyright cases, is discussed in Chapter Two. The report surveys through both research and submitted material expressing Indigenous and expert opinion, the nature of the category *Indigenous cultural and intellectual property*, in terms of its content, commercial value, Indigenous concerns, and rights sought.²⁷ The category is not defined in advance, it is left open to submissions for development in the report and beyond, and so the report presents the category as broad and diverse. The report then examines current levels of protection offered to Indigenous cultural and intellectual property in Australian jurisdictions.²⁸ The final section considers proposals for protection, ranging from amendment, through enactment, to protocols, guidelines and agreements.²⁹ A ‘specific act’³⁰ would be the only legal means of protecting Indigenous intellectual property as a new category of law, as *sui generis* in the first sense mentioned in the definitions above, rather than depending upon analogical

²⁶ Terri Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property* [prepared for Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies], Surrey Hills, NSW, Michael Frankel & Co.

²⁷ *Ibid.*, ‘Part One – The Nature of Indigenous Cultural and Intellectual Property’; also available at <http://www.icip.lawnet.com.au/part1.htm>

²⁸ *Ibid.*, ‘Part Two – Protection Under the Current Australian Legal Framework’; also available, beginning at <http://www.icip.lawnet.com.au/ch5.htm>

²⁹ *Ibid.*, ‘Part Three – Developing Strategies for Protection’; also available at <http://www.icip.lawnet.com.au/part3.htm>

³⁰ *Ibid.*, Ch. 18.

approximation in terms of existing categories of law, which would be the path left open by the amendment of existing Acts. Issues for copyright and native title are discussed in each of the three sections of the report, but there are only two among a range of issues and approaches. The report was inconclusive, not surprisingly since its function was to integrate a large range of opinion, experience, facts, and argument, on a diverse range of potential options.

A legal literature has grown up around these cases and the report. Collectively, though from various angles, it supports the notion of developing stronger levels of protection of Indigenous cultural and intellectual property. Terri Janke, the author of *Our Culture: Our Future*,³¹ has also authored articles on the subject of Indigenous intellectual property. At least two of her articles appear in the *Indigenous Law Bulletin*.³² In 'Don't Give Away Your Valuable Cultural Assets: Advice for Indigenous Peoples',³³ she reviews problems and strategies for the protection of Indigenous cultural property. She divides her discussion in terms of the following: copyright protection, location rights, research involvement fees, trademarks, and bioprospecting agreements.³⁴ Her main point is positive, urging that the best advantage needs to be carefully made of the law as it stands.³⁵ However, the assumption of this recommendation, which is in fact spelled out during the course of the article, is the fact that the law is limited, leaving much unprotected.³⁶ She returns to copyright law in a later article 'Berne, Baby Berne: The Berne Convention, Moral

³¹ *Op. cit.*, n26.

³² T. Janke (1998) 'Don't Give Away Your Valuable Cultural Assets: Advice For Indigenous Peoples,' *Indigenous Law Bulletin* 4(11): 8-11; T. Janke (2001) 'Berne, Baby, Berne,' *Indigenous Law Bulletin* 5(6): 17.

³³ *Ibid.*

³⁴ *Ibid.*, pp. 9-11.

³⁵ *Ibid.*, p. 9.

³⁶ *Ibid.*, p. 9-11.

Rights and Indigenous Peoples' Cultural Property',³⁷ on the significance of the establishment of moral rights in Australia, by the *Copyright Amendment (Moral Rights) Act 2000* (Cth), for the protection of Indigenous cultural property. The addition of moral rights to copyright law in Australia expands the range of copyright protection for all authors, artists, and other creators. However, as Janke acknowledges, Indigenous collective ownership remains unrecognised within copyright law.³⁸ Cate Banks in 'The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators',³⁹ is critical of the lack of scope for the recognition of Indigenous intellectual property after the amendment of the *Copyright Act 1968* (Cth). To solve the problem of the non-recognition of communal property in moral rights legislation, she recommends the enactment of a *sui generis* law.⁴⁰

Joseph Githaiga surveys the limitations of intellectual property law for the protection of Indigenous cultural and intellectual property in 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge'.⁴¹ In the same article he surveys proposed remedies, ranging from Model Laws⁴² for the protection of folklore to *sui generis* enactment proposals.⁴³ His conclusion is that '... an attempt to protect Indigenous folkloric works and traditional knowledge within existing intellectual

³⁷ *Op. cit.*, n32.

³⁸ *Ibid.*, p. 17. Janke supposes that proper attribution of the traditional, collective element or interest, could be written into the nature of the attribution, e.g. 'This work and documentation is the copyright of the artist and may not be reproduced in any form without the artist and the clan concerned ...' p. 15.

³⁹ C. Banks (2000) 'The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators,' *Griffith Law Review* 9(2): 334-47.

⁴⁰ *Ibid.*, p. 347.

⁴¹ J. Githaiga (1998) 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge,' *E Law* 5(2), available <http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52nf.html>

⁴² *Ibid.*, pars. 67-78

⁴³ *Ibid.*, pars. 100-108.

property law systems is akin to fitting a round peg in a square hole'.⁴⁴ This, he says, is due to a 'clash of social paradigms',⁴⁵ and his preferred remedy is 'the enactment ... of *sui generis* legislation'.⁴⁶ In 'Stopping the Rip-offs',⁴⁷ an article published years before the publication of *Our Culture: Our Future*,⁴⁸ Catherine Hawkins reviews an Issues Paper entitled *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*.⁴⁹ This report was a federal interdepartmental paper involving the Departments of Justice, Communications and the Arts and Aboriginal and Torres Strait Islander Affairs. The carpets case⁵⁰ had been heard by the time of this report, and 'special legislation'⁵¹ had been proposed for the protection of 'Folklore' in the form of the proposed Aboriginal Folklore Act, and an Aboriginal Authentication Mark had already been discussed by the National Indigenous Artists Advocacy Association. This Issues Paper⁵² can be said to have led, *inter alia*, to the more broad-based report, *Our Culture: Our Future*.⁵³ Ben Goldsmith relates the cultural self-assertion by the Anmatyere people in 'A Positive Unsettlement: The Story of Sakshi Anmatyere'.⁵⁴ When the Australian company, Steve Parish, began publishing the art of Sakshi Anmatyere, the Indigenous people of the same name could find no relief in copyright or passing off.⁵⁵ Parish withdrew the work from sale, when the artist's tribal pedigree was challenged by the Anmatyere, whose name the artist had adopted. This story illustrates the difficulty of

⁴⁴ *Ibid.*, par. 109.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, par. 111.

⁴⁷ C. Hawkins (1995) 'Stopping the Rip-Offs,' *Alternative Law Journal* 3(72): 7.

⁴⁸ *Op. cit.*, n26.

⁴⁹ Commonwealth of Australia (1994) *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Canberra, Australian Government Publishing Service.

⁵⁰ *Op. cit.*, n10.

⁵¹ *Op. cit.*, n10, p. 10.

⁵² *Ibid.*

⁵³ *Op. cit.*, n26.

⁵⁴ B. Goldsmith (2000) 'Positive Unsettlement: The Story of Sakshi Anmatyerre,' *Griffith Law Review* 9(2): 321-333.

⁵⁵ *Ibid.*, pp. 323-4.

conceptualising appropriate protection for Indigenous cultural property and integrity, especially in the context of current law.

As well as copyright law, native title has provided a forum for Indigenous cultural property to be tested at law. As much as the categories of law remain always open, native title in Australia has perhaps now all but closed. In the years between *Mabo* and the string of cases following the *Native Title Amendment Act 1988* (Cth), native title appeared in the federal jurisdiction and quickly became a fairly settled thing. In a number of cases, as mentioned in this literature review above, the protection of cultural knowledge was raised for inclusion among the incidents of native title. This connection between native title and cultural knowledge is of interest to the present study as it is likely to demonstrate the objects in question in their proper, cultural context. This case law opportunity to view the context of traditional knowledge and debates over its inclusion and exclusion will help to show not only the proper context of traditional Indigenous intellectual property, but also its cultural nature and its connection to land and people, which must be born in mind in the construction in a statutory approach to accommodation, whether traditional objects are to be protected in isolation or among other objects.

David Bennett's Issues Paper, *Native Title and Intellectual Property*,⁵⁶ is the first non-official document known to the present author to draw this connection between Indigenous intellectual property and native title. While this study is expressly concerned with taking an environmentalist slant on these issues, it argues, more relevantly for present purposes, that 'native title rights and interests specifically

⁵⁶ D. Bennett (1996) *Native Title and Intellectual Property*, Native Title Research Unit Canberra, Issues Paper No. 10, Australian Institute of Aboriginal and Torres Strait Islander Studies.

mentioned in the *Native Title Act* could be construed as forms of intellectual property, because a necessary condition of their existence is knowledge of traditional law and customs'.⁵⁷

Authors following Bennett's paper⁵⁸ shared an advantage over it, in that they were able to follow this argument about the connection between native title and Indigenous intellectual property, as it was to unfold, in the courts. In 'Peeking Into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art',⁵⁹ Stephen Gray explores the capacity of native title law to accommodate traditional, cultural and collective interest, and investment, in traditional and tribal Indigenous art. The possibility of the recognition of a special category of Indigenous copyright protection had been denied in the *Bulun Bulun* case,⁶⁰ on the grounds that it would threaten to fracture a skeletal principle of Australian law being the separation of statute based copyright law on one hand, and property in land as a creature of the common law on the other.⁶¹ Gray is concerned with this and other issues, and with theoretical, legal and practical ways of stepping around them. At the time of writing, Gray could not have predicted the outcome of the *Ward* case⁶² before the Full Court of the Federal Court of Australia, nor the subsequent support for this judgement in the High Court of Australia,⁶³ for at that time he could have had access to only the more encouraging decision of Lee J at first instance in that series of trials. Gray found hope for potential accommodation in either the common law, or, if not, in new legislation. The former

⁵⁷ *Ibid.*, p. 8.

⁵⁸ S. Gray (2000) 'Peeking Into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art,' *Griffith Law Review* 9(2): 227-47; K. Howden (2001) 'Indigenous Traditional Knowledge and Native Title,' *University of New South Wales Law Journal* 24(1): 60-84.

⁵⁹ *Ibid.*

⁶⁰ *Op. cit.*, n10; see Ch. 2 below.

⁶¹ *Bulun Bulun v R & T Textiles*, *ibid.*, p. 524.

⁶² *State of Western Australia v Ward* [2000] (*The Miriung and Gajerrong Case*), *op. cit.*, n11; see above, and Ch. 8 below.

⁶³ *Western Australia v Ward & Ors* [2002], *op. cit.*, n34; see above, this chapter; and Ch. 8 below.

option has not since obtained, and the latter remains as a possibility. Gray's observations and proposed solutions will be critical to the construction of new law, which was among his recommendations as an alternative to accommodation in native title law. A more recent article by Kristin Howden, 'Indigenous Traditional Knowledge and Native Title',⁶⁴ argued that '... native title rights are given their character and substance by traditional knowledge, and ... they are, in essence, knowledge rights'.⁶⁵ Whether or not the majority of the Full Court of the Federal Court in the Ward case⁶⁶ concurred with this, they certainly did not think that the protection of such knowledge constituted an incident of native title on the facts, or on the claims made in that case regarding 'cultural knowledge'. However, Howden's statement has undeniable merit, and ought to be reflected in any legislation intended to protect such cultural or traditional knowledge.

The legal literature and legal materials demonstrate the types of Indigenous claims being made against the law both in the Courts and in other documents. These claims have a particular scope invoking a new category of law. This includes a strong traditional element, spanning both legal and non-legal Indigenous institutions. However, such claims will fall upon deaf ears, unless some independent standard of justice is appealed to. Articulating such standards happens to be the kind of thing that political philosophy attempts to do, and what it has done, in the case of Indigenous rights. Only a small amount of this otherwise highly developed body of theory has been applied to the particular problem of the accommodation of Indigenous intellectual property. Does this theory suit the problem? In general, theories in political philosophy provide models that appeal to the state directly. But do they have

⁶⁴ *Op. cit.*, n58.

⁶⁵ *Ibid.*, p. 74.

⁶⁶ *Op. cit.*, n11.

anything constructive to say to the most traditional and normative of Indigenous cultural institutions, with which this dissertation is directly concerned, and, arguably, with which they ought also to be concerned? The philosophical literature itself must be considered in order to answer this. This includes arguments for and against Indigenous cultural rights, and arguments for and against Indigenous property and intellectual property.

The Philosophical Literature

In ‘Cultural Heritage, Property, and the Position of Australian Aboriginals’⁶⁷ Couvalis and MacDonald attempt ‘... to vindicate some aspects of the conception of cultural heritage that is held by Australia’s Indigenous peoples’.⁶⁸ They begin with an implicitly broad definition of Indigenous cultural heritage, and they seem to believe that Western philosophical theories of property are indicative of the rationality of Western legal reality. They begin with Locke, go on to Hume, and end with Hegel. These philosophers’ theories share Western assumptions about what property necessarily involves; chiefly, it could be said, a private individualist view. Couvalis and Macdonald are sympathetic to Hume’s and Hegel’s views that property is constitutive in the development of personhood, rather than stemming from it, as it does on Locke’s account.⁶⁹ In this view, Couvalis and MacDonald project Western values onto Indigenous society, as does Locke, i.e. ‘personhood’ is assumed to be culturally neutral. They seem to view Indigenous property as a variable that only

⁶⁷ G. Couvalis & H. Macdonald (1996) ‘Cultural Heritage, Property and the Position of Australian Aboriginals,’ *Law In Context* 14(2): 141-62.

⁶⁸ *Ibid.*, p. 141.

⁶⁹ *Ibid.*, pp. 142-53.

needs to be pinned down by the better argument, rather than as something positive and fully culturally determined. (Perhaps it is the Western preconception of heritage that produces this image. It is the Western conception of property that allows Indigenous ‘property’ to remain unrecognised.) After discussing both international instruments and domestic legislation, the authors recommend an internationally coordinated solution.⁷⁰

Another example of the philosophy of Indigenous intellectual property is provided by Stenson and Gray,⁷¹ who, although political scientists, give philosophy a primary role in their research, as they rely on John Rawls, Will Kymlicka, John Locke, and Peter Drahos. Their article, ‘An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities’,⁷² is modelled after, or has provided the model for, a chapter in their book, *The Politics of Genetic Resource Control*.⁷³ Stenson and Gray attempt to show that the intuitively appealing ‘entitlement theory’,⁷⁴ which they attribute to Shiva⁷⁵ and others⁷⁶ and which is commonly known as Locke’s labour theory,⁷⁷ does not justify ‘community Intellectual property rights’.⁷⁸ They accept that Indigenous cultural possessions are the product of labour, but they contend the labour expended is cultural, collective and trans-generational, and therefore, successful appeals cannot be made to intellectual property law.

⁷⁰ *Ibid.*, pp. 154-8.

⁷¹ ‘An Autonomy-Based Justification ...’ & *Politics of Genetic Resource Control*, both *op. cit.*, n7.

⁷² *Ibid.*

⁷³ *Op. cit.*, n7.

⁷⁴ ‘An Autonomy-Based Justification ...’ *op. cit.*, n7, pp. 180-83.

⁷⁵ V. Shiva (1990) ‘Biodiversity, Biotechnology and Profit: The Need for a Peoples’ Plan to Protect Biological Diversity,’ *Ecologist* 20(2): 44-7.

⁷⁶ D. Soleri, D. Cleveland, et. al., (1994) ‘Gifts from the Creator: Intellectual Property Rights and Folk Crop Varieties,’ *Intellectual Property Rights for Indigenous Peoples: A Sourcebook*. T. Greaves, Ed., Oklahoma City, Society for Applied Anthropology: 19-40.

⁷⁷ Stated in Locke’s *Two Treatises*, *op. cit.*, n7, Second Treatise, Ch. 5, and restated by, e.g. T. Flanagan (1989) ‘The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy,’ *Canadian Journal of Political Science* 22(2): 589-602. Conversely, Lockean arguments have recently been launched in favour of Indigenous rights by, e.g. Kolers, *op. cit.*, n7.

⁷⁸ Stenson & T. Gray (1999) ‘An Autonomy-Based Justification ...’ *op. cit.*, n7.

If Indigenous intellectual property is to be accommodated, it is not obvious that this accommodation should take the form of intellectual property, as we know it; it is in fact far from clear that this is the best place for it. Indeed, such an accommodation might distort as much as it accommodates, if Western and Indigenous categories of intellectual property are so different. An alternative is to accommodate such forms *sui generis*. Stenson and Gray based their argument not on Locke, but on Kymlicka.⁷⁹ In *Liberalism, Community and Culture*,⁸⁰ Kymlicka attempts to marry an individualistic liberalism with a position sympathetic to minority rights, thereby showing that liberalism can after all explicitly accommodate community. To do this, he attaches to minority rights the idea of the rational end chooser. He holds that rational end choosers are important to liberal theory in the two following ways: firstly, they, as individuals, are seen as the most suitable determiners of the good for themselves,⁸¹ and secondly, as a consequence of this, the political is not to impinge on this highly valued freedom of choice, and therefore on individual liberty, and therefore, *political* justice is to be construed as mutual liberty only. Self respect is enhanced by this ability to choose, and this is where Kymlicka finds the marriage between liberalism and cultural rights to be achievable, for it is one's development in the stability of one's immediate state *or* minority cultural structure, that one finds the safe accumulation of self-respect required of choosing suitably good ends.⁸² He claims that members of cultural minorities will become good liberal citizens if their cultural

⁷⁹ *Ibid.*, pp. 183-90; Kymlicka's work is *Liberalism, Community and Culture*, *op. cit.*, n7.

⁸⁰ *Ibid.*

⁸¹ Kymlicka challenges Rawls' prioritisation of the right over the good, *ibid.*, p. 21, but it is not Rawls version of liberalism that is being characterised here.

⁸² *Ibid.*, pp. 164-5. Here Kymlicka agrees with Rawls, except that he adds that our cultural structure, whatever it may be, state or minority, is the foundation of individual choice, and therefore of the freedom to revise choices, and ultimately of the self-esteem that will inform good choices. The liberty to choose the good for oneself apparently leaves others free to choose theirs, and gives to the state the chief role of promoting liberty.

structure is protected by the state, and so the state provides this protection to promote its own stability. Stenson and Gray adopt this argument and claim that community intellectual property rights lie justly within this collective autonomy.⁸³ They attempt to justify the inclusion of genetic resources among the claimed collective rights, but they have effectively already argued for the Indigenous communities to make this decision, in claiming to justify minority rights ostensibly grounded on individual autonomy.

Recent books⁸⁴ and articles⁸⁵ usually argue in terms of Lockean or Hegelian property theory, or both,⁸⁶ and sometimes in terms of other philosophers, e.g. Proudhon.⁸⁷ The first category of immediate interest is that of Indigenous property. In one such example, Avery Kolers⁸⁸ argues, against some modern exponents of Locke (e.g. Flanagan⁸⁹) that Indigenous property cannot be relativised: ‘One main reason for their failure [Lockean justifications for Indigenous dispossession] is that they undermine anything that could be called a *claim* to land, replacing it with a perverse version of consequentialism’.⁹⁰ If it is correct to argue for the *existence* of positive Indigenous institutions including property, Locke’s theory of property acquisition by labour will not achieve a foothold in claims for or against Indigenous property recognition.⁹¹ This would be as absurd as reorganising Western property in terms of labour. Philosophies

⁸³ E.g. Stenson & Gray, ‘An Autonomy-Based Justification ...’ *op. cit.*, n7, pp. 185-90.

⁸⁴ S. R. Munzer (1990) *A Theory of Property*, Cambridge, Cambridge University Press; J. Waldron (1988) *The Right to Private Property*, Oxford, Oxford University Press; & P. Drahos (1996) *A Philosophy of Intellectual Property*, Aldershot, Dartmouth Publishing Company Limited.

⁸⁵ W. Fisher (2001) ‘Theories of Intellectual Property,’ *New Essays in the Legal and Political Theory of Property*, S. R. Munzer, Ed., Cambridge, Cambridge University Press: 168-99; & J. Hughes (1997) ‘The Philosophy of Intellectual Property,’ *Intellectual Property: Moral, Legal, and International*, A. Moore, Ed., Lanham, Rowman & Littlefield Publishers, Inc.

⁸⁶ E.g. Waldron and Drahos, both *ibid.*

⁸⁷ Waldron, *ibid.*

⁸⁸ ‘The Lockean Efficiency Argument ...’ *op. cit.*, n7.

⁸⁹ *Op. cit.*, n77.

⁹⁰ *Op. cit.*, n7, p. 391.

⁹¹ See Ch. 3, below. Locke speaks of Amerindian property being undermined by the efficiency of European agronomy, *op. cit.*, n7, p. 133.

of property and intellectual property tend to be normative and substantive and tie successful claims to some variable, whereas property by contrast is cultural, traditional, institutional, and thus not negotiable. Even treatments of Hegel's writings on property⁹² attempt to make his account somehow prescriptive. The general question identified by most modern writers is, how should property or intellectual property be distributed? Hence their appeals are made to general criteria of distribution. Instead, the philosophical question should be, what is the function and value of the institution of property, what constitutes an instance of this institution, and what implications for a question do a set of given property arrangements already have? No modern theory of property, including Lockean theories sympathetic to Indigenous property, attempts to answer the problem of the accommodation of the culturally determined, positive property of Indigenous minorities.

The debate on cultural rights and multiculturalism is no more help. Stenson and Gray, who argue for cultural rights, put the question of the protection of Indigenous intellectual property purely in terms of the distribution of rights within the state. This is constructed, following Kymlicka, on the extraneous criterion of individual autonomy. The Indigenous claims discussed above refer to Indigenous institutional criteria. Stenson and Gray's Indigenous intellectual property rights argument begins with their importation of Kymlicka's defence of cultural rights on grounds of individual liberty. Kymlicka has been criticised from within liberalism,⁹³ in the form of a defence of liberalism without cultural rights, which claims that liberalism

⁹² Such treatments, are found, e.g. in, Drahos and Waldron, both, *op. cit.*, n84; and see G. W. F. Hegel (1952) *Philosophy of Right*, *op. cit.*, n32, as the source and immediate context of Hegel's theory of property.

⁹³ J. Waldron (1995) 'Minority Cultures and the Cosmopolitan Alternative,' *The Rights of Minority Cultures*, W. Kymlicka Ed., Oxford, Oxford University Press: 93-119; & C. Kukathas (1995) 'Are There Any Cultural Rights?' *The Rights of Minority Cultures*, W. Kymlicka Ed., Oxford, Oxford University Press: 228-56.

supplies a reasonable sufficiency of liberty for members of cultural and national groups without necessitating, or permitting, group rights. Group rights are, from this perspective, also rightly not tolerated by liberalism, in its assertion of universality, and impartiality.

Anthropological Literature

The analysis of the anthropological literature is to further illustrate and confirm the cultural propriety of the relevant Indigenous claims upon the law (those discussed above regarding copyright and native title laws). These claims were about the nature and social function of the traditional Indigenous art of Northern Australia, that there are traditional Indigenous rights and responsibilities to be observed in relation to that art. Chapter Four of the dissertation is devoted to the anthropological literature and it begins at the origins of Australian anthropology, but is mostly dependent upon a literature of the art, laws and religion of the peoples of Arnhem Land.

Hiatt⁹⁴ charts the role Australia has played in the development of anthropology. He notes for example the early parallel drawn between Indigenous American society and Indigenous Australian society; the role of totem in kinship structure, for example, and early ideas about the prehistoric origins of marriage.⁹⁵ After this initial, mainly juristic, attention, the Australian Indigenous social context drew others, from

⁹⁴ L. R. Hiatt (1996) *Arguments About Aborigines: Australia and the Evolution of Social Anthropology*, Cambridge, Cambridge University Press.

⁹⁵ *Ibid.*, pp. 41-4.

Malinowski⁹⁶ to Durkheim⁹⁷ and Radcliffe-Brown,⁹⁸ to examine various aspects of Australian tribal life, gradually building up an increasingly sophisticated picture, allowing for tribal variation, of Indigenous society. The Yolngu people of Eastern Arnhem Land first appeared on the national scene in the mid-twentieth century with their bark petitions, containing a Western style text of political self-representation accompanied by traditional tribal imagery. Nancy Williams has written some important books about this phase of the history of traditional Indigenous legal institutions, in contact, and in conflict, with Western ones.⁹⁹ These show that Indigenous law is truly a matter of obligation for Indigenous peoples, who struggle to maintain it in the face of the dominant Western system. Howard Morphy has written a general work on Indigenous Australian art¹⁰⁰ and articles on traditional Indigenous art,¹⁰¹ as well as the definitive work on the traditional artistic practice of the Yolngu.¹⁰² Morphy reveals in detail the complexity of Indigenous social rules and practices in relation to the production, content, and status of traditional art, and supports the view of Williams of the obligating nature of Indigenous cultural norms, and of the high status of the function of traditional art in such a context. The work of Ian Keen¹⁰³ on the role of secrecy in Yolngu religion and ceremony supplements that of Morphy and Williams, showing the great weight given to normative cultural

⁹⁶ B. Malinowski (1913) *The Family Among the Australian Aborigines: A Sociological Study*, London, University of London Press.

⁹⁷ E. Durkheim (1915) *Elementary Forms of the Religious Life*, London, Allen & Unwin.

⁹⁸ A. R. Radcliffe-Brown (1952) *Structure and Function in Primitive Society*, London, Cohen & West Ltd.

⁹⁹ N. Williams (1987) *Two Laws: Managing Disputes in a Contemporary Aboriginal Community*, Canberra, Australian Institute of Aboriginal Studies; N. Williams (1986) *The Yolngu and Their Land: a System of Land Tenure and the Fight for its Recognition*, Canberra, Australian Institute of Aboriginal Studies.

¹⁰⁰ H. Morphy (1998) *Aboriginal Art*, London, Phaidon.

¹⁰¹ H. Morphy (1998) 'The Art of Northern Australia,' *Traditional Aboriginal Society*, W. H. Edwards, Ed., Melbourne, MacMillan Education Australia.

¹⁰² H. Morphy (1991) *Ancestral Connections: Art and an Aboriginal System of Knowledge*, University of Chicago Press, London.

¹⁰³ E.g. I. Keen (1994) *Knowledge and Secrecy in an Aboriginal Religion*, Melbourne, Oxford University Press.

practice in traditional Indigenous culture and showing the source of art in the sacred context of ceremony. Luke Taylor¹⁰⁴ provides a contrast to the above Yolngu scholarship by writing about the Kunwingku, a Western Arnhem Land people who bear significant similarities and differences to the Yolngu, thereby revealing what is more and what is less subject to change across almost neighbouring Indigenous cultures, at least within the same linguistic group. The same cultural rigidity in terms of obligation is observable here, again connecting law, myth, story, kinship, and art. Basil Sansom's article,¹⁰⁵ on the cultural aesthetics of Northern Australian Indigenous art, provides further support to the idea of the culturally determined content, style and technique of Indigenous art, incorporating a cultural aesthetic that goes beyond the strictly conventional.

Conclusion to Literature Review

The legal literature shows the lack of accommodation of traditional Indigenous forms, objects, or institutions, as well as a perceived and claimed need for such accommodation. The anthropological literature provides the cultural backdrop for this claim, illuminating it by the deepening of its cultural context. The philosophical literature as it is fails to acknowledge these realities and possibilities. The problem must be closely examined, and ultimately used to structure the solution. Justification must in other words not be too abstract. Indigenous cultural possessions and their attendant norms must not be subjected to entirely independent criteria, such as labour or liberty, but must be allowed to 'speak' for themselves. The literature as a whole

¹⁰⁴ L. Taylor (1996) *Seeing the Inside*, Oxford, Oxford University Press.

¹⁰⁵ B. Sansom (1995) 'The Wrong, the Rough and the Fancy: About Immortality and an Aboriginal Aesthetic of the Singular,' *Anthropological Forum* 7(2): 259-314.

shows that this research is warranted, as there is clearly a gap in understanding. This is a gap that must be closed to further Indigenous accommodation, in terms of existing Indigenous institutions and the people that rely on them.

Conceptual and Theoretical Framework

A theoretical map of the dissertation:

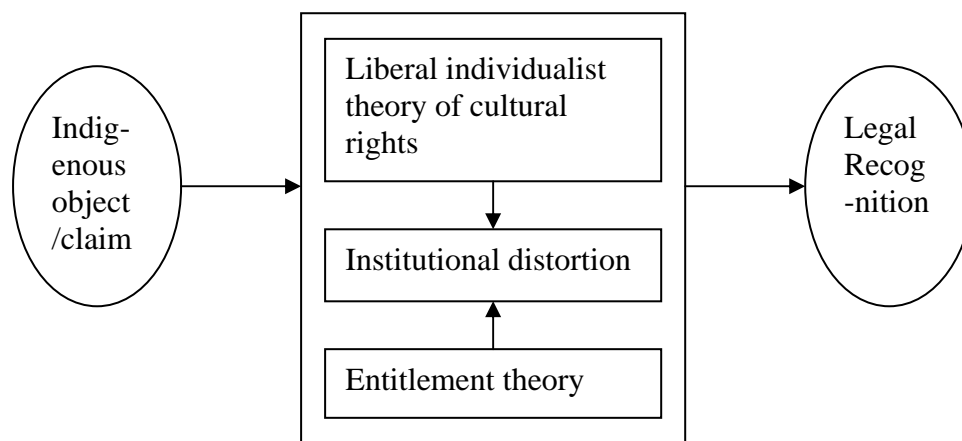


Diagram of thesis design showing theoretical, normative and objective components: Indigenous law reform proposals and claims against the law, through political philosophy to appropriate legal accommodation of Indigenous cultural and intellectual objects.

The intended meaning of the diagram is that claims for the recognition of certain Indigenous objects by the law of the state expose themselves to philosophical evaluation. Rival approaches to evaluation and, if successful, justification, inhabit a ‘black box’ of variability. The black box is at the centre of the diagram. The contents of the box will affect the types of object that can make the passage to recognition. If the objects in question have an institutional character, two of the three theories will not aid that passage, as cultural and institutional matters are unintelligible to such theories. The first theoretical alternative is one that advocates individual autonomy as

a basis for cultural rights. It is the approach of Stenson and Gray,¹⁰⁶ and of Kymlicka.¹⁰⁷ This theory, when applied to the problem of ‘community intellectual property rights’,¹⁰⁸ claims that the rights for cultural minorities promote individual liberty, and therefore benefit the state. As well as being atomistic, it is statist, in that it frames the problem as one of distribution and as one for policy, and subordinates the Indigenous claim of justice to this.¹⁰⁹ The individualist theory is unconcerned with the particular nature of community intellectual property. The next theory is not so much uninterested in what it is ostensibly referring to, as tacitly but negligently in denial of its very existence. For the Lockean labour theory of property¹¹⁰ to work, either for or against Indigenous intellectual property rights, it has to work on a collective model of what is essentially a theory of individual labour and acquisition. It is also dependent upon the state of nature theory. Where a state of nature can reasonably be said to obtain, its application may be insurmountably problematic for the case of a collective labourer, as its intuitive appeal is strong. However, there is no way that a generalisation of this kind can be justified in general, because there simply are cases where customary Indigenous *rules* apply, in advance of any such considerations; where property already has a positive character, and where there is therefore no room for a state of nature, or for justifications based upon it. It simply does not make any more sense to redistribute traditional Indigenous positive property according to a theory of entitlement by labour, than it does to redistribute the property of a state on a

¹⁰⁶ *Politics of Genetic Resource Control*, Ch. 4; & ‘An Autonomy-Based Justification ...’, both *op. cit.*, n1.

¹⁰⁷ *Op. cit.*, n7.

¹⁰⁸ E.g. ‘An Autonomy-Based Justification ...’ *op. cit.*, n7.

¹⁰⁹ This view sees problems of national minorities, such as Indigenous peoples, effectively from the perspective of a state, in that it sees such problems as matters of the distribution of the state’s resources, and of the exercise of the rights of the state, and of persons of the state, and thus already within the responsibility of the state. The point being that in this way, this view misses the substantive nature of the peoples concerned: institutions, culture, art, ritual, the sacred, obligations, and rights.

¹¹⁰ Locke, *op. cit.*, n7, Second Treatise, Ch. 5. Stenson and Gray (1999) ‘An Autonomy-Based Justification ...’ *op. cit.*, n7, p. 181, attribute the theory to Shiva, *op. cit.*, n75, & D. Solieri *et al*, *op. cit.*, n100.

basis of labour. This would also depend upon acts of acquisition taking place in a state of nature, a state in which there is not positive property. In the state, however, 'acquisition' is irrelevant, as property is already distributed, and a state of nature is not, and was not in Locke's time in North America, the condition of Indigenous peoples.

When traditional Indigenous rights and responsibilities are translated into new institutions in the state, their operation in the tribal context is extended, so as to operate also in the wider context of the state. This can be seen as the recognition by the state of Indigenous institutions. 'Institution' is meant here in the narrow context of a law, such as having property in a class of objects, or a legal concept, such as 'property', but it is also meant in its more general usage, to embrace social and cultural institutions, such as marriage, the family, and the institutions of art and religion. In this way, the recognition of a legal institution will bring with it a sufficient part of its original context to maintain its meaning as far as possible, given the basic function of translation. At the heart of this dissertation is this question of the recognition of Indigenous institutions by the state, e.g. collective rights to traditional art. Institutions of all types get their meaning from the culture of the social group to which they belong. Their function is to act as a linchpin in a particular culture, allowing it to be propelled forward, but also to change and to facilitate change in this forward continuity. As a culture changes, so too, eventually, will its institutions. This observation is certainly part of Hegel's thought, but it is not recognised by a liberal approach to cultural rights, or by the 'entitlement' defence of or attack upon Indigenous property or intellectual property. There is some plausibility to both of these theories. They are both models of political reciprocity, but each chooses a

different principle through which reciprocity is to be coordinated, or whose form reciprocity is to take. Each of these two theories advances a theory of political reciprocity through the different vehicle of its own political principle.¹¹¹ In addition, each is a theory of distributive justice. Take first the liberal account of multiculturalism. On this theory, justice is to be determined according to liberty, where liberty is both the good to be distributed and the measure by which this distribution takes place. And now take the entitlement theory. On that theory justice reduces to property relations attained according to one's labour in a supposed state of nature. No such ideas of political reciprocity can justify or deny recognition of Indigenous intellectual property as they cannot account for existing institutions and their values and these are exactly what is at issue in the question of Indigenous intellectual property rights. Institutions in a given society could be evaluated in terms of labour or in terms of liberty, but this kind of evaluation misses the point of an institution. The point of any institution is contextually determined. In other words, institutions can be evaluated, but first they have to be understood, and their intelligibility, their rationality, is dependent on their cultural function and location, which must itself be understood to reveal the meaning of the institution. One institution sits in a nest of others, and all related institutions are connected to each other through the people for whom they operate. To regard an institution in terms of liberty, or labour, is to take it out of context, and render it meaningless.

¹¹¹ Reciprocity is on this view to be coordinated in terms of individual liberty, social contract obligations, or recognition of legitimate property holdings, depending on the version. Labour, as in Locke's theory, is also such a principle-based theory, but its nature is really pre-political. See Ch. 7 above.

Chapter Analysis

The type of justification supplied for a particular object can lend to that object a certain shape that it might not otherwise have had. The problem of the accommodation of Indigenous intellectual property is subject to shaping in this way. Stock justifications from liberal individualism and natural law may work under certain conditions, but Australian tribal conditions defy justification of the object at hand by these means. Law and anthropology show that the nature of the Indigenous art object and its sacral contents are subject to a conventional Indigenous cultural rationality. An alternative justification gives to culture and institutions a rationality that, in the Indigenous instance, demands engagement from the state. Otherwise Indigenous society is exposed to the rapacity of the civil society introduced to it by the state.

Chapter Two surveys Indigenous copyright cases. It finds that traditional Indigenous art has been recognised judicially in the assessment of damages, and in demonstrating the potential for equitable relief, as a customary interest on the part of the relevant clan. This recognition is however very limited (i.e. to equity and the statutory assessment of damages for breach of copyright), and subject to judicial interpretation as well. There exists no general and explicit statutory or common law recognition of Indigenous cultural interest in the ritual knowledge of Indigenous art. This is followed by a review of the report *Our Culture: Our Future*,¹¹² which is a joint Indigenous and government report that examines proposals for the reform of law and practice relating to the preservation of Indigenous Cultural and Intellectual Property. Particular

¹¹² *Op. cit.*, n26.

attention is paid, in this thesis chapter, to the possibility raised by the report of amending copyright and other relevant legislation, and to the alternative of creating a new specific act to encompass the protection of the unique category of Indigenous cultural and intellectual property. The latter ‘specific act’ approach would permit a more inclusive, and more suitably specialised, or *sui generis*, approach to protection.

In Chapter Three traditional Indigenous intellectual property is related to native title. The customary Indigenous basis of native title stems from the same source as tribal Indigenous art. In this way traditional art practice is related to the land, and this is a requirement for inclusion in native title awards. However, in the relatively unsophisticated discussion in the courts, of ‘cultural knowledge’ as an incident of native title was not allowed as it was too vague and did not constitute a use of land as such. The bundle of rights theory of native title won judicial approval as the proper interpretation of native title, and this made the inclusion of cultural knowledge more difficult. This chapter contributes the notions, 1) that cultural knowledge is a vital component of traditional title before its conversion to a common law or statutory native title, and that this traditional context must remain the conceptual and cultural context of any new statutory remedy against abuses of collective and cultural interests in traditional knowledge.

Chapter Four reviews some significant anthropological accounts of Northern Australian Indigenous art, law and religion. It complements the legal evidentiary material as to the collective Indigenous interest in, and sacred nature of, Indigenous art as presented in Chapter Two. The conventional nature of Indigenous art is no mere superficial detail, as it combines sacred and legal norms, affecting the clan as a whole.

The art object is a manifestation of Indigenous clan spirit, taking on the value of that which it represents. The idea of legal authority for the tribal context is considered in order to establish the presence of tribal law and its status as sacred duty, the primary social obligations being to obey and enforce the law and to pass it on by initiating the next generation in it.

In Chapter Five the Lockean argument entitling property acquisition by an act of labour is examined. Stenson and Gray level their ‘autonomy-based’ argument against this view, claiming that it will not justify intellectual property acquisition for Indigenous peoples, as Indigenous intellectual and genetic acquisitions are collective and intergenerational ventures, whereas intellectual property only recognises the innovations of individuals. A very different critique of the Lockean theory of property is that it depends on a ‘state of nature’ in which that which is laboured upon must be unowned. This is not the state in which Indigenous peoples find themselves, as Indigenous possessions already exist in a context of institutions. This latter fact was borne in the cases examined in Chapters Two and Four in that ritual material is subject to sacred cultural obligations, etc.

In Chapter Six, Stenson and Gray’s argument for ‘community’ or ‘Indigenous’ ‘intellectual property’ is examined as being of particular philosophical relevance for its attempt to justify such a category philosophically.¹¹³ This argument, as part of a set of arguments for the protection of genetic resources, is based on a particular application of Kymlicka’s liberal theory of cultural rights.¹¹⁴ Unfortunately Kymlicka’s argument implicitly reduces the cultural in terms of a supposedly more

¹¹³ *Politics of Genetic Resource Control*, and ‘An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,’ both *op. cit.*, n7.

¹¹⁴ Stenson & Gray, *ibid*; & Kymlicka, *op. cit.*, n7.

elevated element of individual autonomy, such that cultural rights are defended not only on grounds compatible with liberalism, but in the service of liberal ends, given the location of minority cultural structures within ‘liberal’ states. This view is shown to be both an untenable position from liberalism, and an unnecessarily constructive response to the problem of cultural accommodation that also distorts the objects it proposes to accommodate.

In Chapter Seven, it is argued that underlying the liberal individualist and Lockean theories, that are discussed in Chapter Five and Chapter Six, is a common terrain of theoretical constructivism where normative theories are given analytical tasks and visa versa. This commonality will more clearly be seen in contrast to the approach in Chapter Nine, which permits the recognition of Indigenous objects and institutions, and makes them a part of the solution to the problem of their own accommodation. By contrast, each of these theories of abstract reciprocity has in common with the others the fact that it applies to a new problem a pre-existing theory that is so abstract and therefore independent of its object that it distorts the problem to which it is applied in terms of the particular criterion each introduces *de novo*. Each of these theories elevates its own different political principle as the primary or exclusive coordinating principle of all political reciprocity. The deleterious effect of this is that it assumes the lack of relevance of Indigenous cultural and institutional rationality.

Chapter Eight proposes an alternative theory to those discussed and suggests a legislative way of taking the theory into account in terms of law reform. It begins with the notion that the primary function of Indigenous ritual art is one of tribal self-representation. This term is intended to cover both the part of this role that is

identified as traditional, which is self-representation to self, and the part that is of the contemporary colonial (or post-colonial) period, where that role is of self-representation to the other (cultural groups including the state) in addition to the traditional role. Now there are two roles for the same medium, those two roles determine each other. Recognition has a role to play in this too. As the tribe depends on the state, for its existence, and the quality of that existence, in the state, its recognition by the state and state society is crucial. Tribal art facilitates this vital cultural exchange. The contemporary function, of these traditional works in cultural recognition, is frustrated, if they are misappropriated and placed in an improper context. Also important, though, is the status of the works within the clans, which is a politico-religious status. This is the equally important subjective side of the works for their clan, where the objective side is the clan ownership in the works. The solution here proposed is that of Indigenous moral rights, a new category of law that would be both *sui generis*,¹¹⁵ accommodating the cultural, institutional, and ritual natures of the works, and avoid conflict with the current regime of copyright.

¹¹⁵ *Sui generis*, here, means unique in the sense that the new law would be neither overly nor unnecessarily interpretive of traditional Indigenous forms by analogy with existing categories. Indigenous moral rights would avoid this chiefly by the fact that collective cultural rights would be recognized, rather than those of individual creative producers as is the case in moral rights as such.

Conclusion to the Introductory Chapter

The introductory chapter has shown the necessity of drawing together anthropology, philosophy and law, in order to show the value of Indigenous institutions, the Indigenous claims for which they form the basis and their proper consideration in terms of one another. In showing this, the introduction has also shown that the received wisdom that very quickly gathers around an emerging field of knowledge is not to be blindly trusted. In a world of complexity and diversity, where organisation is highly prized, generalisations not surprisingly abound. They can be useful, but sometimes they are over-exercised at the cost of diversity and complexity. Culture is particularly vulnerable to such generalisation. It does not easily lend itself to 'efficiency', or any of its conceptual cousins in modern theory and practice. The very cultures most exposed to the ravages of generalisation are Indigenous ones. Therefore, Indigenous peoples' claims for their cultural preservation are appeals to our patience in dealing with and getting to know the concrete detail of their societies, cultures and institutions.

CHAPTER TWO:

TRIBAL NOTIONS OF INTELLECTUAL PROPERTY: A REFORM INITIATIVE AND AUSTRALIAN COPYRIGHT LAW

Introduction

The present chapter views the problem of copyright and Indigenous notions of cultural property through discussion of two types of materials. First it considers a series of cases of the 1990s, in which Indigenous artists and others attempted to assert their copyrights in their works in the courts.¹ The second type of material is a report, produced by the Aboriginal and Torres Strait Islander Commission (ATSIC) and others, on the means and desirability of legally accommodating *Indigenous notions* of intellectual property.² Together, these sources furnish the best initial understanding of how current copyright law fails Indigenous standards of cultural protection. The cases supply a precise account of what the law will protect, what it might protect, and what it will not protect. The report draws on Indigenous and expert knowledge and experience to tackle the question of how indigenous knowledge can be better protected. It is the aim of this chapter to convey this understanding by paying close attention to these texts. This knowledge will provide a foundation for the arguments in all the following chapters.

¹ *Bulun Bulun v Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513; *Milpurrruru and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

² T. Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* [prepared for ATSIC and AIATSIS] Surry Hills, NSW: Michael Frankel & Company.

Indigenous Assertions of Copyright

In the 1970s and 1980s, Indigenous people sought, in at least two instances, to protect their interests in managing their own intangible cultural possessions in the Courts.

One such case was that of *Foster v Mountford*,³ in which the anthropologist Charles Mountford published a book containing cultural secrets of the Pitjantjatjara people to which they had admitted him some thirty years earlier. The Pitjantjatjara Council were successful in suppressing the book in a breach of confidence action.⁴ In the 1990s, however, the assertion by Indigenous people of their copyright deepened into an appeal for a wholly Indigenous type of copyright, one whose proposed operation in Australian law was to be governed by indigenous customary law. The courts, as far as the law would allow, seriously entertained this appeal. The following is a survey of three such cases that appeared in the nineties. First the facts are considered for each case, and then the decisions are considered.

*Yumbulul v Reserve Bank*⁵ was an action instigated by the plaintiff, an Indigenous artist, in respect of the concerns of tribal custodians. Terry Yumbulul had assigned his copyright in a Morning Star Pole to the Aboriginal Artists Agency Limited (AAA). This organisation then sub-licensed the right to reproduce the work to the Reserve Bank of Australia, which it did in 1988 on its ten-dollar bank note produced for the bicentenary.⁶ Mr Yulumbul was admonished then by the Aboriginal community for the culturally inappropriate use of the imagery of the Morning Star Pole by the

³ (1976) 29 FLR 233; described in I. McDonald (1997) *Protecting Indigenous Intellectual Property: A Copyright Perspective* Redfern, NSW: Australian Copyright Council, p 23.

⁴ MacDonald, *ibid.*, p. 23.

⁵ *Op. cit.*, n1.

⁶ *Ibid.*, pp. 481-2. Mr Yumbulul alleged that the assignation of his copyright to the agency was induced by misleading and deceptive conduct.

Reserve Bank.⁷ This is what induced Yumbulul to take action against the bank, the agency and the director of the agency, Anthony Wallis. The action against the bank was settled during the proceedings of the case by a consent order.⁸ The actions against the Aboriginal Artists Agency and its director were unsuccessful. However, for present purposes the claims of the plaintiffs are more significant than the judgement.

Terry Yumbulul was born into the Warimiri clan on Wessel Island, North-East Arnhem Land, in 1950. He had the authority of the Warimiri to paint and construct the traditional art of that group.⁹ The authority to produce the Morning Star Pole comes, however, from his mother's group, the Gulpu clan. Mr Yumbulul had been selling traditional art works, such as bark paintings and Morning Star Poles, throughout the 1980s. Some had made their way into museums, including the Australian Museum in Sydney.

Attention was directed by the applicant's counsel to a desire on the part of Indigenous people to educate the non-Indigenous public about the nature of Indigenous law and custom (through the release of traditional art and other cultural products), and to the concern for the protection of that knowledge.¹⁰ Fears of the inappropriate release of that knowledge are tempered in part by the inability of non-Indigenous observers to understand the symbolism in its transmission.¹¹ It is fair to say, then, that there is a difficult balance that needs to be maintained between appropriate and inappropriate releases of knowledge. The Morning Star Pole at issue in Yumbulul's case illustrates this perfectly. The release of specially made examples of the pole had an educational

⁷ *Ibid.*, p. 490.

⁸ *Ibid.*, p. 482.

⁹ *Ibid.*, p. 482.

¹⁰ *Ibid.*, p. 483.

¹¹ *Ibid.*, p. 483.

value, the limits of which were transgressed when a derived image appeared on Australian currency.

Morning Star Poles are used traditionally in ritual contexts associated with the transmigration of the spirits of the deceased to their ancestral home. Dr Ian Keen, Roy Marika, and Mandawuy Yunupingu all gave evidence as to the cultural importance of the Morning Star Pole.¹² Dr. Keen, then senior lecturer in anthropology at the Australian National University, claimed (as reported by French J) that ‘the making of the pole must be done in accordance with religious rules’.¹³ Mr Marika, a senior member of the Rirratjingu clan, identified the reproduction of traditional works by outsiders as ‘sensitive’, as the traditional knowledge holders would lose control of their knowledge in the process.¹⁴ He said:

It is not right for such objects [as the Morning Star Pole] to be made by children, women or men who do not understand their meaning and power and who have not been given the right to make such things.¹⁵

Mr Yunupingu described the ceremonial importance of the Morning Star Pole as including the commemoration of the dead and helping to maintain healthy bonds between clan groups, and he contended that, accordingly, the right to produce a Morning Star Pole is revered, and breach of that right ‘is a subject of great sensitivity to people who believe in ... the ceremonial Morning Star Pole’.¹⁶

The evidence as to the cultural role and significance went unchallenged by the respondent. French J accepted the cultural importance of the work in question, as well

¹² *Ibid.*, pp. 482-3.

¹³ *Ibid.*, p. 482.

¹⁴ *Ibid.*, p. 483.

¹⁵ *Ibid.*, p. 483.

¹⁶ *Ibid.*, p. 483.

as the fact that Yumbulul was its author and that it was an original work for the purpose of the *Copyright Act 1968* (Cth). However, Yumbulul had sold the work itself without provision to restrict its special use and had in addition licensed his copyright in the work to the AAA. On this basis the injunctive and declaratory relief and compensation that were sought against the agency and its director were denied and costs were awarded against the applicant.¹⁷

The litigants in the next two cases discussed were to be generally more successful. In *Milpururru and Others v Indofurn Pty Ltd and Others*,¹⁸ three applicants, Ms Marika, Mr Milpururru and Mr Payunka, were indigenous artists and the fourth applicant, the public trustee, represented the estates of another five indigenous artists who had died. In the trial those artists who were no longer living were referred to by their skin names, Ngaritj, Gumarang, Wamut, Tjapaltjarri and Jangala, so as to avoid causing offence or affront to their indigenous relatives and friends.¹⁹ Four of the artists are from Central Arnhem Land and three are from the Western Desert area. The application was made by the respondents against the unauthorised reproduction, on ‘wall’ carpets, of artworks (and parts thereof) by those eight Indigenous artists. Many of the carpets had been sold. All of the artworks had been exhibited or published previously under license from the artists and all imagery copied by the manufacturer had been sourced from such publications.²⁰

The respondent company was known until after the commencement of the proceedings as Beechrow Pty Ltd. The other three respondents, Mr Bethune, Mr King

¹⁷ *Ibid.*, p. 492.

¹⁸ 130 ALR 661, von Doussa J presiding.

¹⁹ *Ibid.*, pp. 660-61.

²⁰ *Ibid.*, pp. 661-62.

and Mr Rylands, were directors of the company. Beechrow conducted business in Vietnam where it had the decorative carpets made. The unauthorised reproduction of Indigenous imagery on the carpets was derived from the authorised publications in the form of a calendar and portfolios produced by the Australian National Gallery (ANG) and the Australian Information Service (AIS), from works in collections belonging to the ANG and the Australian Museum. Mr Bethune, who admitted to making all of Beechrow's business decisions, claimed to have been introduced to the publications at the carpet factory.²¹

The initial order for carpets included several designs wholly reproducing paintings from the reproductions, and others simplifying the visual material of the paintings in the reproductions.

These two [initial] shipments Mr Bethune has described as "samples" and included 18 carpets of aboriginal design including reproductions of the complete artwork in the Goose Egg Hunt (1 carpet), Freshwater Fish (2 carpets), Crow and Prayingmantis [sic] (3 carpets), Djanda and the Sacred Waterhole (3 carpets) and Emu Dreaming (1 carpet). The order also included three other designs which it is contended by the applicants are reproductions of a substantial part of the artworks Witiitj, Emu Dreaming and Kangaroo and Shield People Dreaming...²²

Two other carpets were included in the consignment, but they were not at issue in the proceedings. One of these was from the AIS portfolio. After being satisfied by these samples, Mr Bethune ordered another 70 carpets based on the same designs. The carpets were sold at a launch at the Guildford Hotel, and were elsewhere distributed by Beela Art Rugs and by Beechrow.

²¹ *Ibid.*, p. 666.

²² *Ibid.*, p. 666.

After the first commissioning of the carpets and before the launch of the samples, Mr Bethune, on advice from friends and in consultation with his wife, contacted Mr Ian Horrocks, the office manager at the Aboriginal Legal Service of Western Australia, regarding possible issues of copyright raised by the 'proposed' importation of carpets.²³ Mr Horrocks identified the breach of copyright in the proposal and referred Mr Bethune to the Aboriginal Arts Management Association (AAMA), as '...the appropriate body through which to seek copyright permission ...'²⁴ Mr Horrocks was invited by Mr Bethune to contact the AAMA on behalf of the latter, and when he did this he was advised (on the assumption that Beechrow had not already proceeded with the manufacture and importation of carpets) that the permission of the artists should be sought.²⁵

Mr Horrocks, in a letter to the AAMA on behalf of Mr Bethune, declared an interest in copyright in six Indigenous artworks reproduced among fifty carpets, each carpet having a value ascribed at \$180 and each being one by two metres in area. A cheque for \$750 as a royalty estimated on the collective value of the artworks was enclosed in 'good faith'.²⁶ The letter was wrongly addressed and never reached AAMA. On his attendance at the opening at the Guildford Hotel, Mr Horrocks was angered to find that '...the carpets on display reproduced important artworks about which nothing had been sent to him, and that the carpet sizes and numbers exceeded those about which he had been told'.²⁷ One carpet measuring 2.7 by 3.5 metres was on offer for \$2,400.

²³ *Ibid.*, pp. 666-67.

²⁴ *Ibid.*, p. 667.

²⁵ *Ibid.*, p. 667. The suggestion was made to Mr Horrocks by Mr McGuigan, then director of the AMAA, who could not recall the conversation, and the information was supplied in ignorance of the existing importation, as Mr Bethune had asked Mr Horrocks not to mention it.

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 668.

At the same time in Sydney, however, an indigenous art carpet of Beechrow's of the same dimensions was offered at \$4,252.²⁸

Much of the deliberation of Von Doussa J was concerned with the question of whether the carpets produced by Beechrow constituted, in part or in a simplified form, sufficiently substantial reproductions to qualify as a breach of copyright. The respondents were found to have infringed the copyright of the artists in each of these cases and in every other case. The judge summarised the orders to which the applicants were entitled as follows:

1. Injunctions against all respondents against further infringement of the artworks.
2. Injunctions against Mr Beechrow against further contraventions of the Trade Practices Act.
3. An order against Beechrow for delivery up of the carpets identified in Exhibit A69.
4. Judgement in favour of the applicants jointly against Beechrow and Mr Bethune for \$188,640.52.
5. Judgement in favour of the applicants jointly against Mr King and Mr Rylands for \$43,222.18.
6. Liberty to the applicants to apply to have the judgement sums increased in the event that any of the carpets in Exhibit A69 are not delivered up.
7. Liberty to the applicants to apply to have separate judgements entered in favour of each of them in lieu of the judgements proposed in paragraphs 4 and 5 hereof.²⁹

Cultural matters were taken into account in the award of damages in two ways. First, 'culturally based harm' was cited as a head of damage,³⁰ and second, damages were

²⁸ *Ibid.*, p. 669.

²⁹ *Ibid.*, p. 699.

apportioned '[s]o far as the procedural rules and practice of the court permit...'³¹ according to traditional rules. This matter will be pursued further below. If this case shows, *inter alia*, that a traditional Indigenous cause for action by a sole artist can be successful, and even to some extent having regard to Indigenous notions, the next case shows how far the cultural question of communal ownership in particular can be taken.

If *Milpurrruru v Indofurn*³² is the Mabo³³ of Indigenous copyright in Australia, Johnny Bulun Bulun's case³⁴ is in terms of its position in the order of things its Wik. It goes so far as to consider a cultural claim by a non-copyright holder and cultural custodian, and to find that in a different situation equitable relief might have been granted to such a person. This case is also known as the T-shirt case, as it involves the unauthorised reproduction and importation of fabric for the manufacture of T-shirts. Mr Bulun Bulun was the creator of the original work at the centre of the case, Magpie Geese and Water Lilies at the Waterhole.

The action was commenced both by Mr Bulun Bulun, as the originator of the artwork, and by George Milpurrruru, the traditional representative of the traditional owners of Ganalbingu country.³⁵ Mr Milpurrruru claimed for the Ganalbingu people an equitable interest in the artwork. The respondents immediately assented to Mr Bulun Bulun's claim with respect to his rights in the work, but stopped short of admitting recognition of any equitable ownership by anyone other than the first applicant. On

³⁰ *Ibid.*, p. 695.

³¹ *Ibid.*, p. 688.

³² 130 ALR 661.

³³ *Mabo v Queensland (No. 2)* (1992) 107 ALR 92.

³⁴ *Bulun Bulun v R&T Textiles*, *op cit*, n1.

³⁵ *Ibid.*, at 513.

the recommendation of the cultural importance of the unresolved claim by the council for the applicants, the evidence in Mr Milpurrruru's claim was allowed to proceed.³⁶ The operation of an express trust or a fiduciary duty were both considered, although for reasons which belong in the following section Mr Milpurrruru was unable to establish an equitable interest in the work.

Judicial Responses

Yumbulul's case³⁷ was an example of the difficulty of adequately accommodating customary Indigenous notions of intellectual property within the statutory basis of copyright. What was not denied in that case was that Mr Yumbulul had held copyright in his own work. That is to say, his creative investment in the work satisfied the copyright requirement of originality, despite the fact that it was composed of visual materials, which, together with their ordering, comprise a cultural inheritance. The artist's skill in rendering a high level faithful, cultural representation as well as, in the same work, an innovative individual interpretation, was recognised.³⁸ The cultural issues pertaining to copyright that Von Doussa J was willing to entertain in the two other cases was of a different order.

³⁶ *Ibid.*

³⁷ *Op. cit.*, n1.

³⁸ Evidence of both attributes of his work was lead at the trial by the artist and accepted by the judge; see, *op. cit.*, n1, p. 484.

Damages

Damages were awarded in *Milpurrruru v Indofurn*³⁹ on the basis of two cultural considerations. In the first of these considerations, Von Doussa J was responding to a request by the applicants that damages should be awarded, according to an equitable distribution, among the applicants, including the estates of those who had died, and who were being represented by the Public Trustee.⁴⁰ The judge was enabled to make such a ruling, with regard to awards granted on behalf of each beneficiary of the public trustee by the operation of Part III, Division 4 A, of the *Administration and Probate Act 1969* (NT). This provision enables the division of the estate of an intestate Aboriginal, in terms of the relevant customs of the indigenous group to which the deceased belonged.⁴¹ With regard to the general distribution of damages, the court was constrained by the rules of the assessment of damages for an infringement under the *Copyright Act 1968* (Cth). Von Doussa J, in what was referred to as a ‘practical’ solution, deemed it appropriate to accede to that request to the extent that those rules would allow.⁴² That meant making a collective award, in the sense that a distinction was made as to the size of the award only with respect to whether or not the particular applicant had died.⁴³ So, within the applicant categories, living and deceased, compensation could be distributed equally and according to Indigenous understanding.

The second cultural consideration that affected the assessment of damages had a legal rather than a practical basis. This was the decision to award, as well as conversion

³⁹ 130 ALR 661

⁴⁰ *Op cit.*, n1, at 659.

⁴¹ *Ibid.*, p. 688.

⁴² *Ibid.*

⁴³ *Ibid.*, and at pp. 695-6.

damages, ‘additional damages for flagrant infringement under section 115(4)’⁴⁴ of the *Copyright Act*. These damages, as well as damages awarded for ‘culturally based harm’, amounted to \$70,000 of total additional damages, before the calculation of interest.⁴⁵ At various points in the trial, Mr Bethune’s and Beechrow’s conduct in relation to matters raised by their actions against the copyright holders and in dealing with the AAMA and the artists were described by Von Doussa J as ‘directed by wrong-headed emotions’.⁴⁶ They had not apperceived the nature of the harm they commissioned. An indication of this was given when Mrs Bethune claimed to be promoting aboriginal art by Bethune’s act of inscribing, on portable floorings, portions of the sacred Indigenous visual repertoire.⁴⁷

This cultural value of the Indigenous artworks was attested to in the publications that Mr Bethune found them in. Ms Marika and another Aboriginal artist, Mr Bruce Wangurra, gave evidence at the trial as to the value of traditional art for Indigenous people.⁴⁸ The evidence addressed the role of painting in Indigenous culture, as a ritual instantiation of the dreaming, and the law laid down therein by the ancestors, and it also addressed the relative rights and responsibilities of members of the tribe in relation to the production of paintings to cultural information manifested in paintings, and to paintings themselves. Ms Marika, who concealed ‘... the unauthorised reproduction on carpets of Djanda and the Sacred Water Hole from her community’,⁴⁹ said:

⁴⁴ *Ibid.*, p. 693.

⁴⁵ *Ibid.*, p. 695; also section 115(4) of the *Copyright Act 1967* (Cth).

⁴⁶ *Ibid.*, p. 696.

⁴⁷ *Ibid.*, p. 669.

⁴⁸ *Ibid.*, pp. 663 & 664.

⁴⁹ *Ibid.*, p. 663. The concealment referred to here was effected in order to evade the responsibility that her tribe will attribute to her for the slight against the tribe’s body of ritual knowledge.

As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu ... who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.⁵⁰

The *Copyright Act 1968* (Cth) provides grounds to seek remedy for flagrant infringement in the following way, at s. 115 (4):

Where, in an action under this section:

- (a) an infringement of copyright is established; and
- (b) the court is satisfied that it is proper to do so, having regard to:
 - (i) the flagrancy of the infringement; and

...

- (iv) all other relevant matters

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

Cultural issues pertinent to the award of additional damages were admitted under s. 115 (4) (iv) and the flagrancy of Mr Bethune's and Beechrow's conduct under s. 115 (4) (i). Flagrancy was evidenced by the 'deliberate and calculated' nature of Mr Bethune's copyright infringement, e.g. the carpets were marketed as Aboriginal implying consent from the Indigenous artists when Bethune *et al* knew there was none.⁵¹ Actually seeking consent was an afterthought (and never included a complete admission of the extent of the reproductions⁵²), and Ms Marika said she was not interested in giving it.⁵³

⁵⁰ *Ibid.*, p. 663.

⁵¹ *Ibid.*, p. 694.

⁵² *Ibid.*, p. 667.

⁵³ *Ibid.*, p. 669.

Equity

Mr Milpurrruru's claims in *Bulun Bulun v R & T Textiles*⁵⁴ were of five kinds. Three were easily dismissed. They were that native title provided grounds for finding, in an interest in land, a basis for the copyright claims, that customary notions of communal intellectual property could be received directly into the common law, and that there was a contract implied between Mr Bulun Bulun and the Ganalbingu people. The remaining two claims, which were given more scope by the courts, were matters of equity. These two were that an express trust would support the protection of the tribal interest in the work when claimed by representative persons other than the artist, such as Mr Milpurrruru, and that a fiduciary relationship, between the artist and the tribal group would allow the same type of claim. The latter was more problematic but at least it was not dependent on the existence of an express trust. The existence of an express trust was simply not found. Von Doussa J noted that an express trust, assuming one had previously been established, might indeed have enabled Mr Bulun Bulun to hold the copyright on trust for Mr Milpurrruru.⁵⁵ This would not, however, have exhausted Mr Milpurrruru's purpose as the second applicant, as that was to demonstrate in particular that Mr Milpurrruru could assert a legal interest in the copyright of Magpie Geese and Water Lilies at the Waterhole, on behalf of the Ganalbingu, and that therefore, in general, indigenous tribal custodians could assert copyright (on behalf of their tribes) in the absence of the artist.

⁵⁴ *Bulun Bulun v Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513.

⁵⁵ This would depend on 'certainty' established by a 'charitable purpose', *op. cit.*, n1, p. 527.

Von Doussa J, in *Bulun Bulun*'s case, characterised the relationship between Mr Bulun Bulun and the Ganalbingu as fiduciary.⁵⁶ The right held by Mr Milpurrurru as a result of this relationship extended to a right *in personam* only.⁵⁷ This meant that Mr Milpurrurru could only have sought to hold Mr Bulun Bulun to his fiduciary duty in respect of the customary knowledge he held on trust from the Ganalbingu. There was no right *in rem* recognised under the circumstances, as the copyright in Mr Bulun Bulun's artwork sufficed to grant relief,⁵⁸ although, in Mr Bulun Bulun's absence, interlocutory relief might successfully have been sought.⁵⁹ There was no equitable interest. The fiduciary relationship actually recognised here is based on the social organisation and cultural beliefs and practices of the Aboriginal people for whom Mr Milpurrurru was acting and who shared a customary interest in the artwork of Mr Bulun Bulun.⁶⁰

Evidence was led at the trial on Ganalbingu rights and responsibilities in relation to traditional art and art practice. First, the Ganalbingu people were identified in relation to other Yolngu people and as the traditional owners of Ganalbingu Country, and of the 'corpus of ritual knowledge from which the artistic work [Magpie Geese and Water Lilies at the Water Hole] is derived'.⁶¹ Then, Mr Milpurrurru and Mr Bulun Bulun are identified as the 'most senior' people, of the 'top' and 'bottom' Ganalbingu respectively, and Mr Milpurrurru and Mr Bulun Bulun are, respectively, the first and second in line of the Ganalbingu people in general.⁶² Next in evidence, the ritual content of the painting in question is connected with the source of the Ganalbingu

⁵⁶ *Ibid.*, p. 530.

⁵⁷ M. Hall (1998) 'Case Note: *Bulun Bulun v R & T Textiles*,' *Copyright Reporter* 16(3) 124 at 128.

⁵⁸ *Op. cit.*, n54.

⁵⁹ *Bulun Bulun v R&T Textiles*, unreported judgement, cited in Hall, *op. cit.*, n57.

⁶⁰ *Bulun Bulun v R&T Textiles*, *op. cit.*, n54, p. 570.

⁶¹ *Ibid.*, p. 517.

⁶² *Ibid.*

people's spiritual and cultural identity, their 'Ral'kal'.⁶³ In the words of Mr Bulun Bulun:

Ral'kal translates to mean the principal totemic or clan well for my lineage [bottom Ganalbingu]. Ral'kal is the well spring, life force and spiritual and totemic or clan well for my lineage of the Ganalbingu people. It is the place from where my lineage of the Ganalbingu people are created and emerge. It is the equivalent of my 'warro' or soul.

Djulibinyamurr is the place where not only my human ancestors were created but according to our custom and law emerged [sic] it is also the place from which our creator ancestor emerged. Barnda, or Gumang (long neck tortoise) first emerged from inside the earth at Djulibinyamurr and came out to walk across the earth from there. It was Barnda that caused the natural features at Djulibinyamurr to be shaped into the form that they are now.⁶⁴

This is followed by several paragraphs of evidence led by Mr Bulun Bulun, on the importance of Barnda and Djulibinyamurr to the Ganalbingu. Barnda, who created the land and its people and their law, also gave them the responsibility of producing the rituals and paintings associated with it.⁶⁵ The importance of Djulibinyamurr is such that damage to it is an attack on the Ganalbingu. Similarly,

[i]nterference with the painting or another aspect of the Madayin ['corpus of ritual knowledge'] is tantamount to interference with the land itself as it is an essential part of the legacy of the land, it is like causing harm to the spirit found in the land, and causes us sorrow and hardship.⁶⁶

⁶³ *Ibid.*, p. 518.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 518-19.

⁶⁶ *Ibid.*, p. 519.

Mr Bulun Bulun then characterised the importance of the painting in this spiritual context as the primary Madayin for Djulibinyamurr and the Ganalbingu-Gurrumba Gurrumba people.⁶⁷ The production of the artwork was carried out according to strict attention to special laws, thereby ensuring the health and strength of the people.

Unauthorised reproduction of ‘at the Waterhole’ threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual and threaten [sic] our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected for countless generations.⁶⁸

Mr Bulun Bulun’s testimony was confirmed by the testimonies of Mr Milpururru and Mr Djardie Ashley. Mr Ashley was Mr Bulun Bulun’s *Waku*, or *Djungayi*, and contributed further evidence on the role of *Djungayi*.⁶⁹

Mr Ashley said that non-Yolngu people characterise his status as *djungayi* as ‘policeman’ or ‘manager’.⁷⁰ He is bound by the

... obligation to ensure that the owners of certain land and Madayin associated with that land are dealt with in accordance to Yonngu custom, law or tradition.⁷¹

In assessing the possibility of a fiduciary relationship, Von Doussa J said that

[t]he grant of permission by the *djungayi* and other appropriate representatives of the Ganalbingu people for the creation of the artistic work is predicated on the trust and confidence which those granting the permission have in the artist. The evidence

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

indicates that if those who must give permission do not have trust and confidence in someone seeking permission, permission will not be granted.

The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.⁷²

Therefore a fiduciary relationship was held to exist, not through the reception of customary law into the common law, but rather it was given rise to by the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people, which could be characterised as one of trust extended with the bequest of knowledge and the tribal permission to reproduce it.⁷³

In all of these cases the question of whether examples of Indigenous art will satisfy the criterion of originality, in determinations upon copyright, was uncontroversial, where it was considered at all. Ownership of the copyright by anyone other than the artist was flatly denied. This of course includes collective ownership by Indigenous groups according to traditional rules or otherwise (deliberate and explicit acts of assignment, and etc., excluded). Also, *sui generis* rights and obligations of customary law are not to be received into the common law. Indigenous notions of ownership may however be *reflected* in the assessment and apportionment of damages. Perhaps most importantly, though, equity will allow a tribal custodian to force an Indigenous copyright owner and artist to affirm the copyright in the courts where it is challenged and, in circumstances other than those in Bulun Bulun,

⁷² *Ibid.*, p. 529.

⁷³ *Ibid.*, p. 530.

...if the copyright owner of an artistic work which embodies ritual knowledge of an aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remedial action through the courts by the clan.⁷⁴

How this will affect the question of reform remains to be seen. At least the question of what the law will and will not do, has been given some form. Reform could easily be conducted with respect to both of these, filling a gap in the case of the latter, and using the former as starting point. To show how legislative responses to the lacunae might be constructed, is to show first what consideration has already been given to the subject.

An Indigenous Reform Initiative

In this section, a reform initiative, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*,⁷⁵ is examined in detail where it is concerned with legislative approaches to copyright reform. The scope of this report is not limited to copyright or even to intellectual property as a whole. Its concern is with what it refers to as ‘Indigenous Cultural and Intellectual Property’, and its conception of this is not limited to traditional cultural forms, or to intangible objects.⁷⁶ It encompasses property as Indigenous people conceive of it, and thus overlaps with what is already recognised in Australian jurisdictions. The term is related to what is already known as Indigenous cultural heritage and folklore. There are some concepts

⁷⁴ *Ibid.*, p. 532.

⁷⁵ T. Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* [prepared for ATSIC and AIATSIS] Surrey Hills: Michael Frankel & Company.

⁷⁶ *Ibid.*, p. 3.

in the report that predominate, such as ‘cultural’ and ‘customary’ objects, and biological knowledge. In relation to copyright and to the proposal for specific legislation in particular, traditional, customary law based objects predominate.⁷⁷ The report aims, largely through submissions solicited by a discussion paper, to identify ways of protection of all Indigenous cultural and intellectual property, and considers copyright issues as one of the manifestations of this. At the time of writing the report, the Bulun Bulun decision was still due, and since the report’s publication, moral rights legislation has been enacted (without a special category of Indigenous moral rights).⁷⁸ The report is written and compiled by Terri Janke.⁷⁹

The Report

In response in part to the above-mentioned Indigenous copyright cases, the Federal Government of Australia commissioned an interdepartmental report called *Stopping the Rip-offs*⁸⁰ on issues of art and copyright pertinent to Indigenous people, and which was published in 1994. An awareness of the problems of the protection of Indigenous cultural endeavours had also been expressed in *Creative Nation*⁸¹ in the same year. Other areas of Indigenous law and practice in Australia and abroad had seen various forms of the question of Indigenous intellectual property ownership articulated: cultural heritage, folklore, *in situ* biodiversity conservation, and farmers’ rights. The

⁷⁷ See, *ibid.*, Ch. 5 (pp. 51-60), & Chs. 9 & 18.

⁷⁸ The *Copyright Amendment Act 2000* (Cth.) has since been enacted; see, C. Banks (2000) ‘The More Things Change the More They Stay the Same,’ *Griffith Law Review* 9(2): 334-47, for the effects of moral rights legislation on the prospect of Indigenous intellectual property.

⁷⁹ *Op. cit.*, note 75.

⁸⁰ Commonwealth of Australia (1994) *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Canberra, Australian Government Publishing Service.

⁸¹ Commonwealth of Australia (1994) *Creative Nation: Commonwealth Cultural Policy*, Canberra, Australian Government Publishing Service.

Aboriginal and Torres Strait Islander Commission (ATSIC) elected to instigate an Indigenous reply to *Stopping the Rip-offs*, which would reflect the scope of intellectual objects that had emerged as being of concern to Indigenous people and sympathetic experts, and which would canvass Indigenous as well as expert opinion. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) was charged with the coordination of the construction of the report, and Terri Janke, then principal consultant of Michael Frankel and Company, a firm of lawyers employed in the construction of the report, was delegated the task of authorship.

ATSIC's Indigenous Reference Group (IRG) distributed a discussion paper in 1997 to solicit submissions from Indigenous and industry bodies as well as individuals and government offices. The paper, '...identified and outlined some issues and proposed solutions raised in submissions received in response to ... previous government inquiries'.⁸² Seventy submissions were received. The range of issues covered in the responses was great, as it encompassed the tangible and intangible, as well as the traditional and non-traditional. As some indication of the range of responses, submissions were given in relation to the Didgeridoo industry, the Indigenous recording industry, the human genome project, and ritual secrecy. One idea, however, is echoed throughout the report: the preferred model for the protection of Indigenous knowledge or culture whatever its form, is a single specific act permitting legal actions, *inter alia*, on the basis of Indigenous cultural and intellectual property as a new category of law.⁸³

⁸² *Op. cit.*, n75, p. xv; the IRG's discussion paper, Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, September 1997, was published as an Appendix 1 of the report, *op. cit.*, n75.

⁸³ *Ibid.*; many such submissions came from the Australian Copyright Council.

The diversity of Indigenous cultural objects, as candidates for legal protection, and the preferred reform model of a specific act for the provision of that protection, together raise questions of definition. Such questions include the question of whether to institute one object or many, as well as that of how broad in scope a conception is feasible or just? Respondents to the discussion paper were asked to answer a set of questions in relation to a ready definition of ‘Indigenous Cultural and Intellectual Property’. The term itself is derived from the UN Working Group on Indigenous Populations’ (WGIP) *Draft Declaration on the Rights of Indigenous Peoples* of 1994.⁸⁴ The definition supplied to this term is the IRG’s adaptation of a definition of heritage, provided in Erica-Irene Daes’ Final Report on the Protection of the Heritage of Indigenous Peoples.⁸⁵ The original definition reads:

‘Indigenous Cultural and Intellectual Property’ refers to indigenous peoples’ rights to their heritage. Heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory.

Heritage includes:

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs).
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna).
- All items of moveable cultural property.

⁸⁴ Article 29 of the UN Draft Declaration on the Rights of Indigenous Peoples, available as UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994):

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

⁸⁵ E. Daes ‘Final Report on the Protection of the Heritage of Indigenous Peoples,’ UN Doc. E/CN.4/Sub.2/1995/26.

- Human remains and tissues.
- Immovable cultural property (including sacred and historically significant sites and burial grounds).
- Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape and all forms of media.

The heritage of an Indigenous people is a living one and includes objects, knowledge and literary and artistic works which may be created in the future based on that heritage.⁸⁶

Respondents to this definition, while accepting its general shape, made cursory adjustments to the details of its scope and application.

Our Culture: Our Future⁸⁷ is divided into three parts addressing Indigenous cultural and intellectual property in terms of its nature, current levels of protection and reform strategies. The first of these is concerned with the value of Indigenous cultural and intellectual property for Indigenous people, i.e. commercially and culturally. The second assesses the current legal frameworks for their capacity to provide protection. The final part canvasses legislative options as well as administrative options, policies and protocols. The legislative options are divided between proposed amendments to the various intellectual property acts and other relevant acts, and the development of a single act encompassing the gamut of Indigenous cultural and intellectual property.

The first section of the report, 'Part One – The Nature of Indigenous Cultural and Intellectual Property', is centred on a traditional indigenous conception.⁸⁸ At the heart of this conception is communal ownership, and radiating out from this are Indigenous

⁸⁶ Our Culture: Our Future, *op. cit.*, n70, p. 3; see p. 11 for the IRG's revised definition, a localised version.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, pp. 1-48.

culture that supports a communal conception of property, and the notion of consent, for the use of traditional Indigenous intellectual property. These divisions are based on evidence presented in submissions, extracts from which are supplied. ‘Commercial considerations’ and ‘major concerns for Indigenous people’ are also covered in this section.⁸⁹ In the first of these, the contribution of Indigenous culture and knowledge to industry is affirmed, and the extent to which Indigenous people should share in the benefits reaped is considered. In the section on major concerns, access to and appropriation of Indigenous cultural and intellectual property are identified, along with technology, education and cultural integrity.

It is the subsequent parts of the report that are of greatest concern to this thesis. This is because they offer 1) a constructive approach to the shape of legislative reforms of a type likely to be of use in the protection of Indigenous cultural and intellectual property, and 2) an analysis of existing legislation and other law in view of its present limitations for the purpose of such protection. The following section of the present chapter deals with copyright amendment issues, raised in parts two and three of the report, and the subsequent section looks at broader intellectual property issues addressed in part two, as well as at the *sui generis* enactment approach addressed in part three as a reform option in response to all relevant Indigenous cultural and intellectual property issues.

⁸⁹ *Ibid.*, pp. 13-49; much of the latter section overlaps with the concerns of the section on ‘The Nature of Indigenous Cultural and Intellectual Property’, pp. 1-12.

Copyright Reform

The Critique of Limitations

Chapter Five of *Our Culture: Our Future* identifies the likely limitations imposed by copyright law on the protection of Indigenous cultural and intellectual property. It examines issues that are, or could be, problematic, in that accommodation. These issues are grouped under the following headings: ‘Meeting the criteria’;⁹⁰ ‘Ownership of copyright’;⁹¹ ‘Rights granted under copyright’;⁹² ‘Moral rights’;⁹³ ‘Performers’ rights’;⁹⁴ ‘Enforcement of copyright’;⁹⁵ ‘Fair dealing for research and study’;⁹⁶ ‘Sculptures and craftworks on permanent public display’;⁹⁷ ‘Period of protection’;⁹⁸ ‘Limitations of protection’.⁹⁹ This is an attempt to classify the ways that Indigenous conceptions of cultural and intellectual property do not ‘fit’, or are not covered by, existing legislative provisions. This is to highlight the way justice is not being done to Indigenous people by this lack of cultural recognition in the law, and to use this as a critical basis on which to build appropriate reforms.

Under the section of Chapter Five of the report on ‘meeting the criteria’, the copyright requirements of originality, material form, and identifiable author are problematised as being not always satisfiable for Indigenous cultural and intellectual products. The purpose of the *Copyright Act 1968* (Cth) is to protect the works of creative

⁹⁰ *Ibid.*, pp. 52-53.

⁹¹ *Ibid.*, p. 53.

⁹² *Ibid.*, pp. 53-54.

⁹³ *Ibid.*, pp. 54-55.

⁹⁴ *Ibid.*, pp. 55-57.

⁹⁵ *Ibid.*, p. 57.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, pp. 57-59.

⁹⁸ *Ibid.*, pp. 59-60.

⁹⁹ *Ibid.*, pp. 60-63.

individuals, not creative tribes, or traditional individuals. ‘Originality’ was not problematic in the copyright cases discussed in the previous section, but it is a potential problem. The same can be said for the requirements of material form and identifiable author. In Indigenous works, such as traditional song and dance, these will not always be evident. On the issue of ownership the report has this to say:

The Crown may own copyright in works produced under its direction and control.

This may have effects on indigenous rights to cultural material.

For example, some indigenous artists produce significant works of art through arts centres funded by ATSIC, where artists receive wages as employees under the Community Development and Employment Program (CDEP). Under the Copyright Act, the centre is recognised as the copyright owner of works artists produce as part of their work there, unless there is a written agreement between the artist and the centre stating otherwise.¹⁰⁰

This is obviously an important point, and it becomes increasingly so when a custodial claim upon the work is present.

A custodian is a guardian of tribal knowledge for the tribal collective. If, as in *Bulun Bulun v R & T Textiles*,¹⁰¹ a claim such as the one made in that case by Mr Milpurrruru is made on behalf of the artist’s tribe by someone other than the artist, to the copyright in the work, this is not likely to be recognised by an art centre or gallery, someone to whom the work is sold, someone who publishes it, or someone who simply copies it. The issue of collective ownership is not addressed under the heading of ownership in Chapter Five of the report, even though this was a primary issue in *Bulun Bulun*’s case (i.e. Mr Milpurrruru’s application), and originality was

¹⁰⁰ *Ibid.*, p. 53.

¹⁰¹ *Op. cit.*, n1.

not controversial in any of the Indigenous copyright cases. The issue is brushed over in the later section of the report, on limitations of protection, but unsatisfactorily.

Perhaps this is due to the fact that Bulun Bulun's case had not been concluded at the time of writing the report.¹⁰² The significance of collective ownership of cultural and intellectual property, by tribe or clan, had not therefore been fully played out before the law.

The next three headings deal with rights currently granted under copyright law.¹⁰³ The exclusive rights of authors are found to be limited in their accommodation of Indigenous cultural and intellectual property, in that they grant copyright to those individuals who reduce works to a material form, recognising them as 'authors' even when the act they performed is subordinate to the creative process itself or independent of it, such as transcription, recording and research writing.¹⁰⁴ Broadcast, publication and display are rights possessed by such authors. There is no comparable right with which traditional possessors of such cultural forms can balance against the interest of 'authors'. Traditional Indigenous songs, stories and dances are a matter of cultural continuity, received and passed on, created in the past and subject to gradual development. No author, for the purpose of the *Copyright Act 1965*, can be pointed out. Similarly with performer's rights; performers do not exercise copyright in their performances. Photographers have copyright in the images they produce. Moral rights have been added to the copyright regime since the writing of the report,¹⁰⁵ and although rights of attribution and integrity (moral rights), which have the potential to be powerful tools in the Indigenous context, are now recognised in general, they only

¹⁰² *Op. cit.*, n75, p. 62.

¹⁰³ *Ibid*, pp. 53-57, 'exclusive rights granted to authors ... [and] makers of recordings', moral rights and performers rights.

¹⁰⁴ *Ibid.*, p. 54.

¹⁰⁵ See n78.

apply within the limitations of the *Copyright Act*. That is to say, they can only be established by, and only establish rights for, an individual creative agent who produces in a material form, or for a person who reduces a cultural object, image or act to a material form.

The section of the report dealing with ‘enforcing the act’ is only descriptive of the status of the operation of copyright law, i.e. its criminal and civil remedies. The three subsequent headings further address the actual scope of copyright: fair dealing, accessibility to public art, and duration. Fair dealing allows reproduction without consent from the copyright owner to the extent that is reasonable (as specified in the Act with reference to a given form) for the purposes of research and study.¹⁰⁶

Indigenous notions of what is reasonable here are not affirmed, and this may create problems for Indigenous people, especially where the ‘original’ from which an extract is taken was not given consent, and where customary law and Indigenous sensibilities are offended. Public indigenous works on permanent display are also subject to legal reproduction.¹⁰⁷ Where copyright is recognised in a work, it is limited to a set duration, fifty years after the death of the creator. Traditional Indigenous culture, being of an intergenerational nature, and being invested as such in even static works, is left unprotected by copyright from the end of its duration in perpetuity.¹⁰⁸

The final section in the critique of copyright law comprising Chapter Five of *Our Culture: Our Future* is entitled, in a general and summary manner, ‘Limitations of protection’. It is concerned with expression versus style, commerce versus culture,

¹⁰⁶ *Our Culture: Our Future*, *op. cit.*, n75, p. 57.

¹⁰⁷ This was at issue in Yumbulul’s case, *op. cit.*, n1, discussed in the previous section of this chapter; this is observed in the report, *Our Culture: Our Future*, *ibid.*, pp. 58-59.

¹⁰⁸ *Ibid.*, pp. 59-60.

language, secrecy, sacredness, and communal ownership. Firstly, particular Indigenous styles such as rarkk, the ‘cross-hatching style of Indigenous art used largely in Arnhemland regions’,¹⁰⁹ are left unprotected. This is significant when it is remembered that particular examples of such styles are the cultural possessions of certain Indigenous groups to the exclusion of others and identify a particular group as such.¹¹⁰ Thus they could be termed customary intellectual property. Indigenous languages are not protected as such by copyright. One submission to the report made the following assertion:

There is a need to differentiate between rights over the language *per se* and rights to specific materials written in the language [which are copyrightable]. The people affiliated with the language should be regarded as the ‘owners’ of the language. As such they should be consulted in matters related to the language.¹¹¹

Such recognition of ownership would prevent culturally inappropriate uses of the language.

The issues of secrecy and sacredness¹¹² are dealt with superficially by the report, firstly by being identified as one, and next by being too briefly addressed. These concepts are markedly different, even if those things that are most sacred to Indigenous people are also most secret. Degrees of secrecy, what is secret, and the appropriate treatment of the sacred, are only determinable by Indigenous law and custom and its recognised interpreters and authorities. Both concepts are of vital importance to the subject of the recognition of Indigenous cultural and intellectual

¹⁰⁹ *Ibid.*, p. 60.

¹¹⁰ Each clan represents its *own* totem in its art in symbolic form, e.g. H. Morphy (1998) ‘The Art of Northern Australia,’ *Traditional Aboriginal Society*, W. H. Edwards, Ed., Melbourne, MacMillan Education Australia, pp. 24-5.

¹¹¹ Rob Amery and the Kurna Language and Language Ecology Course, University of Adelaide, Submission to Our Culture: Our Future, October 1997; cited therein, *op. cit.*, n75, p. 61.

¹¹² Our Culture: Our Future, *ibid.*, p. 61.

property because they determine its nature, but differently for each. If something is secret it must be kept from certain identifiable individuals; if something is sacred it must be treated with reverence or respect in particular ways depending on its nature and role. The following section on cultural integrity reaffirms the concern over the limitations of moral rights, in that in the protection of the integrity of a work, cultural ownership through custodial control, or interest, is not recognised.¹¹³ The final section on communal ownership¹¹⁴ has been discussed above under 'Ownership'. The speculative nature of this discussion, before the *Bulun Bulun* case, was there noted.

Amendment

The copyright reform strategies advanced in Chapter Nine of the report are less inclusive than the critique in Chapter Five and yet more attention is given to each topic covered. Chapter Nine is entitled, 'Amendments to Copyright Act'.¹¹⁵ The discussion therein is limited to 'moral rights',¹¹⁶ 'collection of fees',¹¹⁷ 'performers' rights',¹¹⁸ and the appropriateness of amendment.¹¹⁹ The Discussion Paper, which preceded the report, included the following proposals on the subject of amendment of the *Copyright Act 1998*:

1. Moral rights amendments to give Indigenous communities the rights of cultural integrity and cultural attribution.
2. Introduction of a new part to establish a collecting agency for Indigenous works.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, pp. 61-63.

¹¹⁵ *Ibid.*, p. 113.

¹¹⁶ *Ibid.*, pp. 114-19.

¹¹⁷ *Ibid.*, pp. 119-27.

¹¹⁸ *Ibid.*, pp. 127-30.

¹¹⁹ *Ibid.*, p. 130.

3. Extension of performers' rights.¹²⁰

Presumably this particular focus accounts for the submissions being received under the same divisions, as well as for the arrangement of the contents of Chapter Nine.

The section in the report on moral rights assessed the *Copyright Amendment Bill* 1997, as the *Copyright Amendment (Moral Rights) Act 2000* (Cth) had not been enacted by Federal Parliament.¹²¹ The report identified as the rights asserted in the bill, the right of attribution, the right against false attribution and the right of integrity.¹²² These rights have since been included in the new Act. The report had the following to say about the application of these rights for Indigenous purposes:

Under Indigenous customary law, the responsibility for ensuring that important cultural images, themes and stories are used appropriately rests with the Indigenous custodians of a particular item. This means that under the proposed moral rights legislation, traditional custodians would not be able to prevent culturally inappropriate use of their arts and cultural material without relying on the moral rights of an individual artist.

The Bill also proposes that these rights can be waived unconditionally, or that derogatory treatment of works can be consented to.¹²³

These are the same types of concerns as those raised by the application of copyright in general to indigenous cultural and intellectual property, applied in turn to moral rights. The new Act confirms the concerns raised by the Bill, by failing to protect

¹²⁰ Cited in *Our Culture: Our Future*, *ibid.*, p. 113.

¹²¹ See n78.

¹²² *Op. cit.*, n75, p. 114.

¹²³ *Ibid.*, p. 115.

Indigenous tribal interest in a tribal work, and only extends moral rights to individual creators.¹²⁴

The discussion paper suggested two moral rights that would expand the basic conception to provide protection of Indigenous cultural and intellectual property according to Indigenous notions of what constitutes such protection:

A right that would allow Indigenous custodians to act against derogatory, offensive and fallacious reproduction and use of Indigenous cultural heritage material (cultural integrity rights).

A right that would allow Indigenous custodians to take action when a group or community was not acknowledged as the source of a particular item of cultural heritage (cultural attribution rights).¹²⁵

Submissions were received on the following: distinctions between different uses of Indigenous cultural and intellectual property,¹²⁶ the matter of defining ‘Indigenous’ and ‘derogatory, offensive and fallacious’,¹²⁷ the necessity of complementing these rights with a requirement of consent for the use of Indigenous cultural and intellectual property,¹²⁸ and the problems of accommodating customary law notions in a legislative framework of Western concepts of individual ownership.¹²⁹ In addition to this last concern the Australian Copyright Council (ACC) listed the following issues raised by the problem of accommodation:

The creator of the material may not necessarily be the same person as the Indigenous custodian, and moral rights vest in the author whether or not they own copyright.

¹²⁴ See Banks, *op. cit.*, n78.

¹²⁵ Cited in *Our Culture: Our Future*, *ibid.*, p. 116.

¹²⁶ *Ibid.*, p. 116, citing, e.g. Film Australia’s submission to the report.

¹²⁷ *Ibid.*, p. 116, no submission cited.

¹²⁸ *Ibid.*, p. 116, citing Karen Brown, The Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October, 1997.

¹²⁹ *Ibid.*, p. 117, citing Australian Copyright Council Submission to the report, October, 1997.

Moral rights under the Bill last only as long as copyright.

Moral rights under the Bill are only granted in relation to copyright material. They will not apply, for example, to styles or techniques such as cross-hatching or dots and will often not apply in relation to the mere use or production of such items as the bull-roarer or didgeridoo.

The right of attribution, as drafted in the Bill, does not correspond with the suggested right of acknowledgement of sources raised in *Our Culture: Our Future*. Neither will it stop plagiarism or lack of acknowledgement of sources.

Insofar as distortion or mutilation is concerned, it is not clear that the nature of the right proposed for an Indigenous custodian would be the same type of right that falls within the right of integrity already listed in the Bill.

It is not clear that use of protected material contrary to Indigenous customary law will necessarily be an infringement of the right of integrity under the Bill.

Exceptions to the infringement of moral rights in the Bill will generally not be appropriate in relation to Indigenous cultural and intellectual material. See for example the exceptions in the Bill, which relate to whether the use of the material is ‘reasonable’ in terms of industry practice.¹³⁰

The ACC concluded by questioning the amendment approach and instead recommended the provision for protection of moral rights ‘in stand-alone

¹³⁰ *Our Culture: Our Future*, *ibid.*, p. 117, citing ACC submission.

legislation'.¹³¹ One solution, submitted by Tanya Aplin of the Asia Pacific Institute of Intellectual Property, Murdoch University School of Law,¹³² was to recognise in legislation an Indigenous community as a joint author in the work with the artist. This would make special use of the joint authorship provision of the act.¹³³ In addition to this, Aplin suggested protecting such joint ownership in moral rights in perpetuity to keep Indigenous knowledge out of the public domain.¹³⁴ She also suggested enabling Indigenous creators to assign moral rights to their Indigenous communities.¹³⁵

The ACC also submitted a response to the question, raised by the discussion paper, of an Indigenous collecting society.¹³⁶ It argued, however, that part V, A and B, of the *Copyright Act*, which provides for the collection of fees, does not constitute a good model for Indigenous purposes.¹³⁷ The provisions in VA and VB are compulsory licensing arrangements, which prevent authorial autonomy. A voluntary model under *sui generis* legislative and indigenous control could avoid such a compulsory scheme. The existing scheme is subject to tribunal decisions, which might make inappropriate decisions in the Indigenous context. An 'indigenous body comprised of Indigenous people',¹³⁸ under *sui generis* legislation, would be preferable. Parliamentary scrutiny, to which the general scheme is subject, may also not be suitable. In addition to these few, various other points were made, and the ACC concluded on this point as follows:

[t]he ACC does not feel that it is in the best interests of Indigenous communities either to lobby for changes to the Copyright Act, which would see either the establishment of blanket statutory licensing schemes, or to establish a collecting

¹³¹ *Ibid.*, p. 117.

¹³² Submission to Our Culture: Our Future, cited therein, *ibid.*, p. 118.

¹³³ *Ibid.*, p. 118.

¹³⁴ *Ibid.*, p. 119.

¹³⁵ *Ibid.*, p. 119.

¹³⁶ Ian McDonald, ACC Submission to, Our Culture: Our Future, cited therein, *op. cit.*, n75, p. 123.

¹³⁷ *Ibid.*, pp. 123-25.

¹³⁸ *Ibid.*, p. 124.

society which is subject to government control as envisaged under Part VA and VB of the *Copyright Act*.¹³⁹

Similarly, the submission from Screenrights noted that '[c]ompulsory licensing does not take into account circumstances where customary law would prohibit use'.¹⁴⁰ The National Parks and Wildlife Service (NSW) concurred with ACC that a voluntary arrangement would be preferable for similar reasons.¹⁴¹ Other submissions were made on the subject of collection arrangements in relation to 'defining Indigenous cultural works' and 'Indigenous cultural recording'.¹⁴²

The next issue addressed by the report under the heading of copyright amendment is performers' rights.¹⁴³ It was noted that performances only are protected and not the content therein.¹⁴⁴ The ACC again affirmed 'stand-alone' legislation to remedy problems of Indigenous performers' rights along with other indigenous intellectual property rights, but on this occasion it supported amendment of the Copyright Act as well, 'to upgrade them ... to a full performers' copyright'.¹⁴⁵ This amendment would apply to Indigenous and non-Indigenous performers alike.

The concluding section of the chapter of the report concerned with copyright reform is concerned with the appropriateness of amendment. This concern focused on the effects that Australia's obligations under the Berne Convention (and therefore the *Copyright Act*) would have on the question of the accommodation of Indigenous

¹³⁹ *Ibid.*, p. 125.

¹⁴⁰ Submission to, *Our Culture: Our Future*, October 1997, cited therein, *ibid.*, p. 125.

¹⁴¹ *Ibid.*, p. 125-6; submission to the report, October 1997.

¹⁴² *Our Culture: Our Future*, *ibid.*, pp. 126-7.

¹⁴³ *Ibid.*, p. 127.

¹⁴⁴ *Ibid.*, p. 127; observation referenced to I. McDonald (1997) *Protecting Indigenous Intellectual Property: A Copyright Perspective*, Redfern, NSW, Australian Copyright Council, p. 64.

¹⁴⁵ *Our Culture: Our Future*, *ibid.*, p. 129.

cultural and intellectual property by amendment.¹⁴⁶ The observation was again made by the ACC.¹⁴⁷ Under that convention Australia is bound to recognise the copyright of nationals of other countries. Amendments would need to reflect this protection and might thereby distort indigenous cultural and intellectual property protection. Another obligation is to copyright holders to the exclusion of others, such as Indigenous groups. The ACC noted that separate *sui generis* legislation would circumvent problems such as these.¹⁴⁸

With regard to amendment, the report made recommendations for a specific act in preference to amendment, one which recognises 'Indigenous cultural ownership' in Indigenous works and knowledge, which provides 'rights of prior consent and to negotiate rights for suitable use'.¹⁴⁹ The report also recommended the amendment of the Copyright Act, to:

...include moral rights for indigenous custodians which provide the Indigenous cultural group whose tradition is drawn upon to create a copyright work with rights of attribution, false attribution and cultural integrity.¹⁵⁰

Another recommendation was made that voluntary licensing arrangements, or a licensing system under specific legislation should be made for the collection of fees for the use of Indigenous cultural and intellectual property. (It is remarkable that the report fails to recommend a voluntary system under specific legislation.)

The authorisation of materials should be based on the premise of prior consent and rights should be given to the society under license rather than as an assignment of rights.¹⁵¹

¹⁴⁶ *Ibid.*, p. 130.

¹⁴⁷ McDonald, *op. cit.*, n3, cited, Our Culture: Our Future, *ibid.*, p. 130.

¹⁴⁸ *Ibid.*, p. 130.

¹⁴⁹ *Ibid.*, p. 131.

¹⁵⁰ *Ibid.*, p. 131.

Finally, the report recommended a full copyright for all performers, in which amendment would have to be subject to consultation with Indigenous people.¹⁵² The definition of ‘performers’, it was noted, requires for Indigenous purposes further consideration.¹⁵³

A Specific Act

The second and third parts of the report, *Our Culture :Our Future*, encompass, in terms of limitations and prospective reform, the *Copyright Act 1968*, the *Designs Act 1906*, the *Patents Act 1990*, the *Plant Breeders Rights Act 1994* and the *Trademarks Act 1995*, as well as breach of confidence laws and passing off. For the purpose of reform, according to one option, instead of amendments in all of these areas, such proposed amendments would be substituted by a single act, expressing a single category; this is the subject of Chapter Eighteen.¹⁵⁴ The problems of copyright, according to this approach of enacting new legislation, incorporating a new category of law, are to be resolved in an act that simultaneously resolves other Indigenous cultural and intellectual property issues. The legal object is new, a *sui generis* type of intellectual property. The following headings are the subdivisions of chapter eighteen, each related to the idea of specific legislation: ‘models’;¹⁵⁵ ‘appropriateness’;¹⁵⁶ ‘purpose’;¹⁵⁷ ‘scope’;¹⁵⁸ ‘active provisions’;¹⁵⁹ ‘structure’;¹⁶⁰ ‘authorised uses’;¹⁶¹

¹⁵¹ *Ibid.*, p. 131.

¹⁵² *Ibid.*, p. 131.

¹⁵³ *Ibid.*, p. 131.

¹⁵⁴ *Ibid.*, pp. 179-96.

¹⁵⁵ *Ibid.*, p. 179.

¹⁵⁶ *Ibid.*, pp. 179- 82.

¹⁵⁷ *Ibid.*, pp. 182-83.

¹⁵⁸ *Ibid.*, pp. 183-86.

¹⁵⁹ *Ibid.*, pp. 187-89.

‘possible remedies’;¹⁶² ‘exemptions and fair dealing’;¹⁶³ ‘relationship with intellectual property laws’;¹⁶⁴ ‘grace period’;¹⁶⁵ ‘codes of conduct’;¹⁶⁶ ‘further indigenous consultation/education’;¹⁶⁷ and ‘recommendations’.¹⁶⁸

The chapter begins by drawing attention to the fact that several models for the protection of Indigenous cultural and intellectual property already exist. It identifies as examples of these the UNESCO/WIPO Model Provisions for National Laws for the Protection of Folklore, The Tunis Model Law, and the Aboriginal Folklore Act Model of the Working Party Into the Protection of Aboriginal Folklore.¹⁶⁹ The report lists as ‘common features’ of these models:

- [A]llowance for cultural works ... not in material form.
- Rights should be recognised in perpetuity.
- [E]xceptions for customary [and other fair] uses ...
- [Prohibition of] [n]on-traditional uses of sacred/secret material ...
- [Prohibition of] [t]he debasement or mutilation of cultural material ...
- [Establishment of] [s]ystems ... to authorise prospective uses.¹⁷⁰

To the list of models could be added The Jalyinbul Statement (1993),¹⁷¹ the Mataatua Declaration (1993),¹⁷² and the IRG’s own Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People¹⁷³ which formed part of the report

¹⁶⁰ *Ibid.*, pp. 189-92.

¹⁶¹ *Ibid.*, p. 192.

¹⁶² *Ibid.*, p. 192-93.

¹⁶³ *Ibid.*, p. 193.

¹⁶⁴ *Ibid.*, p. 193.

¹⁶⁵ *Ibid.*, p. 194.

¹⁶⁶ *Ibid.*, p. 194.

¹⁶⁷ *Ibid.*, p. 194.

¹⁶⁸ *Ibid.*, p. 194-96.

¹⁶⁹ These were also discussed in more detail in Appendix Four of the report, *ibid.*, pp. 299-305.

¹⁷⁰ *Ibid.*, p. 179.

¹⁷¹ Appendix Five of the report, *ibid.*, pp. 306-10.

¹⁷² Appendix Five of the report, *ibid.*, pp. 310-13.

¹⁷³ Appendix One of the report, *ibid.*, pp. 273-77.

process; guidelines 20 to 25 of the IRG's draft are headed, 'National programs and legislation'.¹⁷⁴

Support from submissions for specific legislation, according to the report, mostly 'favoured the development of specific legislation rather than amending existing laws'.¹⁷⁵ This predominating view concurred with submissions in response to the earlier *Stopping the Rip-offs* Issues Paper.¹⁷⁶ The purposes suggested by those submissions were concerned with cultural preservation, protection of economic interests, acceptable use, prevention of offensive use and of non-traditional use of secret and sacred material and provision of a: 'framework for indigenous communities to control the use and benefit economically from the commercial exploitation of their arts and cultural expression'.¹⁷⁷ Among the submissions made with respect to purpose, but in addition to these topics, the Centre for Indigenous History (WA) said the specific legislation should enable Indigenous people to '[a]ccess and control their intellectual property which is contained in institutions, such as libraries, universities and museums'.¹⁷⁸ Various submissions on the scope of the legislation advocated a broad notion of Indigenous cultural and intellectual property spanning tangible and intangible, traditional and urban, cultural expression and biological knowledge, and encompassing traditional rights, communal rights, and rights in perpetuity.¹⁷⁹

Under the heading of 'Active provisions', Chapter 18.5, the report said:

¹⁷⁴ *Ibid.*, pp. 275-76.

¹⁷⁵ *Ibid.*, p. 181.

¹⁷⁶ Our Culture: Our Future, *Ibid.*, pp. 179-80 & 181; *Stopping the Rip-Offs*, *op. cit.*, n80.

¹⁷⁷ Our Culture: Our Future, *ibid.*, p. 182.

¹⁷⁸ Submission, October 1997, cited in Our Culture: Our Future, *ibid.*, p. 183.

¹⁷⁹ *Ibid.*, pp. 183-86.

[t]he general effect of the legislation would be to ensure that those who use or incorporate elements of Indigenous culture within their work would have to seek the full and informed permission of the relevant custodians.¹⁸⁰

To this it was added that legislation might empower traditional custodians to take civil action against the misuse of customary Indigenous cultural and intellectual property, as well as to provide prohibition against the use of ‘secret/sacred material’.¹⁸¹ The report draws attention to the relevant parts of the UNESCO/WIPO Model Provisions, which are concerned to prohibit through national laws, ‘unauthorised commercial use’, ‘misrepresentations of the source’, and ‘wilful distortion’ of expressions of folklore, as well as being concerned that defences to abuse of secret or sacred material be narrow.¹⁸² In response, the Centre for Indigenous History suggested expanding and clarifying the definitions of ‘misrepresentation of the source’ to encompass misrepresentation of the meaning, and for ‘wilful distortion’ to include ‘mutilation, debasement or presentation of Indigenous material in a manner which is offensive to indigenous peoples, including inappropriate and incorrect contextualisation’.¹⁸³ The Centre also advocated the addition of moral rights provisions and added that due to communal ownership of Indigenous cultural and intellectual property such rights should not be subject to a right of waiver.¹⁸⁴ ATSIC made a similar observation in relation to the subject of remuneration for the use of Indigenous cultural and intellectual property, through charging fees, in that, determinations of ownership, whether communal, individual or both, should be reflected in the distribution of remuneration.¹⁸⁵

¹⁸⁰ *Ibid.*, p. 187.

¹⁸¹ *Ibid.*, p. 187.

¹⁸² *Ibid.*, p. 187; UNESCO/WIPO Model, *op. cit.*, n169.

¹⁸³ Centre for Indigenous History, cited in *Our Culture: Our Future*, *op. cit.*, n75, p. 187; see n171.

¹⁸⁴ *Ibid.*, pp. 187-88; see n171.

¹⁸⁵ *Ibid.*, p. 188; citing ATSIC South Australia submission to the report, October 97.

The next section of Chapter Eighteen of the report refers to ‘Structure’, meaning administrative structure to accompany legislation, rather than the structure of the legislation itself. A centralised body, the report notes, would be troubled by the problem of ensuring customary authority in making determinations of one sort or another.¹⁸⁶ The Centre for Indigenous History submitted that:

A national body could be established, but it must liaise closely with local community organisations, arts centres, land councils, native title bodies, etc. It would act only as an advisory body to communities and groups and oversee the implementation of the Act (e.g. the Collecting society, registration of Certification Mark, etc.).

The national body should be composed entirely of indigenous people having a good knowledge of Indigenous Cultural and Intellectual Property, an understanding of the arts industry and arts practice. It is also important that members of the national body have experience with, and an understanding of contractual agreements, particularly in relation to long-term implications for the individual or group concerned.

It is also essential that the national body be accessible to all indigenous peoples in all states and territories in Australia (eg, have agencies in all the various regions across Australia, hold meetings in each region across Australia). The Indigenous Representatives must be selected from across all States and Territories across Australia.¹⁸⁷

There were three types of centralised system considered: a tribunal system, a statutory body, and specialist legal bodies.¹⁸⁸ A tribunal system would have the same advantage that tribunals in general share, efficiency through specialisation. A statutory body ‘could act as a go-between for Indigenous communities and potential users ... and

¹⁸⁶ *Ibid.*, p. 189.

¹⁸⁷ *Ibid.*, p. 189; see n172.

¹⁸⁸ *Ibid.*, pp. 190-92.

administer any relevant legislation'.¹⁸⁹ 'Specialist legal bodies' potentially covers a range of special legal avenues not covered by the tribunal or statutory body options. As one example, David Bennett suggested the 'ownership' of Indigenous cultural and intellectual property by foundations, which would be given the responsibility to distribute benefits to the appropriate Indigenous beneficiaries.¹⁹⁰ Other models suggested in the report were a trust and a company.¹⁹¹

The next question raised was concerned with who has authority to authorise non-traditional usage of indigenous cultural and intellectual property. The UNESCO/WIPO model had suggested delegating this responsibility to a 'competent authority', which would be representative of various Indigenous groups.¹⁹² This would seem to assume that contact with those groups is somehow better through such a representative authority. Another suggestion made by the report was a network of authorities. Legislation, the report contends, should enable Indigenous *groups* to take civil action including against cultural harm and should provide for criminal sanctions for 'flagrant' abuses.¹⁹³ New legislation should provide for fair dealing, but this may be inappropriate for 'sacred or secret material'.¹⁹⁴

On the subject of the relationship between a new act and the Copyright Act 1968 and other intellectual property legislation, the report stated that newly created rights 'would not be able to override any material in which copyright exists'.¹⁹⁵ The purpose of such legislation would be to extend the operation of copyright to Indigenous

¹⁸⁹ *Ibid.*, p. 190.

¹⁹⁰ *Ibid.*, p. 191; Bennett's Submission to Our Culture: Our Future, October 1997.

¹⁹¹ *Ibid.*, p. 192.

¹⁹² *Ibid.*, p. 192; UNESCO/WIPO Model, see n163.

¹⁹³ *Ibid.*, p. 193.

¹⁹⁴ *Ibid.*, p. 193.

¹⁹⁵ *Ibid.*, p. 193.

groups, and in time. Submissions supported the adoption of a grace period before any new legislation comes into effect.¹⁹⁶ The Australian Film Commission suggested that codes of conduct should be established by negotiation rather than legislation, and be overseen by a national body.¹⁹⁷ The report ended Chapter Eighteen by asserting that consultation with Indigenous people is necessary before enactment and education should address this end.¹⁹⁸

The First Six recommendations of twenty-one appended to Chapter Eighteen are here reproduced:

18.1 A *sui generis* (specific) legislative framework should be established to protect Indigenous Cultural and Intellectual Property Rights, including ecological knowledge.

Indigenous people prefer the introduction of one Act. However, if this is too broad to legislatively manage, or not feasible constitutionally, it might be possible to implement two or more acts which deal with the following:

- (a) Arts and cultural expression
- (b) Indigenous ecological (biodiversity) knowledge.

18.2 Any definition used in the legislation should be broad to allow for the above.

18.3 The legislation should provide protection for works that are intangible; there need not be a requirement of material form. Rights should exist in perpetuity.

¹⁹⁶ *Ibid.*, p. 194.

¹⁹⁷ *Ibid.*, p. 194; cited: Australian Film Commission Submission, January 1998.

¹⁹⁸ *Ibid.*, p. 194.

18.4 Any rights granted should ensure that there are no time limits on protection and no fixed form requirement for protection to be given.

18.5 The legislation should include provisions which:

- Prohibit the wilful distortion and destruction of cultural material;
- Prevent misrepresentations of the source of cultural material;
- Allow payments to Indigenous owners for the commercial use of their cultural material; provide special protection for sacred and secret materials.

18.6 The legislation should not inhibit the further cultural development of materials within their originating communities. That is, customary and traditional use should not be affected.¹⁹⁹

The concern of the relevant chapters on copyright in the report has been to expand the existing notion and operation of copyright for Indigenous purposes, primarily but not only to bring the copyright regime, or an alternative regime, into line with customary laws pertaining to the use of Indigenous cultural and intellectual property. Our Culture: Our Future has proposed, in Chapters Nine and Eighteen (legislative responses), three avenues of protection in respect of limitations of the *Copyright Act 1968*. The preferred approach to amendment to the existing Act was essentially or largely restricted to moral rights, performers' rights, and a body for the collection of fees (which, if voluntary, would not therefore require legislation). The preferred approach was for a separate act to encompass a broad conception of Indigenous cultural and intellectual property. This would seem to be a more efficient solution and

¹⁹⁹ *Ibid.*, pp. 194-95.

a less controversial means of bringing the law of the land into line with customary law and at the same time to allow sufficient scope for potentially non-customary actions on the basis of biological knowledge or other intellectual property types. Such an act, in not discriminating between types of intellectual object or types of practice, can best reflect and accommodate Indigenous cultural notions, which do not easily correspond with Western ones. Finally, both of these approaches may warrant some kind of administration by a special body; this may require a statutory foundation.

Conclusion

The law has recognised the copyright of the individual producer of a traditional Indigenous work. If, however, such a work does not satisfy the requirement of originality, there is no protection. The same can be said of intangible cultural material that is not reduced to a material form, and of material that is not of individual or joint authorship. Judges might distribute damages according to Indigenous traditions and may award damages for ‘culturally based harm’. An Indigenous artist may owe his or her community a fiduciary duty. In the absence of such an artist, and depending upon the facts, the community may be allowed some limited equitable protection.

Communities do not hold copyright in their cultural productions. No rights that are recognised are held in perpetuity. There are no guarantees. Successful protection of Indigenous cultural traditions instantiated in works of art is accidental to the purpose of the law. To remedy this, to give redress against violations of Indigenous *sui generis* copyright some security and uniformity, legislation is required. Amendment of the Copyright Act will not solve problems for related, broader areas of intellectual

property and Indigenous culture, without also amending other areas of the law. This would be cumbersome, unpopular, and very likely resisted, especially by the intellectual property legislators themselves, as they are only too familiar with the complexity and carefully accumulated rationality of copyright law. The amendment approach may also be somewhat incomplete, given Australia's obligations to international conventions, and to a uniform copyright regime in Australia. If a specific act, protecting a new category of Indigenous cultural and intellectual property were passed, these problems of accommodation could be overcome.

CHAPTER THREE:

NATIVE TITLE AND CULTURAL KNOWLEDGE

Introduction

When speaking of the legal accommodation of traditional Indigenous intellectual property a number of possibilities are raised. As a partial response, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for example could be amended to include intangible objects. If this, or a similar extension of some other existing category of law, required such extensive amendment as to warrant the construction of a new act, or even a new category of law, then that would be another approach. At some point in either of these approaches, or indeed in any other, the question of scope must arise, and to resolve this question, the nature of the object to be protected would have to be considered as fully as possible. At the heart of any such protection arrangement would have to be the collectively held, sacred, and intangible objects of the clan: the expressible content of the clan's totemic identity. What this has to do with native title, it shall be argued below, is that the 'bundle of rights' traditionally exercised by the clan included rights both in and of land and rights in the clan's corpus of ritual knowledge that were intimately related to those rights in and of the land. To consider the significance of the connection between native title and cultural knowledge for the question of the legal accommodation of Indigenous intellectual property satisfactorily requires a departure from the philosophical discussion undertaken in this thesis up to this point, and a return to where the thesis began, with the law.

The nature of the relationship between rights in land, and in ‘knowledge’, is, first, that both kinds stem from the same source of ancestral authority, and second, that each kind is grounded in the other. This latter point can be explained as follows. The tribal imagery, and the rights and responsibilities in relation to it, concern the clan ancestor and its activities and imperatives as recorded in tribal lore. These activities and imperatives are the clan ancestor’s creation and occupation of the sacred site, movement along the ancestral track, and the tribal behaviour required by the ancestor. From this perspective the intimate connection between land and cultural knowledge in the spiritual and political life of the tribe can clearly be seen. This was captured beautifully in the explanation given in evidence in the *Bulun Bulun* case.¹ After *Mabo*,² and especially in, and since, the *Bulun Bulun* case, this question of whether the common law can accommodate traditional Indigenous intellectual property has been raised. The most recent judicial response to this was provided recently in *Western Australia v Ward and Others*³ on appeal to the High Court, from the Full Federal Court.⁴ In the High Court the majority judgement held that ‘cultural knowledge’ is beyond the scope of native title.⁵ It is worth following the debates leading up to this discussion, as if native title must exclude traditional Indigenous intellectual property, then the bundle of rights exculpated from the traditional set in the construction of native title is, arguably, precisely the content of the very Indigenous intangible possessions at issue in this dissertation. Hence, if this argument is correct, native title, to the extent of its current recognition, and traditional

¹ *Bulun Bulun & Anor v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

² *Mabo v Queensland* (No. 2) (1992) 107 ALR 92.

³ *Western Australia v Ward & Ors* (2002) HCA 28;

⁴ *State of Western Australia v Ward* [2000] FCA 191; 99 FCR 316, or the *Miriwung-Gadjerrong Case* (2000) 199 FCR 316; and at first instance: *Ward & Others v The State of Western Australia & Others* (1998) 159 ALR 483.

⁵ *Op. cit.*, n3, Gaudron, Gummow, & Hayne JJ, & Gleeson CJ, pars. 57-64.

Indigenous cultural and intellectual property, which is largely not given legal recognition, are naturally complementary, as they form a whole, and therefore, native title and the story of the exclusion of cultural knowledge from it must form a backdrop to discussion of the possibility of the accommodation of Indigenous rights to cultural knowledge.

This chapter examines several legal cases comprising this debate as it took place in the courts. What is at issue here in this debate is crucial to the discussion in this dissertation. It has already been shown that the appropriate justification of the accommodation of Indigenous knowledge rights is dependent upon whether what is to be accommodated consists in a traditional or customary Indigenous category. What is under consideration in this dissertation is the translation of one institution into a new institutional framework. The native title cases that consider the possibility of the scope of native title extending beyond land rights have already constitute a relevant discussion. The judges in these cases have to varying degrees found themselves bound to consider whether customary Indigenous intellectual possessions are a part of the same structure to which rights recognised by native title also belong. Native title and ‘Indigenous intellectual property’ occur naturally together, i.e. in their own cultural environment. It may even be the case that this issue in the law has not finally been foreclosed. The majority judgement in the Ward case found the category claimed, ‘cultural knowledge’, too obscure.⁶ Perhaps a particular instance of such a category explicitly defined in the Bulun Bulun Case, would in Ward have met a different reception. The *Native Title Act 1993* (Cth) recognises successful applications ‘in

⁶ *Ibid.*, par. 58.

relation to land'.⁷ Clearly the traditional rights in intangible cultural objects are *prima facie* in relation to land. If they cannot be included decisively in the native title bundle of generic rights, then the project of arriving at this decision should help us to focus on what rights are excluded, if only by default, and therefore remain at issue. This intangible remainder, it will be shown below, is the *sui generis* object at issue in this dissertation.

In *Bulun Bulun v R & T Textiles*, the Ganalbingu people's rights in Mr Bulun Bulun's artwork were asserted by Mr Milpururru, as an incident of that tribe's native title to its traditional lands.⁸ The court, however, did not have the jurisdiction to make a determination on a native title claim. In *Mabo*, the floodgates of native title appeared to have been opened, only then to be narrowed by the *Native Title Act* and its 1998 Amendment.⁹ The cases relevant to the discussion below are the Croker Island Case,¹⁰ *Yanner v Eaton* (the crocodile case),¹¹ and the Ward case.¹² In the Croker Island case sea rights were asserted and won. In Yanner's case, the immunity of tribal members from prosecution for hunting juvenile crocodiles was established. In the Ward case, an extensive compound land claim was secured, the doctrine of partial extinguishment developed, and rights to minerals and cultural rights, denied. In these three last cases, cultural or spiritual activities were at issue for protection. Following these legal developments will help to establish the attitude of the law to 'rights in relation to land', insofar as such rights might be concerned with Indigenous cultural and intellectual possessions. Towards the end of this discussion it will be possible to

⁷ *NTA 1993* (Cth), s. 223.

⁸ *Op. cit.*, n1, p. 523.

⁹ *Native Title Amendment Act 1998* (Cth).

¹⁰ *Yanner v Eaton* [1999] HCA 56.

¹¹ *Commonwealth v Northern Territory; Yarmirr v Northern Territory* [2001] HCA.

¹² *Op. cit.*, n3.

determine the object at issue as a thing to be identified for accommodation in a new category of law.

The Capacity of Native Title to Support Indigenous Intellectual Property Rights

Stephen Gray has examined the criteria that would have to be satisfied if native title law were adequately to support Indigenous peoples' rights in their traditional art, as those peoples themselves understand it, i.e. as something beyond the scope of copyright.¹³ He considers the question of whether native title is excluded from protecting Indigenous intellectual property, listing seven criteria as follows. In order to succeed, Indigenous rights in art must be shown to have 'survived the acquisition of sovereignty', remain unextinguished,¹⁴ 'explain how ... native title ... [as] inalienable except to the Crown could in practice apply to indigenous rights to art ...',¹⁵ and 'consider what court could enforce such rights'.¹⁶ Further, such a project must address three questions: whether it might fracture a 'skeletal principle' of Australian law, whether such customary norms would only apply within communities, and whether the common law or statute would be the preferred vehicle for adequate protection.¹⁷

¹³ S. Gray (2000) 'Peeking Into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art,' *Griffith Law Review* 9(2): 227-47.

¹⁴ *Ibid.*, p. 229.

¹⁵ *Ibid.*, p. 229. Gray asserts at p. 241 that if Indigenous intellectual property were recognised as an incident of native title they would only be alienable to the Crown in accordance with s. 21 of the *NTA 1993* (Cth), and therefore an assignation of copyright would mean that the assignee would remain bound by Aboriginal tribal law.

¹⁶ *Ibid.*, p. 229.

¹⁷ *Ibid.*, p. 230.

Gray claims that two possible ways by which Indigenous intellectual property may have survived the acquisition of sovereignty are, first, the survival of such rights in the same way as rights to land are recognised,¹⁸ and, second, as an ‘incident’ of such rights to land, i.e. of native title.¹⁹ The problem with the former proposal is that there is lacking a common law or other criterion by reference to which judges could be expected to make determinations. Even if, as Gray argues, Indigenous criminal laws would duly be expected to survive the acquisition of sovereignty by the Crown, he admits that these would be applicable only to tribal offenders.²⁰ The problem for the accommodation of Indigenous laws is, however, not which would still operate, but which would be newly charged therein with a more general application. It is because Indigenous title can be threatened by the desire for land on the part of the general populace that it is worth protecting not only among Aboriginals, but also from the newcomers. Gray refers to the anthropologist, Morphy, to support the idea of an intimate connection between Indigenous art and land. An Australian tribal group’s paintings and its interest in land are each to be considered to have their origins in ancestral beings. The clan’s sacred site must be protected for the same reason as that for which tribal iconography must also be protected: both are associated with the ancestor. Gray claims that ‘[a] relationship of this type between art and land under particular Aboriginal laws is arguably sufficient to establish that the relevant laws are a “nature or incident” of Aboriginal native title to land’.²¹ While this view is intuitively attractive, as it seems to do justice to the ritual and political nature of Indigenous art, the truth is not so simple. Two Native Title Acts stand between Mabo

¹⁸ *Ibid.*, p. 231.

¹⁹ *Ibid.*, p. 232.

²⁰ *Ibid.*, p. 235.

²¹ *Ibid.*, p. 237.

and Gray's argument,²² and since the publication of the latter there have been some illuminating legal determinations. This is not to say that the matter is closed, but this approach will always be subject to the law in particular cases brought before it, unless legislation decides the matter one way or another. In short, traditional Indigenous art is often 'in relation to land or waters',²³ but not clearly as a body of rights *recognised* by Australian law.

Gray next tackles the questions of what a 'skeletal principle' is and when one is threatened. Brennan J in Eddie Mabo's case had determined that native title could not accommodate a fracture in a skeletal principle of law. Von Doussa J then suggested in Johnny Bulun Bulun's case that the separation of real property and intellectual property might be such a principle.²⁴ However, Von Doussa's J suggestion is too vague to be of constructive help, probably as the question was for him a side issue to what for him was the matter to hand. Gray then takes an unexpected turn based on the 'skeletal' nature of human rights in the present legal system, urging that 'the non-recognition of indigenous cultural and intellectual property rights is out of step with such international standards and laws'.²⁵ Indeed Kirby J argued something similar in his minority judgement in the 2002 Ward (Miriuwung and Gajerong) High Court Decision.²⁶ Von Doussa's J refusal to identify or combine in a single category real and intellectual property may not present a problem for the recognition of Indigenous intellectual property if it can be maintained that what is at issue here is not intellectual property as such, but, as in native title, something *sui generis*. This notion may be

²² *Native Title Act 1993* (Cth), and *Native Title Amendment Act 1998* (Cth).

²³ S. 223(1) *NTA 1993* (Cth)

²⁴ What in my opinion, on the other hand, Brennan J must surely have intended was that a principle on which the authority of a Court was based, namely the very sovereignty from which its authority derived, could not be questioned by that Court.

²⁵ *Op. cit.*, n13, p. 240.

²⁶ *Op. cit.*, n3; and see below.

further reinforced if it can be shown that the context of the Indigenous 'IPRs' is included within what has come to be known as native title.

The issue of extinguishment is said by Gray to be 'perhaps the most difficult barrier' to the recognition of 'Indigenous legal rights in art ...', 'particularly by the passage of intellectual property statutes ...'.²⁷ This was also the position of Von Doussa J in the *Bulun Bulun* case, who entertained the possibility of the continuation of Indigenous intellectual property in the absence of the reception of copyright law into Australia.²⁸ If however, as mentioned above, the Indigenous intellectual property must be considered as *sui generis*, then copyright must fall far short of replacing the 'parallel' rights by analogical subsumption. Gray notes that there is a 'clear and plain intention' test for extinguishment, one not altered by the *Native Title Act*.²⁹ He points to the judgements of *Yarmirr v Northern Territory*³⁰ and *Yanner v Eaton*³¹ regarding the extinguishment of native title, especially in regard to the possibility of regulation, rather than the complete extinguishment of rights. In relation to this, Gray finds that two other questions arise, although both inconclusively: could the reception of intellectual property entail the mere regulation of pre-existing Indigenous intellectual property rights? And is such recognition dependent upon the establishment rather than the extinguishment of native title to land in each particular case?³² Gray tries to demonstrate the possibility of the survival of copyright by Indigenous intellectual property so as to be independent of land rights *per se*; here he remarks on the *sui*

²⁷ *Op. cit.*, n13, p. 241.

²⁸ *Ibid.*, p. 242; *Bulun Bulun v R & T Textiles* (1998) 157 ALR 193 at 205.

²⁹ *Ibid.*, p. 242.

³⁰ (1998) 156 ALR 370 at 429; supplied in Gray, *op. cit.*, n13, p. 243.

³¹ (1999) 166 ALR 258; supplied in Gray, *ibid.*, p. 243.

³² Gray, *ibid.*, pp. 243-4.

generis nature of both Indigenous intellectual property and land rights.³³ Indigenous intellectual property is usually communal and usually sacral. The Indigenous connection to land as in the determination of native title is also characterised in this way. Gray also observes with regard to extinguishment the absence of a ‘clear and plain intention’ on the part of intellectual property statutes to extinguish Indigenous intellectual property, and concludes his discussion of extinguishment with the following important point relevant especially to considering the desirability of possible legislative approaches:

[I]t is possible that rights in art would not be extinguished where the community or group continued to uphold traditional laws relating to the use of works of art by reference to a continuing spiritual, although now legally extinct, connection with the land. This possibility suggests that it would be preferable for Aboriginal people to argue that their traditional rights in art continue to exist independent of native title rights in land, rather than as a nature and incident of such title.³⁴

An alternative of course is that traditional rights in art might be recognised as ‘incident[s] of native title’ so as to be independent of the recognition of rights in land. It can now be seen that Gray has argued cogently why traditional Indigenous cultural and intellectual property might not be excluded from common law recognition, on the basis of its survival of the acquisition of sovereignty and the reception of copyright, avoiding the fracturing a skeletal principle, and regulation rather than extinguishment.

³³ *Ibid.*, p. 244.

³⁴ *Ibid.*, p. 245.

Potential Native Title Grounds for Indigenous IPRs?

Gray has argued somewhat optimistically for non-exclusion of Indigenous intellectual property as an incident of native title. As an act preliminary to the establishment of such an object by legislation this is exactly what is required. What is required further to this end is a positive envisioning of the shape such legislation must take. Kristin Howden attempts just that in her article on, *inter alia*, the judicial treatment of ‘cultural knowledge’.³⁵ She says therein:

... I investigate the nature of physical native title rights, and argue that they are better understood as consequential upon, or flowing from, knowledge rights. As it is traditional knowledge which informs indigenous interactions with the land and environment, it is this knowledge which gives native title its character.³⁶

A bold claim, but one that goes to the heart of the present problem, in the sense that it attaches native title interests in land to Indigenous intellectual property, and does this in such a way as to make the former dependent upon the latter.

Howden asserts the *sui generis* nature of native title and its dependency upon only the traditional Indigenous rights and interests ‘in relation to land or waters’ as supported in s. 223 of the *Native Title Act 1993* (Cth) (NTA).³⁷ She puts flesh on her illustration by reference to *Yanner v Eaton*, which highlights the dependence of native title upon surviving practices by recognising a tribal ‘totemic’ right to catch and eat juvenile crocodiles as an incident of native title. Indeed, native title was according to the

³⁵ K. Howden (2001) ‘Indigenous Traditional Knowledge and Native Title,’ *University of New South Wales Law Journal* 24(1): 60-84. For the terminology ‘cultural knowledge’ see for example, p. 63. This term is used interchangeably with ‘traditional knowledge.’ ‘Cultural knowledge’ was the term adopted in all three of the Ward cases; see notes 4 & 5.

³⁶ Howden, *ibid.*, p. 61.

³⁷ *Ibid.*, p. 68.

majority judgement held to include ‘cultural practices’.³⁸ Similarly, Howden observes that in *Yarmirr v Northern Territory* rights to the seabed were recognised *inter alia* to ‘safeguard cultural and spiritual knowledge’.³⁹ Howden says that this right, among the others recognised at the same time, ‘confirms the unique and self-generating character of native title rights’.⁴⁰ Of Lee’s J recognition in the Federal Court of the ‘right to maintain, protect and prevent the misuse of cultural knowledge’⁴¹ in the *Ward v Western Australia* case at first instance, Howden says that: ‘This last right is a direct recognition of the ability of native title to encompass a general right of protection for traditional knowledge’.⁴² On appeal, the inclusion of a right in cultural knowledge as among those things ‘in relation to land’ was denied. Howden adds that in this decision the majority of the Federal Court ‘offered no real explanation for this finding’.⁴³ The Miriung and Gajerrong continued their pursuit of cultural knowledge in the High Court, which only delivered its judgement after the publication of Howden’s article.

Next Howden seeks to explain how she would attach Indigenous intellectual property to an interest in land. She sets out to do this by building up a connection between the particular nature of Indigenous land rights, Indigenous spirituality’s connectedness to land, and the manifestation of this spirituality as art, but with its connection to land intact.⁴⁴ On the third *NTA* requirement for native title, that the type of rights claimed for recognition be of a kind recognised by the common law, Howden returns to the *sui generis* nature of native title. This is followed by an acknowledgement of the majority decision of von Doussa and Beaumont JJ in the *Miriung and Gajerrong Case*,

³⁸ *Ibid.*, p. 69.

³⁹ Howden’s words, *ibid.*, p. 69.

⁴⁰ *Ibid.*, p. 69.

⁴¹ Lee J in *Ward v Western Australia* (1998) 159 ALR 483 at 640, cited in *ibid.*, p. 70.

⁴² Howden, *op. cit.*, n35, p. 70; appears in original in brackets.

⁴³ *Ibid.*, p. 70.

⁴⁴ *Ibid.*, p. 71.

when, following the majority decision in *Fejo v Northern Territory*, they excluded the protection of cultural knowledge from native title. Howden characterises this decision as ‘arbitrary’.⁴⁵ Presumably ‘arbitrary’ is in terms of its reasoning concerning a decision about the limitation of native title, and not referring to its legal derivation from *Fejo v Northern Territory*. What was specifically excluded in the *Miriuwung-Gadjerrong Case* was ‘... purely religious or spiritual relationships with the land’,⁴⁶ and cultural knowledge was there typified as ‘a personal right residing in custodians.’⁴⁷ What is really at issue here is that neither a purely religious or spiritual relationship, nor a merely custodial relationship, and therefore Howden’s characterisation of the judgements as arbitrary is fitting. Rather, what is at issue contains both a spiritual, or religious, relationship to the land, as well as a custodial arrangement as was demonstrated in Chapters Two and Five above. There is also a collective element, and the religious relationship to the land has not merely a spiritual but also an institutional quality. This fundamental character of the Indigenous politico-sacral object, or intellectual property, is surely not fully cognised by the Court when it addresses it as something vague and indeterminate. Howden comes close to asserting this herself when she says: ‘Where the [traditional] knowledge still exists and is used, it unquestionably connects indigenous communities to the land, and in fact *is* the link between indigenous people and the land’.⁴⁸

In the next part of Howden’s argument, she goes further by claiming that ‘... native title rights are, in essence, knowledge rights’.⁴⁹ She makes a connection between a

⁴⁵ *Miriuwung-Gadjerrong Case* (2000) 99 FCR 316 at 348; cited in *ibid.*, p. 73.

⁴⁶ Beaumont & von Doussa JJ in *Miriuwung-Gadjerrong Case*, *op. cit.*, n4, at 348; cited in Howden, *op. cit.*, n35, p. 73.

⁴⁷ Howden, *ibid.*, p. 73.

⁴⁸ *Ibid.*, p. 73.

⁴⁹ *Ibid.*, p. 74.

clan's specific territory or its hunting behaviour, and its schema of conceptual self-regulation, and tries thereby to show that land rights proper are sourced in intellectual possessions.⁵⁰ These possessions become traditional intellectual property when they are subject to rights and responsibilities as part of the same conceptually self-regulating, territorially oriented schema. What is difficult about this argument is its claim about why Indigenous intellectual property should be recognised as an incident of native title. At least it is clear that these are 'rights in relation to land', even if this was not made sufficiently clear to relevant courts. Pursuing protection in terms of 'cultural knowledge' probably did not help, as this term entirely misrepresents the significance of what is at issue. 'Relation to land' is present in this idea, but without properly articulating the function of 'rights' in this relation, the relation is vague and unpersuasive. Howden's approach to reconceptualise native title rights 'as knowledge rights from which flow physical rights'⁵¹ does not explain why those knowledge rights should be recognised as native title rights, or indeed as rights at all.

Howden believes with Gray that the skeleton of principle issue is most important. She believes in addition however that the skeleton of principle objection is the '... only significant obstacle to recognition of Indigenous knowledge rights which has been offered by the courts.'⁵² In fact, Howden claims that the skeleton of principle demands rather than prohibits such knowledge rights.⁵³ The principle itself comes from Brennan J in *Mabo* where his Honour stated that a legal determination would not

⁵⁰ She draws on D. Bennett (1996) 'Native Title and Intellectual Property,' *Native Title Research Unit Issues Paper* No. 10 Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies, cited in *ibid.*, pp. 74-6.

⁵¹ Howden, *op. cit.*, n35, p. 76.

⁵² *Ibid.*, p. 77.

⁵³ *Ibid.*

have authority if it ‘offends’ *inter alia* ‘equality before the law’.⁵⁴ Howden argues that equality before the law supports the case for the common law recognition of Indigenous knowledge rights as native title.⁵⁵ It should be noted that this argument is introduced by reference to Brennan’s J ‘balancing test’, as described by Howden:

In my opinion, Brennan J is suggesting that when a new principle is argued for (for example, the recognition of indigenous traditional knowledge rights as part of native title), if it conflicts with a fundamental principle (or principles) which can be identified as skeletal principles of the Australian legal system, then the general disturbance caused by overruling those fundamental principle(s), either generally or in a particular case, must be weighed against the potential benefits flowing from the recognition of the new principle.⁵⁶

Howden reasserts the argument made by Gray that the skeleton of principle problem (at least as described by Von Doussa J in the *Bulun Bulun* case), might be circumvented by recognising the *sui generis* nature of native title; it would not present a challenge to the fully received categories of copyright, or for that matter of land law. Howden’s equality approach to Indigenous knowledge rights from Brennan’s J principle runs as follows:

⁵⁴ *Mabo, ibid.*, pp. 29-30; Howden, *op. cit.*, n35, p. 77.

⁵⁵ Howden, *ibid.*, pp. 77-8.

⁵⁶ *Ibid.*, p. 77. In applying this ‘test’ to Indigenous intellectual property as a skeletal principle she goes on to say, also at 77:

In this section I will argue that if recognising Indigenous traditional knowledge rights is equated with upholding the fundamental principle of equality before the law (as I believed it can be), then any principles with which it comes into conflict must be weighed against the requirement of equality before the law – a balancing process that often (understandably) favours equality.

The quotation from Brennan J in which Howden claims to find the test, is, from *Mabo, op. cit.*, n53, at p. 30, cited in Howden, p. 77:

It is not possible, a priori, to distinguish cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

The reader can judge whether in these words it was reasonable to find a test that hinged on the relative fundamental importance of a rival skeletal principle. A ‘skeletal principle’ of our law is one that structurally beyond the capacity of the law to question.

recognising Indigenous knowledge rights is synonymous with ensuring the application of the principle of equality before the law. The current lack of protection of such knowledge – knowledge which lies at the heart of the survival of Indigenous communities – can clearly be contrasted with the protection afforded to non-Indigenous Australians, and reveals a disturbing inequality of treatment. Recognising this entails an investigation into the importance of the principle of equality to the integrity of the structure of our legal system, and a subsequent weighing of this against other structural principles which are identified in a particular case to determine which should prevail.⁵⁷

How much merit this idea has remains to be seen. It is not the same as recognising Indigenous intellectual property as grounded in traditional rights and responsibilities in relation to land. Rather Howden's ultimate position is to say that recognition should be derived from something external to the intangible objects and clan rights in them, as if, having already decided to cast Indigenous knowledge rights as the very source of native title, and therefore in relation to land by definition, she loses faith in the power of these *mardayin* (sacra) to speak for themselves, and relies instead on human rights concepts. Much more remains to be done to establish the exact nature of the connection between Indigenous intellectual property and native title as such. What is lacking, in both Gray's and Howden's arguments, is a thorough investigation of exactly this, which would provide a positive basis for the recognition of Indigenous intellectual property either at common law or in spite of it. This will be attempted in the following sections.

⁵⁷ *Ibid.*, p. 81.

The Ward Cases

The Claims at First Instance

The Miriung and Gajerrong native title claim extended from the coastal shore of far northern Western Australia, wound down then beyond Lake Argyle, and included a small incursion into the Northern Territory. The appearance of the case in the Federal Court⁵⁸ before a single judge was a result of the failure of the Aboriginal claimant and state parties to reach agreement, in compulsory native title mediation at the National Native Title Tribunal where the claimants had lodged a native title application. The claim in the courts was largely successful. As well, it produced some interesting developments in native title law. In particular Lee's J determinations proved decisive upon several matters that had until then remained unresolved areas of native title law. These included the issue of partial extinguishment, the exclusion of mineral rights from the bundle of rights that make up native title, the favouring of a bundle of rights approach over a *sui generis* approach, and, most relevantly for present purposes, the denial of the protection of 'cultural knowledge'. These matters were laid to rest in the High Court of Australia in 2002, but initially the claimants were more successful. It will be interesting and useful to follow the passage of the claims through the Courts, and the judicial responses to them. This will be important for understanding the High Court's rejection of 'cultural knowledge' in the context of the Ward native title claims, and its significance for the future of possible judicial and statutory approaches to Indigenous intellectual property.

⁵⁸ *Ward v WA* (1998) 159 ALR 483 (Lee J).

Three applicants brought the Miriuwung and Gajerrong case to the Federal Court before Lee J. The first applicants were the Miriuwung and Gajerrong people, who constituted a single claim. The second applicants were the Miriuwung and Gajerrong people in their constituent clans or ‘estate groups’. The third applicants were the Balangarra people who with the Miriuwung and Gajerrong people claimed simultaneous native title to Lacrosse Island (Boorroonoong). The claim in total was for native title to 7900 square kilometres, the greater majority of which occupied part of the Eastern Kimberly in north Western Australia and the remainder ran into the Northern Territory.⁵⁹ The respondents were the State of Western Australia, the Northern Territory, the Conservation Land Corporation, the Kimberley Land Council and various persons who pursue independent and, at the time of the claim, legitimate activities upon the claimed area. Significant issues raised by the claims presented in the case in relation to the law were the question of the appropriateness of the proposed native title holders (i.e. Miriuwung and Gajerrong or their composite clans, and the Balangarra), the question of extinguishment (i.e. Ward was to have been a test case for the bundle of rights theory of property as it applies to native title in particular), and the protection of cultural knowledge, for which the decision on the previous issue was to prove decisive. Ward was to have been a test case for this too. However, Lee’s J findings on these latter two important questions were to be reversed on appeal.⁶⁰ The denial of the second applicants’ claim was supported, and the success of the first applicant’s claims was maintained upon subsequent hearings. Subsequent hearings also maintained and confirmed the test case status of Ward, even with a different outcome and a different set of reasons. The judgement was largely the same for Ward

⁵⁹ *Ibid.*, at 489.

⁶⁰ See below.

to the extent that the first applicants retained native title to the bulk of the claim as recognised by Lee J, but certain legal issues were turned on their heads.

Lee's J Determination

The bulk of Lee's J extensive judgement went to the issue of extinguishment that was discussed under multifarious sub-headings, legal and practical. Lee J, drawing on Canadian as well as Australian law, followed the *sui generis* approach to native title as determined by Brennan J in *Mabo (No. 2)* before the Native Title Acts replaced common law native title, as well as the constitutional approach in *Delgamuukw v Crown*.⁶¹ In those cases native title was perceived to be a unique category of law whose contents, when recognised by the common law to exist in a particular instance, is to be determined by the laws and customs as a whole of the people in whom it is vested. From this Lee J determined that a declaration of native title could only be *in toto*, and could not therefore be extinguished. This presumably is why he found it appropriate to include in the list of rights he attributed to the Miriuwung and Gajerrong the right to preserve cultural knowledge. In fact, reasons for this inclusion are not otherwise forthcoming. It is easy, on his stated view of native title, to see why this right to the protection of cultural knowledge should be awarded, because if it constitutes a part of the traditional corpus of rights pertaining to land, being importantly in relation to land, it would also be native title. In addition to the general success of the claim for the Miriuwung and Gajerrong together and the Balangarra with the Miriuwung and Gajerrong in Lacrosse Island, certain instances of the

⁶¹ *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185. The legal context of this case is one where (in Canada) Indigenous rights are constitutionally recognised.

extinguishment of native title were also determined. These were uncontroversial, but seem to uphold the idea of partial extinguishment. Lee's J determination of native title for the Miriuwung and Gajerrong concluded that in addition to rights to 'possess, occupy, use and enjoy' land and 'maintain, protect and prevent the misuse of cultural knowledge', are the rights to 'access and control the access of others', and rights in relation to resources and places of importance.⁶² Determinations were also made about the relationship of applicant and Crown interests.⁶³

On Appeal: The Majority of the Full Federal Court⁶⁴

On appeal to the Full Court, the majority, consisting of Von Doussa and Beaumont JJ, acceded in part to the appellant's claim to reduce the total size of the award. In addition to this difference from the original judgement, they also overturned Lee's J decision on three important points: the application of the adverse dominion test, the rejection of the bundle of rights approach in favour of a more holistic approach to native title, and the right to maintain, protect, and prevent the misuse of cultural knowledge. In following the adverse dominion test Lee J was following Canadian law. Contrary to this, Beaumont and Von Doussa JJ followed the 'inconsistency of incidents test', recently affirmed in *Fejo*.⁶⁵ In the words of Rawlings:

The adverse dominion test does not require that if there is inconsistency between a grant and native title that native title should give way. Conversely, the fact that native

⁶² *Ibid.*, at 639-640.

⁶³ *Ibid.*, at 640.

⁶⁴ *State of Western Australia v Ward* [2000] FCA 191.

⁶⁵ *Fejo and Mills v The Northern Territory and Oilnet (NT) Pty Ltd* [1998] HCA 58.

title must give way, at least to the extent of the inconsistency, is a proposition inherent in the inconsistency of incidence test.⁶⁶

Importantly, Lee's J judgement had established that if native title is to be affirmed, then it is affirmed as a whole, and if extinguished, likewise it is extinguished as a whole. However, the majority of the Full Court held that native title is a bundle of rights, some of which can be extinguished by acts inconsistent with them, while others can be affirmed, unaffected by this partial extinguishment. To do otherwise would be to raise native title interests to common law rights, which they are not. Clearly, both the former point on adverse dominion and the latter on the affirming the bundle or rights approach contributed to facilitating the decisions that lead to the reduction in the size of the claim in the Full Court's decision on the decision of Lee J in the original jurisdiction. On the last remaining point, the most relevant to the present enquiry, the majority confined native title to '... rights and interests ... which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices'.⁶⁷ It would not be too hard to argue that it was Lee's J holistic approach that seemed to render the recognition of the protection of cultural knowledge reasonable. The Majority of the Full Federal Court found the notion easier to exclude with their piecemeal approach to native title.

The Minority of the Full Federal Court: North J

In defending native title against partial extinguishment North J reaffirmed the *sui generis* nature of native title, suggesting that this fact demands that native title be

⁶⁶ P. Rawlings (2000) 'Partial Extinguishment - The Next Step in the Recognition of Native Title: *State of Western Australia v Ward*,' *University of Queensland Law Journal* 21(1): 110-14, p. 112.

⁶⁷ *State of Western Australia v Ward* [2000] FCA 191 at par. 104; cited in *ibid.*, p. 113.

viewed from an Indigenous point of view, i.e. as traditional, not constructive, laws and customs. Then, as Rawlings says,

[a]fter analysing, on a general level aboriginal heritage and beliefs, his honour concluded that a community title is proprietary in nature and not made up of individual usufructuary rights, although the latter may exist in addition to the community title. As such partial extinguishment is not possible.⁶⁸

On the issue of the protection of cultural knowledge, North J supports Lee's original judgement. North contends that that judgement, affirming the protection of cultural knowledge as an incident of native title arising from the connection to land, was correctly based on the importance of the knowledge for the 'organisation of the community',⁶⁹ and the respect given by the community to the body of rules relating to such cultural knowledge. North drew heavily on the statement given in evidence at the original trial by the anthropologist, Mr Kim Akerman. Akerman's evidence asserted the 'intimate' connection between the community's knowledge and their land. North J said of this evidence that it:

... highlights how the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the rights to the land. Thus, the obligation to care for country has a secular aspect – burning the land – and a spiritual aspect – acquiring knowledge of ritual. The protection of ritual knowledge is required by traditional law. Traditional law treats both incidents of native title. There is no reason why the common law recognition of native title should attach to one incident and not the other. Because common law recognition is accorded the entitlement to land as defined by traditional laws and customs the contrary conclusion should follow.⁷⁰

⁶⁸ Rawlings, *ibid.*, p. 114.

⁶⁹ Lee J in Ward [1998] ALR 538; cited in Ward [2000] par. 864.

⁷⁰ *Ibid.*, par. 866

North J remembered the spiritual dimension as a valid element of native title as recognised in Yanner.⁷¹ He rejects the majority in the present appeal to the Full Court of the Federal Court and confirms Lee’s J original judgement on this point of Indigenous intellectual property as an incident of native title.⁷² North remarked that copyright is not an obstacle to the recognition of Indigenous intellectual property in the case before him, as it was for Von Doussa J in *Bulun Bulun v R & T Textiles*.⁷³

The Majority at the High Court⁷⁴

The original applicants were given leave to appeal, on several points of law, to the High Court of Australia against the majority decision of the Full Federal Court. The majority decision of the Full Court was upheld and the debates on extinguishment of native title continued. On the matter of the protection of Aboriginal cultural knowledge, the majority excluded the claim in a brief early discussion that shall be related here below. The majority judgement in the High Court (consisting of the joint determination of Gleeson CJ, and Gaudron, Gummow and Haynes JJ) said of the claim as to the protection of cultural knowledge that its initial difficulty, as a concept presented to the Court, is its apparent vagueness. ‘[I]mprecision’ was the term used at trial.⁷⁵ Indeed the ‘cultural knowledge’ is also exceedingly, disappointingly vague and imprecise. One can only speculate as to whether the claim would have had a more sympathetic hearing if it were defended upon the same scale as the more central and

⁷¹ *Ibid.*, par. 867

⁷² *Ibid.*, par. 868

⁷³ *Ibid.*, par. 869

⁷⁴ *Op. cit.*, n3.

⁷⁵ Majority, *ibid.*, par. 58: ‘The first difficulty in the path of that submission is the imprecision of the term “cultural knowledge” and the apparent lack of any specific content given it by factual findings made at trial’.

less controversial claims of the Miriuwung and Gajerrong native title claim. In the paragraph below, 59, it was recognised that a connection with the land was evidenced ‘to some degree’ in relation to laws, customs and ceremonies, but what was claimed was something more, ‘akin to a new species of intellectual property to be recognised by the common law under par (c) of section 233(1)’ of the *Native Title Act*. It was this lack in the claim for cultural knowledge in terms of what in fact was evidenced and not the issue of vagueness that proved decisive and was what the Court referred to as the ‘fatal difficulty’ for the claim regarding cultural knowledge. The joint judgement said,

... the essential point for present purposes is the requirement of ‘connection’ in par (b) of the definition in s. 223 (1) of the native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s. 223 (1).⁷⁶

Of the minority judgements, Kirby J alone gave special consideration that was sympathetic to the issue of cultural knowledge. It will be interesting therefore to consider his reasoning, if only to gain a better insight into what the majority left out.

Entertainment of the Protection of Cultural Knowledge by Kirby J

Kirby J sought avenues of accommodation in human rights law,⁷⁷ in s. 116 of the constitution,⁷⁸ and deliberated upon the question of whether the accommodation of Indigenous peoples’ rights in their cultural knowledge would fracture a skeletal

⁷⁶ *Ibid.*, par. 60.

⁷⁷ The human rights ‘convention’ referred to was the Draft UN Declaration on the Rights of Indigenous Peoples; at *ibid.*, par. 581.

⁷⁸ Freedom of religion.

principle of the common law of Australia.⁷⁹ Most interestingly and importantly, however, he determined that the Indigenous cultural evidence in relation to the internal requirements of native title provided sufficient reason for the protection of Australian Indigenous peoples' rights in their cultural knowledge. He agreed with the majority justices in their objection to the lack of clarity of the claim.⁸⁰ He said, however, that '... it includes many elements, such as restricting access to certain sites or ceremonies and restricting the reproduction of other artworks or other images'.⁸¹ He commented on the sometime importance of secrecy and its significance for native title claims for the tribal protection of cultural knowledge. He then identified as the 'critical threshold question' for the success of this particular claim, the meaning of right or interest 'in relation to' lands and waters.⁸² Kirby J defined this as a '... real relationship, or connection, between the interest claimed and the relevant land or waters'.⁸³ The majority had rejected this claim to protect cultural knowledge on the basis of it being not of a type of right normally associated with property in land, without explaining why this provided a sufficient criterion for exclusion, i.e. why a *sui generis* right should be limited on these terms.

Kirby J is keen to point out the *sui generis* nature of the form of Indigenous life that is recognised in native title,⁸⁴ the breadth of its scope that is seen as cultural knowledge,⁸⁵ and the near identity of a core part of a *sui generis* conception of Indigenous peoples' rights to land, and cultural knowledge.⁸⁶ This theme of cultural

⁷⁹ *Ibid.*, pars. 583-5.

⁸⁰ Kirby J at *ibid.*, par. 576.

⁸¹ *Ibid.*, par. 576.

⁸² *Ibid.*, par. 577.

⁸³ *Ibid.*, par. 577.

⁸⁴ *Ibid.*, par. 578.

⁸⁵ *Ibid.*, par. 579.

⁸⁶ *Ibid.*

knowledge as ‘related to land’ for the purpose of statutory requirements is then developed in relation to the statutory concept of ‘connection’.⁸⁷

It has been accepted that the connection between Aboriginal Australians and ‘country’ is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their ‘country’. In evidence, the Ningamara appellants described the ‘land-relatedness’ of their spiritual beliefs and cultural narratives. Dreaming Beings located at certain sites, for example, are narrated in song cycles, dance ritual and body designs. If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land according for the purposes of the NTA.⁸⁸

Kirby supports this in law by reference to *Yanner v Eaton*, in which the social context of native title was affirmed, and to the NTA, s. 223 (1) itself, as a right ‘in relation to’ land, and to the preamble of that Act asserting the purposes of the Act to include ‘the *full* recognition of the rich culture of Aboriginal peoples and the acceptance of the “unique” character of native title rights’.⁸⁹ Kirby J has thus found the same grounds for including cultural knowledge as the object of a native title right as the other justices have for excluding it. Either cultural knowledge is held as a right or custom in relation to land or not. Why then have Lee, North and Kirby JJ held out?

⁸⁷ *Ibid.*, par. 580.

⁸⁸ *Ibid.*, par. 580.

⁸⁹ *Ibid.*, par. 581.

The Remaining Scope for Common Law Protection, and Native Title as a *Sui Generis* ‘Model’ for Legislation

Lee, North, and Kirby JJ tried to accommodate respectfully the Indigenous institutional basis for native title as a *sui generis* whole. The remaining judges of the majorities and minorities trod a more cautious path. Despite the majority on ‘cultural knowledge’ in *Ward* at the High Court, a similar claim, put in more certain terms, might be successful in the future, but for the fact that the majority has determined that native title is at present limited to rights in land, and does not extend otherwise in relation to land. The majority said at par 59 that ‘[t]he “recognition” of this right would extend beyond denial or control of access to land held under native title’. This decision is unlikely to be overturned by members of the same Court, unless grounds are found which sidestep the decision in some novel way. Those with an interest in the recognition of Indigenous intellectual property must surely now look to legislation. The question is then, what would such legislation contain? The answer is to be found, at least in part, in the claims and evidence presented to Courts. One such piece of evidence not yet considered in this dissertation on its own terms is the evidence of anthropologist Mr Akerman.⁹⁰

Akerman establishes the connection of cultural knowledge to land concepts and connections, by explaining its nature. The following is considerably reduced in length from the extract presented by North J.

The association with particular tracts of country whether acquired patrilineally or matrilineally, as country or site or conception or birth, of adoption or long term residency, or as a regent infers that one has certain rights to that country and

⁹⁰ *Western Australia v Ward* (2000) North J, at par. 865.

obligations of both sacred and secular import, both to the country and the group, that must be fulfilled.

* * *

From a religious perspective the acquisition of knowledge concerning the metaphysical rationale of the landscape is perhaps the primary way in which an individual can be perceived as caring for country. This acquisition takes place from an early age. Children are taught 'open' versions of the myths associated with their locale in much the same way as Christian toddlers are introduced to bible stories. As a child grows the stories are placed in a topographical perspective which validates both the mythology and the bond between the Dreaming, the child and the land. A youth, in the course of initiation into manhood and induction into the religious life of his cultural group, acquires deeper knowledge of the events of the Dreaming, particularly those with which he is directly associated with. He is also taught the rituals and associated songs that he will ultimately have primary responsibility for. As well as acquiring knowledge directly related to his patrilineal estate; religious knowledge relating to other country and people with which he may be associated with through kin ties, or with whom he shares elements of the dreaming in common are also learnt. The acquisition of ritual knowledge including sacred objects may be seen as an introduction to, and an affirmation of, an individual's right to belong to a body corporate that is associated with, through various religious and social links, certain tracts of land. Sacred objects are often described to non-Aboriginal people as 'Title-Deeds', the possession of which ratifies the owners' claim to and association with, a particular country.

* * *

A cursory glance at the site lists and records amassed over the past decade or so clearly indicates that the majority of Miriuwung and Gajerrong sites recorded can be considered to be of a religious nature ... Of these sites, many are documented as being ritually significant, they being celebrated or referred to in one or other of the

major religious cult rituals of the Miriwung and Gajerrong. The ownership of these sites and the songs and rituals associated with them can possibly be considered the most valuable ‘property’ that one can possess. The acquisition of these bodies of knowledge must be paid for by the novice and transmission is not lightly undertaken. The person who holds such knowledge may legitimately display that knowledge at the appropriate time to his religious peers with the approval of his seniors. He will in time become a senior himself with the responsibility of deciding on maintaining the continuity of transmission of that knowledge to appropriate individuals who have demonstrated a maturity that indicates that the knowledge is in safe hands.⁹¹

In so far as Aboriginal cultural knowledge is held in terms of rights and responsibilities such as those mentioned in the last two sentences of the previous extract, these rights and responsibilities are certainly rights and responsibilities in relation to land, as this knowledge so held *is* itself the very connection to land. If these rights and responsibilities remaining after the recognition of native title by the common law and the legislative regime that followed are also to be protected in legislation, then the impression left by that *sui generis* legislation will fit exactly its negative image in the regime of native title law, from which it was severed in 2002. It is easy to see why the sympathetic judiciary hoped for the inclusion of cultural knowledge in native title, but less easy to comprehend why the majorities in the Full Court of the Federal Court and the High Court found it so easy to reject this.

Legislation, ironically, would have to represent the object of Indigenous cultural knowledge or intellectual property as rights and interests in relation to land. It would need to contain everything that native title contains: connection to land, the religious nature of that connection, the political identity of the group with the land and its ritual

⁹¹ *Ibid.*, par. 865.

knowledge, cultural continuity pre- and post-acquisition of sovereignty, traditional laws and customs, connection to sacred places and things, connection to ceremonial, painting, hunting, fishing, sea and land rights, and the stories, songs, ceremonies and pictures that make up the traditional knowledge that is at the heart of 'native title', but excluded from its recognition at law. It would seem that native title and Indigenous cultural and intellectual knowledge will be mutually exclusive and mutually complementary areas of law, albeit different statutory and common law concepts. The fractured unity that this creates, one originally discouraged by the statutory concept of native title, is the result of there now being two parts of native title, recognised and unrecognised, physical and spiritual. Native title and Indigenous intellectual property are two sides of the single *sui generis* coin of the traditional set of Indigenous institutions. Each face of this coin has a legal and yet fictitious incarnation as separate. Rather than risk a bungling of the legislative reconstruction by analogy, of the unrecognised, spiritual remainder of the *sui generis* category of native title, it might be prudent not to replace Indigenous collective rights in intangible, sacred objects with supervening rights, but instead to legislatively re-enable existing rights, having first established what they might be expected to be.

Conclusion

Malcolm and Meyers see the majority from the High Court of Australia as indicative of a judicial reluctance to acknowledge Aboriginal sovereignty prior to the acquisition

of sovereignty by the Crown.⁹² In other words, those majority judges were, on Malcolm and Meyers's account, failing to recognise Indigenous title as *sui generis*, whole, and encompassing rights and concepts beyond what would normally belong to Western land title, or property of any kind, and as they are found in traditional, Indigenous societies. The question of 'good law' aside, the common law accommodation of Indigenous society and spirituality as native title emasculates at the same time as it accommodates Aboriginal society, by denying its spiritual core and its coherence. Native title acknowledges the shell of Indigenous society. Perhaps that is all it was meant to do, but in taking into account Aboriginal ritual knowledge for its (albeit separate but complementary) accommodation, it must be borne in mind that it is the core of tribal life. The surest way to protect Indigenous knowledge rights is to attach them explicitly in legislation to native title concepts, to land, to the people attached to that land, and to all those things to which Indigenous knowledge and Indigenous knowledge rights are attached. *Mardayin* (sacra) should be included in this, as should stories, songs, cultural information, explicit rights, interests, iconography, clan pictures, secrets, and interpretations. Procedural aspects should cover consent, prosecution, mediation, negotiation, native title issues, and biodiversity and plant knowledge, especially where not already covered. Non-customary objects should also be dealt with. Traditional law, as in native title, provides a model for its recognition as itself that is also not an external, analogical model, and avoids the pitfalls of external models. A new act must 'recognise' rather than create rights.

A much more immediate problem than the common law's capacity to accommodate some notion of Indigenous cultural knowledge is the nature and existence of cultural

⁹² R. Malcolm & G. D. Meyers (2003) 'Native Title Rights and the Protection of Indigenous Cultural Knowledge,' *Intellectual Property Forum* 50: 12-22, p. 17(c. i).

knowledge and its relation to other Indigenous institutions. It is because native title is both tied to cultural knowledge and a part of the customary set of rights and obligations that it takes its legitimate place in the debate on the accommodation of Indigenous cultural and intellectual property. That part of that debate on the traditional side of Indigenous cultural and intellectual property requires the cooperation of lawyers, anthropologists, and Indigenous and non-Indigenous political representatives. This is due to the fact that traditional objects need to be securely placed at the heart of any attempt to protect Indigenous cultural and intellectual property on a broader footing. Another opportunity for the respectful protection of Indigenous culture and laws ought not to be allowed to slip away. The short history of ‘cultural knowledge’ in the High Court of Australia could not fail to provide lessons.

CHAPTER FOUR:

THE NORMATIVE ENVIRONMENT OF YOLNGU ART

Introduction

In its survey of Indigenous tribal evidence led in court, Chapter Two more than hinted at the institutional nature of Indigenous property. It was evidenced in that chapter for example that Indigenous knowledge as secret and sacred is subject to intra-tribal rules of a conventional, cultural nature.¹ This sounds like an institution. It will be a task of this chapter to flesh out that evidence by reference to anthropology. Within the social parameters of the Yolngu (and also Central Desert peoples),² discussed in the first part of Chapter Two the nature of traditional Indigenous intellectual property will be established, as well as the significance of this for its accommodation in Australian law.

There is an international literature of legal anthropology, which makes general points about worldwide tribal law and which might be appealed to here.³ However, focusing on the normative context of Yolngu art gives a relevant localisation to the present chapter. The points made here will be limited in terms of this focus, provided in part

¹ See the discussion of *Yumbulul v Reserve Bank* (1991) 21 IPR 481, *Milpururru v Indofurn* (1994) 130 ALR 659, and especially *Bulun Bulun v R & T Textiles* [1998] 41 IPR 513, in which customary evidence constituted part of the proceedings in each case. In the latter case, the second applicant asserted ownership on behalf of the tribe to which both he and the first applicant belonged. Evidence was presented there for collective and custodial ownership of ritual, intangible objects.

² Claimants in the cases discussed in Ch. 2, see *ibid.*, included some Indigenous artists from the Central Desert area, in *Milpururru v Indofurn*, *ibid.* However, the present enquiry will be restricted largely to the Yolngu (of Arnhemland), for the sake of unity, to reflect the availability of anthropology of relevant scholarship, and to represent the geographical majority of claimants.

³ E.g. N. Rouland (1994) *Legal Anthropology*, London, The Athlone Press; S. Roberts (1979) *Order and Dispute: An Introduction to Legal Anthropology*, Harmondsworth, Penguin.

by the cases presented in Chapter Two. A more general study of Australian Indigenous art would have advantages over the present approach, but it would suffer disadvantages also. A broader approach would make its case for more people and more peoples, but it would also suffer from its very generality, in that it would be weaker in its representation of the specifics of tribal life, rules, ritual, and related art practices.

The structure of the chapter is as follows: First, the origins of Australian social anthropology are introduced with the purpose of elucidating the debates behind present theories of Indigenous culture. Next the Yolngu are introduced as an Aboriginal people about whom there is a recent body of anthropological work focusing upon their traditional law, religion and art. The Yolngu feature significantly in the political history of relations between the Australian government and Indigenous peoples; they featured in the discussion of copyright in Chapter Two above. Yolngu society is described in terms of its internal structure and functioning, and Yolngu art is introduced into this context. Then this traditional art practice is described from the perspective of its components. These components are shown to have normative cultural significance, as well as religious, political and other kinds of collective significance. Indigenous traditional art is shown to have a social function, which is rigidly determined by and couched in cultural norms. These norms are discussed with a view to understanding them as constituting law. Ideas of the political and the constitutional are drawn into this discussion, using a minimal definition of law.

Background: Anthropology

Indigenous peoples had been the subject of philosophical, legal and theological debate since Europe's discovery of the Americas. It was not until the mid-nineteenth century after the 1832 Marshall decision in the United States⁴ that Indigenous or tribal peoples became the legitimate subjects of systematic legal scholarship.⁵ Legal scholarship on the subject has continued well into the twentieth century.⁶ In the twentieth century it was met by a new kind of scholarship professing to be the natural discipline of tribal life, represented by Boas, Durkheim, Malinowski, Radcliffe-Brown, Evans-Pritchard and Levi-Strauss, which came to be known as ethnography and as social or cultural anthropology. Australia is well represented by these disciplines, first by interested amateurs and proto-anthropologists⁷ in the mid-nineteenth century who, were inspired by and contributed to the work of the American ethnography-writing jurists, Morgan and Maine,⁸ and, latter, Durkheim⁹ and Malinowski.¹⁰

Before the publication of Maine's celebrated *Ancient Law*,¹¹ Lewis Henry Morgan's oeuvre on Amerindian law-ways and life was already substantial.¹² Morgan's findings

⁴ *Worcester v Georgia* 6 Pet 515 (1832), in which the political status of Indian tribes in the US was famously recognised, in the judgement of Chief Justice John Marshall of the Supreme Court.

⁵ E.g. L. Morgan (1851) *League of the Ho-de-no-saw-nee, Iroquois*, Rochester, Sage, & H. Maine (1876) *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*, London, Murray.

⁶ E.g. K. Llewellyn & E. Adamson Hoebel (1941) *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, and E. Adamson-Hoebel (1954) *The Law of Primitive Man*, Cambridge, MA, Harvard University Press.

⁷ L. Fison & A. W. Howitt (1880) *Kamilaroi & Kurnai: Group-Marriage and Relationship, Marriage and Elopement*, Melbourne, George Robertson, and see for example the account of these pioneers in relation to the group marriage debate in L. R. Hiatt (1996) *Arguments About Aborigines: Australia and the Evolution of Social Anthropology*, Cambridge, Cambridge University Press, pp. 41-4.

⁸ See Maine & Morgan, *op. cit.*, n5, and Llewellyn & Hoebel, *op. cit.*, n6.

⁹ E. Durkheim (1915) *Elementary Forms of the Religious Life*, London, Allen & Unwin.

¹⁰ B. Malinowski (1913) *The Family Among the Australian Aborigines: A Sociological Study*, London, University of London Press.

¹¹ *Op. cit.*, n5.

concerning Iroquois kinship structure, binding together five tribes, were thought by Morgan and others to have parallels with the kinship structures of the Ojibwa, the Tamils, and among Australian tribes, the Kamilaroi and Kurnai.¹³ These findings led to speculation that early human kind had practiced a kind of group marriage or polyandry, and that these practices were represented in residual form in some contemporary tribal societies.¹⁴ Reasons for the belatedness of the attention to Indigenous cultural forms, institutions and peoples relative to the discovery and settlement of Australia, were that the customs of Australian Indigenous society were invisible to many Europeans who settled here.¹⁵ Knowledge seeped through the colonial edifice to such an inadequate degree as to prevent the formation even of a notion of Indigenous societies as wholes. Prejudice existed against the construction of such a notion, as in Australia at that time the acquisition of lands from the Indigenous population was still occurring. Earlier, Australian jurists and others were aware of the rudiments of a ‘customary law’ (and Indigenous connection to land), and some puzzled over the proper relation between the two forms, Indigenous law and the ‘British’ law that was ‘received’ into Australia, but such upsets soon abated.¹⁶ Once the internal social nature of Australian Indigenous peoples was raised in an international scientific forum by Morgan’s research, based in part on the work of

¹² Including: *League of the Ho-de-no-saw-nee, Iroquois*, *op. cit.*, n5; (1871) *Systems of Consanguinity and Affinity in the Human Family*, Washington, Smithsonian, (1872) ‘Australian Kinship, from an Original Memorandum of Reverend Lorimer Fison,’ *Proceedings of the American Academy of Arts and Sciences* 8: 412-38, & (1964 [1877]) *Ancient Society: Researches in the Lines of Human Progress From Savagery Through Barbarism to Civilisation*, Cambridge, MA, Harvard University Press.

¹³ Hiatt, *op. cit.*, n9: for Ojibwa & Tamils, p. 38; & for Fijians & Australians, p. 41.

¹⁴ Hiatt, *ibid.*, Ch. 3, ‘Group marriage’; re: McLennan &c., see esp. pp. 38-41.

¹⁵ ‘[B]elated’ e.g. the New World and its peoples were discovered in and discussed from the year 1492, and NSW itself was annexed on behalf of the Crown 101 years before the publication of Morgan’s *Systems of Consanguinity and Affinity in the Human Family*, *op. cit.*, n12.

¹⁶ For an interesting commentary on this period, see H. Reynolds (1969) *Aboriginal Sovereignty: Reflections on Race, State and Nation*, Sydney, Allen & Unwin. Customary Indigenous law is viewed here through a history of British law and policy in Australia.

Fison and Howitt,¹⁷ there was no turning back. The subject was vitally interesting, in an era that produced both Frazer's *Golden Bough*¹⁸ and practical ethnography.

Australian religion and kinship caught the attention of Durkheim and Malinowski, who each wrote significant works on the subject.¹⁹ Analysis of the complexities of kinship has continued to the present, as kinship patterns vary from tribe to tribe as well as within tribes and language groups. However, one feature is general: tribal kinship structure is determined by and embodies customary norms, and breaches, when they occur in traditional society, are subject to sanctions.²⁰

The Yolngu have been in the public eye since early last century, when missionary activity as well as fishing and livestock enterprises penetrated Arnhem Land. By the mid-century this encroachment included mining interests, which in turn led the people of Yirrkala to their second nationally prominent act, a court action, *Milerrprum v Nabalco*,²¹ asserting ownership of their traditional lands against the activities of a mining company. It was the first such action in Australia. The applicants were unsuccessful, and it was held by Justice Blackburn that the common law recognised no traditional rights to land as had been claimed by the Yolngu. The principle in this case was eventually overturned in the Mabo case (No. 2).²² The Gove land rights case, as *Milerrprum v Nabalco* is known, has been described above as the second public act of the Yolngu, because there was a previous public act, a petition in 1963 against the proposed mining of their traditional territory for bauxite. The partition was significant

¹⁷ E.g. 'Australian Kinship, from an Original Memorandum of Reverend Lorimer Fison,' *op. cit.*, n12.

¹⁸ J. Frazer (1936 [1890]) *The Golden Bough: A Study in Magic and Religion*, London, MacMillan.

¹⁹ Durkheim, *op. cit.* n7; Malinowski, *op. cit.*, n8.

²⁰ Documentation for this, of various kinds, is supplied in the course of the chapter. Generally, traditional Indigenous collective cultural rules affect kinship, authority, crime and punishment, art, knowledge, territory, land, ceremony and potentially every other aspect of daily and occasional life of Indigenous tribal people.

²¹ (1970) 17 *FLR* 141; alternatively known as the Gove land rights case.

²² *Mabo v Queensland* (No. 2) (1992) 107 ALR 1.

not just as an early assertion of Indigenous traditional rights, but also in that the petition was bilingual, in English and Gumatj, and it was framed in traditional bark painting.

Two copies of the actual petition were made and then each was pasted to sheets of bark around the borders of which were painted designs of the Dhuwa and Yirritja moieties respectively. The genius of the bark petition was that it introduced Aboriginal symbolism into parliamentary discourse, making it harder for Europeans to respond in terms of their own cultural categories.²³

This was a strategy that was repeated in the 1988 Barunga Statement. Although the direct objectives of the 1963 petition were unsuccessful, as was the Gove land rights case, the publicity received by Northern Territory Indigenous groups eventually led to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwth), an act that was to operate to the full extent of the power of the Commonwealth of Australia at the time, a jurisdiction restricted to the Northern Territory of Australia.

The Bark Petition and the Barunga Statement show the Yolngu in their two public faces, the political and the artistic. The Yolngu are one of the peoples of the north coast of the Northern Territory whose art practices are traditionally based. Tending to be figurative, Yolngu art often incorporates techniques and styles characteristic of that group, such as *rarrk* (crosshatching) and x-ray designs (graphic representations of internal organs and skeletons of complete animals, humans and spirit forms).

Although the Central Desert group was represented (in the minority) in the Carpets case,²⁴ it is the Arnhemland group to which the Yolngu belong, and which will be the subject of the remainder of the present chapter. The north coast people of the

²³ H. Morphy (1998) *Aboriginal Art*, London, Phaidon., p. 254.

²⁴ *Milpururru v Indofurn*, *op. cit.*, n1.

Northern Territory represented the majority of applicants in the Carpets case,²⁵ as well as all three applicants in the Banknote²⁶ and Tee-shirts cases.²⁷ Also, these people are better represented in the relevant anthropological literature of tribal art, religion and law, in such excellent works as those by Morphy,²⁸ Keen,²⁹ Williams,³⁰ and Taylor.³¹

Some generalisations can be made about 'Aboriginal law'. Such law exists; it is related, through the collective consciousness of each tribe, to their common myths; the tribe's relationship to land is determined in its specificity in this law and myth; the land of one moiety (totemic division of the tribe into two complementary parts; also known as 'skin') is not that of the other (the complementary moiety); and all of these connections are manifested in artistic productions from the purely ritual to the deliberately marketable.

There are many ways in which the Yolngu typify traditional Indigenous Australian society and many ways in which they do not. One practice not shared with their Kunwinjku neighbours, for example, is the ritual painting of mortuary boxes.³² The Kunwinjku have a particular affinity with the *mimih* spirits of the rocky country they

²⁵ The remainder were all from the central desert area, see *ibid.*

²⁶ *Yumbulul v Reserve Bank*, *op. cit.*, n1.

²⁷ *Bulun Bulun v R & T Textiles*, *op. cit.*, n1.

²⁸ H. Morphy (1991) *Ancestral Connections: Art and an Aboriginal System of Knowledge*, University of Chicago Press, London; (1998) *Aboriginal Art*, *op. cit.*, n23; (1998) 'The Art of Northern Australia,' *Traditional Aboriginal Society*, W. H. Edwards, Ed., Melbourne, Macmillan Education Australia; (2000) 'Elite Art for Cultural Elites: Adding Value to Indigenous Arts,' *Indigenous Cultures in an Interconnected World*, C. Smith & G. Ward, Eds., Sydney, Allen & Unwin. This selection represents an array of Morphy's work from professional anthropology to more general and occasional works.

²⁹ I. Keen (1994) *Knowledge and Secrecy in an Aboriginal Religion*, Melbourne, Oxford University Press.

³⁰ N. M. Williams (1987) *Two Laws: Managing Disputes in a Contemporary Aboriginal Community*, Canberra, Australian Institute of Aboriginal Studies; (1986) *The Yolngu and Their Land: a System of Land Tenure and the Fight for its Recognition*, Canberra, Australian Institute of Aboriginal Studies.

³¹ L. Taylor (1996) *Seeing the Inside*, Oxford, Oxford University Press. Taylor is concerned with the Indigenous art of the north coast of the Northern Territory, i.e. belonging to the Kunwinjku - neighbors of the Yolngu.

³² Taylor, *ibid.*, p. 108, says, '[u]nlike burial ceremonies in eastern Arnhem Land, Kunwinjku do not paint the body of the deceased nor the coffin'.

inhabit, whereas the Yolngu do not.³³ Even within Yolngu society, beliefs, practices, and associations vary from place to place, but not at random; cultural differences between immediate neighbours are slight, whereas over distance the difference tends to increase. However, the Yolngu do have many things in common with Indigenous peoples as far away as in other Australian States, and to a lesser degree with tribal peoples of other countries. A common feature is the complexity of traditional Indigenous society. This feature can be laid out on a number of different planes. 'Moiety' has already been touched upon above. An additional plane, which interlocks with moiety, is the variety of different types of groups, which vary according to size and structure. At the broadest level is the language group. Then there are those people who share the same 'but different',³⁴ myths and laws, the 'same story',³⁵ and the 'same song'.³⁶ Next are the members of the group who will come together for a local ceremony, and this aggregation may vary according to the type of ceremony involved. Then there are smaller groups with their own territory and sacred sites. Finally, there are the groups that live together on a daily basis as a functioning unit, but which interact with and sometimes attach themselves to other units for a range of purposes. There is a set of terms that corresponds to a greater or lesser degree with all or some of these groups, and it includes tribe, clans, and bands, and sometimes, additionally, language group, community, group, horde, and people. The local representatives of a particular moiety are the guardians with rights in and responsibilities for particular sacred sites. This is to the exclusion of the correlated moiety, except that some

³³ Taylor, *ibid.*, p. 88, says the '[m]ore eastern Arnhem Land groups say they would not paint these spirits for they see them as 'belonging' to the Kunwinjku'.

³⁴ 'Same but Different', is a theme running through Keen, *op. cit.*, n29, where it indicates the singularity and unity especially of proximate Aboriginal clans, etc., on various planes, see pp. 38-9 for a brief explanation; it is also the title of Part I of the book.

³⁵ *Ibid.*, see chapter 1, pp. 40-61.

³⁶ *Ibid.*, see chapter 4, pp. 132-168.

members of that group may have matrilineal, managerial rights (while more usually rights in land are patrilineal, and sometimes individual rather than collective).³⁷

Painting is also tied to moiety. The moiety of the painter determines the subject matter suitable for painting and provides an encoded means for painting it. An Indigenous landscape is divided into two parts, firstly as a kind of patchwork pertaining to sacred sites and attached lands, and then in terms of individual members, people, animals and plants. These things are likely to belong to one moiety or the other: sacred sites, lands, people, plants and animals; also painters, and dreaming spirits. Then there is the political dimension regulated by people with special access to sacred and secret knowledge. This is tied together in something like the following way. The creator ancestor spirit who created the people of one moiety inhabits the land attached to a particular sacred site, for which those people are responsible. This spirit gave to these people, people A, this land in which they have rights and for which they are responsible. Those other people, B, who have a different story and different lands, provide women for the men and husbands for the women of people A. People A may paint the organism with which they identify, their totem, but at certain times they may not eat it;³⁸ the reverse is true for people B, in relation to the same animal: they may eat it but not paint it. Despite the relationships that develop between the moieties through marriage and the rights that accompany them, moieties remain distinct.

³⁷ Taylor, *op. cit.*, n31, p. 59.

³⁸ D. B. Rose (1998) 'Consciousness and Responsibility in an Australian Aboriginal Religion,' *Traditional Aboriginal Society*, W. H. Edwards, Ed., Melbourne, Macmillan Education Australia, p. 244.

Art and Its Relevance to Law

What a Yolngu painting looks like is tied intimately to its purpose and to its cultural context. That is to say that those visual elements constituting a work of art work together as a form of code. This code is culturally determined. And while the meaning of a painting is fully determined in this way, that is not the end of its significance. Three points need to be observed in relation to this cultural encoding. The first is that, while an artist may paint a picture of a tribally legitimate story, act, or being, from the perspective of his or her tribal guardians and ancestors, adopting the correct tribal iconography, the picture can, within those cultural constraints, also be an individual interpretation of the myth concerned. The artist is free to express him or herself within cultural parameters, and so differences between different renderings of the 'same' painting can be great. If the painting is iconographically correct, it will be recognisable to the culturally initiated. Second, a painting is not merely a code for something, but is also the embodiment of something, the instantiation of myth and clan life. For example, the 'kangaroo' people, kangaroos, the kangaroo ancestor, the 'kangaroo' sacred site and ritual objects, and the kangaroo totem, are all identical, in the sense that they have the same spirit running through them. Third, levels of meaning derivable from a single painting, ranging in depth of ritual and spiritual significance, correspond to different modes of encoding the same material. The deeper meanings are only available to privileged initiates and concern what is 'really' going on in a given story.

The markings on a particular painting can be divided into several types. They include figurative, symbolic, and 'infill'.³⁹ Additional types or sub-types can be discussed in relation to these broader headings. The figurative element is the most representational. It includes the 'iconic',⁴⁰ which is the culturally understood way of depicting a being (often but not necessarily figurative). Some of these iconic figures display a style and content component that is famed in northern Australian traditional art. This component used by the Kunwinjku, for example, is the x-ray motif (which varies from being to being) in which internal organs and bones of the being are incorporated into the figure representing it.⁴¹ These x-ray components form part of the iconography of a whole design, and can be, in addition, separately iconic also. Another figurative element is the geographical, which would include the mythical with the real, and journeys and events as well as places, and which can also be iconic. This then introduces the next conceptual level of artistic components, the symbolic.⁴² The two main occasions for this are 1) when a figurative element simultaneously represents something figuratively and something else, a related thing, symbolically, and 2) alternatively, when a graphically simple image (e.g. geometrical) is used (usually in repetition) to represent something. This latter case is perhaps most frequently the symbolic signature of a given clan, or 'clan design'.⁴³ The final formal component of traditional Indigenous imagery is the infill. This can be a 'ground', fire, or water, and as such, can be symbolic, or iconic, or both. The clan design is often rendered to

³⁹ Morphy (1991) *op. cit.*, n28, pp. 146-7, inc. illustrations; see Ch. 8.

⁴⁰ *Ibid.*, p. 152.

⁴¹ Taylor, *op. cit.*, n31, pp. 132-41.

⁴² See Morphy's account of the relation and distinctions between theme, symbol and icon, *op. cit.*, n28, pp. 118-26.

⁴³ *Ibid.*, pp. 169-76.

denote, in addition to the clan, its moiety and related ideas, other ideas associated with the story given by the particular picture, e.g. ‘bees’, ‘flowing water’, or ‘smoke’.⁴⁴

A little needs to be said about materials used in paintings and their contexts. Not all traditional Indigenous art is produced on bark or board. The Morning Star Pole at the centre of the Yumbulul case⁴⁵ discussed in Chapter Two exemplifies a class of ritual pole objects. Other examples are mortuary poles and boxes (coffins), body paintings and sand paintings, and paintings on implements and dwelling structures. There is no rigid division between art that is non-ceremonial, for the market, and art that is non-marketable, for ceremonies. Some ceremonial art, which is transportable and permanent, is recycled, after its ceremonial use, for sale. Some art that is intended for the market place is given a suitably ‘European’ subject matter and treatment, while other examples contain or express ritual knowledge. In the latter case it is often reasoned that this will have an educational effect on *balanda* (Europeans), so long as appropriate permission is gained from tribal custodians and the material is not too secret or sensitive. Traditional and contemporary Turkey Creek artist Rover Thomas’ paintings have been incorporated into ceremonies.⁴⁶

Tribal Content

Apart from clan designs designating clan and therefore moiety also, traditional Indigenous art is group specific in other ways as well. Works of art range from the very simple to the very complex. At the simpler end of the spectrum are depictions of

⁴⁴ Morphy, *ibid.*, pp. 173-6, see diagram p. 175.

⁴⁵ *Op. cit.*, n1.

⁴⁶ Morphy, *op. cit.*, n23, p. 136.

single animals and simple geometric arrangements, usually symbolic. In the middle are depictions of acts such as hunting, or fragments of myth. At the sophisticated end, of the painting spectrum are creation and other mythical stories, which can contain mythic and real landscapes, multiple actors (human, spirit and animal, as well as plants), sacred objects, implements and inanimate objects. They may also combine the figurative, the geometric, the symbolic and the ground, in symphonic orchestration. However, the thematic content is what is important, especially with regard to the purpose of painting, and this purpose varies from clan to clan, as the myth underlying the image varies. An example of this is where neighbouring clans are responsible for and identity with different ‘acts’ in the same story, i.e. different events in the same ancestor’s journey.⁴⁷ The paintings are therefore an affirmation of a clan’s particular identity. They can celebrate the virtue of the hunt of a culturally appropriate animal, they can represent spirits that can only be seen by ‘clever’ people, or they can affirm the creation myth for that particular tribe, and assert obligations given or passed on to the tribe by their ancestor spirit. Whichever is the case, the painting will bear the stamp of the clan that produced it, and that stamp is an indelible and incontrovertible one. And the painting is determined by and in turn conveys the traditional laws. The law, along with its interpretive guide, myth, together embody the painting’s relationship to its social environment.

Keen makes an exemplary use of the term ‘same but different’ in his study of secrecy in Yolngu society.⁴⁸ The secrecy achieved is related to initiation. Initiation opens a door at the same time to both knowledge and secrecy. Release of knowledge

⁴⁷ R. Layton (2000) ‘From Clan Symbol to Ethnic Emblem: Indigenous Creativity in a Connected World,’ *Indigenous Cultures in an Interconnected World*, C. Smith and G. Ward, Eds., Sydney, Allen & Unwin, p. 54. The phenomenon is also noted by Keen through his ‘same but different’ terminology – see note to follow, and *op. cit.*, n29.

⁴⁸ *Op. cit.*, n29, Part I, The Same But Different, pp. 37-168.

accompanies ceremonial participation, initially as an initiate, and otherwise more gradually through the course of a life. The more secret the knowledge, and the less public, the greater is the responsibility for its secrecy. The idea of sameness and difference is used to explain the background to this exclusivity towards knowledge. Knowledge, in Keen's account, concerns the sacra (*madayin*), rites and myth of the clan holding the knowledge.⁴⁹ These intellectual possessions of the clan are in a sense part of the 'same story',⁵⁰ common to related clans, and, parallel to that distribution, the 'same song',⁵¹ also. Each clan's aspect of the shared story is different while still the same because it is a different part of the 'same' story. Different clans within the tribe see the story from different perspectives, geographically and mythically. The same is true of their song. The common tribal song varies from clan to clan, because it is broken into different parts. However, there is another important concept of mythic difference and sameness. The 'same' myth also has different levels. One level is for general consumption, public knowledge, and the higher level is accessible to the initiated only, and is secret.

Morphy's approach to different instances in the interpretation of the 'same' myth, though on a different cultural plane to Keen's usage of 'same but different', is through the adoption of the terminology 'inside' and 'outside'.⁵² These terms correspond, respectively, to the secret and the public within a given clan or tribe, rather than to mythic and sacral variation between neighbouring, geographically successive clans. Morphy's context for these terms is primarily art and its interpretation, but the concepts will serve sufficiently for more general, as it is the knowledge embodied in

⁴⁹ *Ibid.*, pp. 110-24, 133, & 144-6.

⁵⁰ *Ibid.*, Ch. 1, The Same Story, pp. 40-61.

⁵¹ *Ibid.*, Ch. 4, The Same Song, pp. 132-68.

⁵² Morphy, 1991, *op. cit.*, n28, p. 78.

the artwork that is to be determined 'inside' or 'outside', and as they were never intentionally restricted to traditional Indigenous art. This terminology, in relation to art, gives the impression that, on an 'outside', reading, only the surface colours and shapes are visible, as they are opaque, and thus prevent a more penetrating view. Only upon the initiation of the viewer to an appropriate level does the surface image become translucent, revealing a critical subtext and a deeper, or 'inside', meaning. This is, figuratively, exactly what happens. Everyone in the clan and possibly the tribe knows the story captured as 'outside' in the painted image. It tends to be the senior men who are most exposed to inside knowledge and in control of the ceremonial life centred in this knowledge, and in which all take part without becoming formally initiated beyond the public level.⁵³

The Relationship of Indigenous Art to Indigenous Society

Indigenous paintings tend to have a social function that is related to their encoded meaning. That is to say, paintings have a social function that is not only socially reflective and socially determined, but that actually embodies aspects of the culture itself. This is true of ritual painting, and, to a varying degree, of non-ritual painting also. Even non-ritual painting contains symbols, icons, or styles that are specific to a clan or tribe, and which might therefore be subject to tribal rules. For ease of discussion though, these two categories of painting will be discussed separately. A ritual painting is one that has been, will be, or could be used in a ceremony. All ceremonies, whether pertaining to death, circumcision, or some other event, have a

⁵³ Also see Morphy on the relationship between men's and women's knowledge, *ibid.*, pp. 88-92.

public side in which women and moieties not owning tribal knowledge can participate, and indeed must, for the effective running of the ceremony. All ceremonies are affected by varying levels of secrecy and sacredness, depending on the ceremony and the participant's level of initiation. Large and important ceremonies often involve several clans, as they demand a high degree of production coordination, participation, and effort to stage. In initiation ceremonies, for example, the organisers will wait until there are enough prospective initiates to make the ceremony efficient.

A major part of ceremony is painting, which at this ritual level has a particular function for the participants. According to Morphy,

[p]aintings as ancestral designs do not simply represent the ancestral beings by encoding stories of events which took place in the ancestral past. As far as the Yolngu are concerned the designs are an integral part of the ancestral beings themselves. By painting the designs in ceremonies, by singing the songs and performing the dances, Yolngu are re-creating ancestral events. What ultimately makes the paintings more than mere representations of the ancestral past is that the designs themselves possess or contain the power of the ancestral being.⁵⁴

In Australian Indigenous cultures there is endless reflection and overlap amongst the abstract constituents of the culture: religion is reflected in morality and law, and, through territory or property, upon landscape itself; this process is repeated for all cultural elements. Another way of expressing the idea, that in Indigenous societies, myth is related to law, art and territory. More succinctly: myth is law. This is exemplified by the fact that an ancestor spirit supplied the totem, rights, obligations, ritual, and sacred sites, and that this is inscribed in the relevant art, and even in the Indigenous social interpretation of the landscape itself. Myth gives an account of how

⁵⁴ Morphy (1991) *ibid.*, p. 102.

specific laws came about and why, how spiritually and politically important landmarks were made by the ancestor who also made the law, as well as providing the source of painting a particular person's torso in a particular way.

Sand sculpture, body painting and painted funerary posts are allowed to wear or wash away after their use in a ceremony, and some art is buried after use. Otherwise, art that is painted on boards, boxes, roofs, doors, walls or ceilings, using durable materials, can have a prolonged life, and can even become a marketable and collectable commodity. Some of this can have a double life, first as ritual and then as marketable Indigenous art. Some marketable art is produced not for ritual, but only for the market, and yet is still deeply attached to a particular tradition of ritual so that it could have been used in a ritual context. There seem to be two reasons for this possibility. One is the Indigenous desire to educate, to a certain level, the *balanda* (Europeans, from 'Hollander') in Indigenous ways, and the other is that, in painting a picture, a traditional Indigenous artist is very often painting a very particular picture. This is in turn both because there are stock pictures, as there are stock narratives, for particular clans or tribes. It is also because the contents of the immediate landscape, which may include a very lengthy ancestral trail, falls into one moiety or the other, and is identified with one moiety or the other, and divided among a number of clans, so that even a simple depiction of a kangaroo can be subject to tribal ownership rights, as can the iconographic, stylistic and the symbolic interpretive range of a given clan.⁵⁵

Of course there are exceptions, and some Indigenous 'traditional art' is highly representative of the artist's individuality and may be influenced by a cultural

⁵⁵ Some anthropologists have even been assigned, not only a moiety, but also a particular kinship relation, e.g. the husband and wife assigned to opposite moieties, who each had 'siblings' and 'parents' assigned to them assigned to them from within the tribe, to give them clear identifications in tribal space; reported in N. M. Williams (1987) *Two Laws*, *op. cit.*, n30, pp. 23-4; this was described by Williams as 'adoption.'

aesthetic, while not actually being culturally determined. Such an expression incorporates 'Indigeneity', and may even correspond to a localised aesthetic, but not necessarily to tribal identification also.⁵⁶

Painters and Non-painters

Observers of traditional Indigenous art are either tribal or non-tribal. The producers are, by definition, tribal, and often men. This observation recalls the fact that painting is intimately related to tribal knowledge, which tends to be guarded by old men. It may also reflect the fact that correct painting is often related to initiation and thus also to knowing a clan story and its standard visual self-representation combining various levels. Painting is often an hereditary profession, but in the absence of willing heirs a recruit can be made from an aspirant painter of suitable temperament, often someone with a 'managerial' responsibility for relevant totem, a kin connection. This relation of role heredity to clan story is due to the uncontroversial identification of a clan and its story, and its images and knowledge, which identification is not unlike that of Eastern Orthodox religions and their Icons.⁵⁷ The Eastern and Greek Orthodox Churches each have their style, which amounts to a set of stock images, and a set of rules governing their production. The style can be conveyed in words, which would include religious narrative and characterisation, art history, religious history, etc. but

⁵⁶ Basil Sansom in (1995) 'The Wrong, the Rough and the Fancy: About Immortality and an Aboriginal Aesthetic of the Singular,' *Anthropological Forum* 7(2): 259-314, pp. 294-7 relates a case of a gift, to himself, of a painting by a Darwin Indigenous man, Roy Kelly. The painting was a purely personal gesture painted specifically for the recipient. It was therefore neither of tribal ritual nor of commerce, but it was 'fancy' (and not 'wrong' or 'rough') and thereby corresponded, in Sansom's terms, to an 'Aboriginal Aesthetic of the Singular'.

⁵⁷ The idea of the Icon as a parallel exemplifier of Indigenous religious art was the subject of a lecture by Basil Sansom at Edith Cowan University, Semester I, 2002, on Indigenous Australian art, in which the sacral status of Orthodox Icons was used to illustrate the ritual power and function of traditional indigenous art; & see *ibid*.

what it amounts to is a way of representing something in such a way that it rises to become an instance of what it represents.⁵⁸ Thus an Indigenous person painted with kangaroo symbols becomes ‘kangaroo’, i.e. invokes ‘kangaroo’ in themselves. An Aboriginal board painting of a kangaroo may also instantiate the animal category: ‘kangaroo’, invoke the Kangaroo ancestor, and the Kangaroo people, as well as the particular marsupial. That a particular person can paint a particular picture is a matter of right, once permission been granted by the appropriate tribal guardian. Indigenous iconography is culturally determined, group specific and thoroughly conventional, while also leaving room for individual interpretation within this set of stylistic, iconographic, and symbolic limitations.

Non-painters, or ‘the audience’, are a disparate group ranging from non-Indigenous private and public collectors, often from Europe and America, to fully initiated clan members who can read the images at their deepest level, and owners of the images who can speak for the clan with which a given image is identified. The distinction here to be noted is not that between Indigenous and non-Indigenous. Traditional art practice already varies among the Yolngu, without introducing complicated comparisons between themselves and other Indigenous groups, such as the nearby neighbours of the Yolngu, the Kunwinjku (whose pictures differ from Yolngu art on every level, from content, through stylistic, symbolic and iconographic elements, to the suitability of vehicles for painting on⁵⁹). The basic distinction to be made between

⁵⁸ *Ibid.*

⁵⁹ Taylor, *op. cit.*, n31, reports that Kunwinjku, living in rocky country, are preoccupied with *mimih* that live in the rocks, whereas the Yolngu are not (see p. 88); the Kunwinjku have their own unique stories and conventional graphic representations corresponding to them. They do use x-ray and *rarrk*, but they use them differently from the Yolngu. They do not paint mortuary or reburial vessels as do the Yolngu (see p. 108). The Kunwinjku refer to their eastern relatives (including Yolngu) as *malarrk*, meaning those who use the word *mala* for ‘... an association of clans ...’ (p. 267); the Kunwinjku do not use this word.

types of viewer is that of the cultural participant and the consumer; whether this latter be the aesthete, the tourist, an investor, an anthropology student, or a browser of art books. The cultural participant is someone who has the means to recognise their tribal story in the picture, and therefore to identify with the picture. This is done through recognition of the various visual elements discussed above as particular to the viewer's people, which may be at the level of clan, or of a related clan, but is probably limited to a particular language group, i.e. Kunwinjku or Yolngu. Without the ability to decode the picture in this way in terms of identity or relatedness, the viewer is merely a consumer of some kind, however well meaning, rather than a participant. This distinction pertains to 'outside' meaning. 'Inside' meaning is often restricted to a group within the clan, that is the Indigenous, 'ideological', view at least (corresponding, that is, to *some* Indigenous accounts).

Law and Polity

Traditional Indigenous cultural rules relating to painting are part of the web of rules relating to Indigenous life in general. As Morphy says, such social rules tend to be activated by initiation:

A man first obtains rights to produce his own clan's paintings. He generally learns by watching his father paint and subsequently assists his father in infilling his sections of half-finished paintings. The ideology is that young boys are taught painting only after they have been circumcised, an event which takes place between the ages of nine and thirteen. The teaching of paintings is seen as part of the ongoing process of initiation, and takes place in conjunction with the learning of songs and some of the meanings of paintings. Old men stress that willingness to learn the songs and some success in

learning them are a precondition of teaching young men paintings. Songs are considered the most public medium for expressing the *mardayin* and should be the first thing learned. Along the same lines, the first paintings a young man is encouraged to produce are ‘outside,’ or public, ones.⁶⁰

The *mardayin* is the sacred and non-public element, belonging to the clan but restricted to the initiated. In this passage the confluence of Indigenous myth, law, and religion, is attested. Painting, rather than being tacked onto the outside of the body of its Indigenous culture, has its proper place in an ordered cultural context. People of different roles are also related to one another through painting as through other elements of Indigenous culture. The rights of the painter are not merely to paint as such, but for the right person to paint images appropriate to their age, status, and level of initiation:

... Narritjin’s son Mowarndi was producing only outside paintings in 1976. At this time he was thirteen and it was three years after his circumcision. In 1974, Lumaluma ... then in his early twenties, produced his first “inside” painting. Prior to that he had become an accomplished bark painter, but had produced only outside paintings of his own invention depicting clan *mokuy* (ancestral spirits). At the same time that they begin to produce outside paintings by themselves, young men start assisting their fathers or elder brothers in the production of sacred paintings, but do not, as yet, paint them on their own.

Once a young man has produced his first sacred painting, he fairly rapidly acquires the right to produce a number of other paintings belonging to his clan.⁶¹

This development of the painter’s personality is not completed all at once, as

⁶⁰ Morphy (1991) *op. cit.*, n28, p. 61.

⁶¹ *Ibid.*, p. 61.

... the right to produce paintings that represent the designs on *rangga* (sacred objects) or which are closely associated with the most restricted sacred objects remains restricted to the senior male members of a clan.⁶²

Morphy goes on to describe how the acquisition of the knowledge of 'their clan's most restricted paintings'⁶³ is associated with the death of the artist's father.⁶⁴ He then describes the three means by which painting rights are to be passed on as 'generation, primogeniture, and subgroup affiliation'.⁶⁵ The picture that has been drawn here, and the one Morphy draws in more detail in *Ancestral Connections*,⁶⁶ is one in which a clan has a number of paintings, which are particular to it. In addition to this, they are ranked on a scale, from those 'paintings' of lesser significance and unlimited access to those of maximum importance, sacredness and secrecy. These 'paintings', and rights to their production, are released, to clan initiates, at appropriate moments by senior clans-folk, in a graduated manner. The words 'rights' and 'paintings' were separated in the previous sentence in preference, for example, to the construction 'right to paint', because a painting's release entails that the novitiate painter be shown how to paint it and granted the right to do so at the same time.⁶⁷ The power to grant rights such as this is reflected in this latter hierarchy as well. Rights can be transferred only from those who have them already. Therefore, the rights attached to the clan's most restricted knowledge, can correspondingly only be transferred, from the most elevated clan statuses (which presumably accounts for the appropriateness of effecting this transfer), at the approach of the transferor's death.

⁶² *Ibid.*, p. 61.

⁶³ *Ibid.*, p. 62.

⁶⁴ Morphy reports an single case in which rights to paint passed in this way to the declining painter's daughter, *ibid.*, p. 62.

⁶⁵ *Ibid.*, p. 62.

⁶⁶ *Ibid.*

⁶⁷ Morphy (1991) *op. cit.*, n28, p. 62.

The type of right acquisition discussed above is not the only kind. Morphy considers in detail two more standard cases of painting rights, not to ‘one’s own clan’s’ paintings, but to those of ‘one’s mother’s clan’, *ngaarndi*, of M clan, and to those of ‘one’s mother’s mother’s’, or ‘mother’s mother’s brother’s’ clan, *maari*, or MMB clan.⁶⁸ The differences are worth recording briefly. On the former type acquirable from the artist’s *ngaarndi* (M clan), Morphy asserts,

[r]ights in M clan paintings are of two different kinds: (1) those rights and obligations toward an individual’s actual mother’s clan; and (2) those rights and obligations toward sets of clans related in a particular way through myth and ceremony to an individual’s own mother’s clan. ... In both cases the rights involved can include the right to produce M paintings for sale and the right to be consulted by M clan members before they may use the paintings in ceremonial contexts. Among the obligations entailed are the responsibilities of acting as “workers” for the M clan the production of ritual paintings and of participating in the organisation of the M clan’s ceremonies.⁶⁹

On Maari clan paintings:

Rights in own-clan and M clan paintings centrally involve the right to produce the paintings. The case with MM[B] Maari clan paintings is different. A man is usually the recipient of (or perhaps canvas for) his MM[B] clan painting rather than its producer: he has it painted on his behalf by a member of his MM[B] clan rather than painting it himself.⁷⁰

This account of some of the rules of Yolngu painting is presented here at its most simple, so as to convey some of the complexity of this context of Indigenous

⁶⁸ *Ibid.*, pp. 63-70.

⁶⁹ *Ibid.*, pp. 63-4; ‘M clan’ = mother’s, or mother’s, sister’s clan.

⁷⁰ *Ibid.*, p. 67; ‘M clan’, *ibid.*, ‘MM[B] clan’ = mother’s, mother’s, or mother’s, mother’s, brother’s clan.

traditional art without placing a burden upon the reader. Only enough is given here to allow for an intelligible presentation of the nature of the thing. As well as complex, it is richly normative, and beyond this, the nature of these norms is that they are reflective and constitutive of the social structure itself.

Interpretation and Inference

A variety of important questions remain unanswered at this point, though they have been implicitly considered. These are as follows: What is the nature of *sui generis* Indigenous ‘intellectual property’, and is there any justification to classify it as intellectual property at all? What significance has the question of the validity of categorising Indigenous law as ‘law’ at all, and what bearing does this question have on the accommodation of Indigenous law in state jurisdictions? What is the status of Indigenous polity? What relevance does this have for the present study? What is the significance of the relationship between traditional Indigenous law and polity? Is there an Indigenous constitution? What relevance do these questions have for the present study? In this chapter, significant detail has been added to the nascent image provided of Indigenous ‘intellectual property’, law and society in Chapter Two. Although the image remains a sketch, no more can be done in such a small space. And yet what has been demonstrated is sufficient to answer the four questions posed immediately above.

On the first question of Indigenous ‘intellectual property’, the primary focus is not on intellectual property itself, but on the Indigenous rules pertaining to the protection of

tribal knowledge. The chief thing to be understood here is the Indigenous claim for the accommodation of Indigenous institutions. The secondary issue is the possible suitability of copyright as a venue for the legal recognition of an Indigenous collective form of ownership. The object that demands our attention, therefore, is not a painting, or an Indigenous group, nor an artist, or even ‘Indigenous knowledge’, but an existing relationship between a people, certain persons, and a thing that has the form of a right. That collective, cultural idea of Indigenous knowledge is not merely an idea, but is embedded concretely in a political entity, and is given life and meaning in that context as an institution. The words cited above in Chapter Two and given in evidence on this very point by Ms Marika will make it clear:

As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu [her clan] who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.⁷¹

The interest of the tribe has been expressed by one of its members, the copyright owner; she also asserts her tribal responsibility reflecting that interest. While it was the artist’s copyright in her work that was breached by the respondent, the intangible object at the heart of the tribal interest in the same work has simultaneously been degraded.

The relationship described above, of *sui generis* customary right, is characterised qualitatively in another evidentiary statement from Chapter Two above, this time from Mr Bulun Bulun:

⁷¹ *Milpurrurru v Indofurn, op. cit.*, n1.

Unauthorised reproduction of 'At the Waterhole' threatens the whole system and ways that underpin the stability and continuance of Yolngu society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor. It interferes with our custom and ritual and threatens our rights as traditional Aboriginal owners of the land and impedes in the carrying out of the obligations that go with this ownership and which require us to tell and remember the story of Barnda, as it has been passed down and respected over countless generations.⁷²

This characterisation of the relationship, and the offence against it, places it at the heart of the political and ritual life of the tribe, and even suggests that at this intersection the political and ritual are really identified with one another. The violation is against collective cultural knowledge, but also against the notion of the sacred attached to a particular polity. To the violated, the violation approaches blasphemy and sedition, even though the intention behind the act was merely overt opportunism. The repetition of the image affected the dignity of the tribe as well as breaching its internal norms; to punish, remedy, or proscribe this behaviour would be to recognise the importance of the image in its cultural context, that is, to its cultural owners, even if couched only in terms of property. The issue of property is only part of the true picture, although property is the closest analogy Western law will allow. So it is at least clear 1) that what is of concern here is already recognised by copyright law in its relation to the individual artist, 2) that there is an irreducible claim of collective ownership, 3) this claim is of great cultural importance to the people concerned, 4) that equity would allow relief, circumstances availing,⁷³ and 5) that the collective object at issue is, for the purpose of its protection at law, intangible. It would therefore be reasonable to entertain the claim for mainstream legal recognition

⁷² Johnny Bulun Bulun's case, *op. cit.*, n1.

⁷³ See Ch. 2; or *Bulun Bulun v R & T Textiles*, *ibid.*, pp. 524-31.

of collective Indigenous copyright, or to consider the construction of a new legal category of Indigenous ‘cultural and intellectual property’,⁷⁴ given the existence of this lack of cross institutional fit, or lack of, or incomplete, accommodation.

Related to the issue of Indigenous ‘intellectual property’ is the more general issue of Indigenous ‘law’, of which the former is only an element. In the background, middle ground, and foreground of the question of the accommodation of Indigenous intellectual property are traditional Indigenous tribal and clan specific norms. Do those norms constitute law? The answer depends on how law is defined. If law is a system of norms attached to a polity, without which the polity would lose its identity or coherence, then the answer is yes. If ‘law’ is defined according to a more limited mould, such as the commands issued by a sovereign,⁷⁵ then the answer could be no. To adopt the command theory would be to embrace a too narrow or particularist definition, in which we will have accepted limitations before the inquiry begins. ‘Commands of a sovereign’ was a definition devised for a particular kind of legal system.⁷⁶ Insisting upon the necessity of any particular element being contained in a definition of law, such as the presence of a sovereign, a constitutional document, or a legislature will lead to an external definition, tied to a context, rather than an intrinsic, internal definition,⁷⁷ concerned only with the nature of law, encompassing a variety of manifestations. There are, however, some elements the lack of which will demonstrate an absence of law. These are, an integrated set of complementary norms, or ‘laws’, a

⁷⁴ T. Janke, (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property* [prepared for Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies], Surrey Hills, NSW, Michael Frankel & Co, considers the issue of such a new category of law; see discussion in Ch. 2 above.

⁷⁵ An Austinian (positivist) definition; see J. Austin (1955 [1832]) *The Province of Jurisprudence Determined*, London, Weidenfeld & Nicholson.

⁷⁶ See *ibid.*

⁷⁷ See C. McCracken (1999) ‘Hegel and the Autonomy of Contract Law,’ *Texas Law Review* 77: 719-51, pp. 722, 723, & 724-9.

natural or organic polity, and a mutually dependent operation of the two. This negative approach to necessary legal elements provides us with a *necessary* definition, a type of philosophical definition as opposed to a sociological or juridical one. It is absolutely minimal, and absolutely necessary, i.e. again, no part can be foregone without it dissolving away, and no part is missing, e.g. authority is present in the relation to the political. ‘A set of norms’, includes norms of the prohibitive kind and of the prescriptive kind, such as ‘norm B applies to resident X (X having breached norm A) and determines that X should go to jail’. Such a norm set also constitutes a single system, or part of one; all its norms are sourced in the same authority. This authority is an aspect or function of a given natural polity. Corporations are artificial polities operating within an existing set or sets of norms. States on the other hand are organic polities, even ones set up in the wake of revolution, as there is always much left over from the previous society to work with. Acephalous tribal societies, such as Australian Indigenous polities, may be loosely hierarchical rather than being governed by a sovereign; nonetheless, such societies are necessarily and inextricably bound together by explicit norms.

Law is as necessary to organic polity as organic polity is necessary to law. Law and polity are given their particular forms, validity, and actuality by being embedded in each other. A polity is not merely a collection of individuals. A natural polity is a polity in which individuals, and in which generations of their families are in the habit of living in terms of shared institutions, and also, necessarily, of a shared culture. In the above discussion of law, the polity in terms of which law was described was defined as natural or organic. Indigenous polities are ‘cultural’ polities. They are

natural polities in which the polity is coextensive with and embodied in its membership.

Conclusion: Tribal Constitution

Acephalous Indigenous societies, more than other societies having (no courts of law as such), have their institutions inscribed into the minds of tribal members, and into cultural objects of the tribe. Importantly, there is enough institutional knowledge shared by all adults (public knowledge) to complement and support ‘secret’ knowledge in the law and the polity. Law reflects not only a political function, but the cultural paradigm as well. Law, religion, politics, art, culture, and myth are one, and are carried by all tribal members. On this point, Balandier has aptly noted:

In every society, the political power is never completely de-sacralized; and in the case of ‘traditional’ societies, the *relation with the sacred* is quite overt. But whether it is unobtrusive or apparent, the sacred is always present in political power. By means of this power society is seen as a unit (the political organisation introduces the real totalising principle), order and permanence. It is seen in an idealized form, as a guarantee of collective security and as a pure reflection of custom or law; it is experienced as a supreme, constraining value; it thus becomes the materialization of a transcendence imposed on individuals and particular groups. At this point, we might return to the argument used by Durkheim in his study of the elementary forms of the religious life [sic]. In his view, the relation of power with society is not *essentially* different from that between the Australian ‘totem’ and the clan. Anthropology is still largely, and often unconsciously, a sort of illustration of this fact.⁷⁸

⁷⁸ G. Balandier (1970) *Political Anthropology*, London, Allen Lane, Penguin Press, p. 38.

There is a way of speaking of the unity of law and polity, although it is unconventional and probably controversial. This is to speak of Indigenous peoples as having constitutions. The constitution is where law and people are one. Tully has attempted this in *Strange Multiplicity*.⁷⁹ At least his usage of the idea affirms the moral validity of the continuity of Indigenous polities.⁸⁰ Tully's idea is that the validity of future continuity of a given Indigenous group is justified on the basis of past group continuity. A constitution in its wider sense, not a document or simply a body of laws, is self-justifying, not in terms of its existence, but in terms of its continuation. The presence of a constitution in this sense is what makes a natural or cultural polity more than a mere group. It is an entity, an identity, essential and actual. The group whose ancestors have handed down to them their valid culture and laws will hand down these laws to the generations that follow. As a continuity, this process is linear, unchanging; as a continuity, it is organic, constantly changing. Change is effected by the activity of individual members living the constitution, making necessary adjustments to maintain the continuance of the whole, and making contributions to accommodate new situations. Indigenous constitutions are inscribed as 'texts' on the bodies of ceremonial dancers, on *rangga*, or sacred objects, and on sacred sites made by the ancestors. It is carried, like law and culture, in the minds of tribal members. That there is law, and an organic cultural polity, means there is also a constitution. That there is a constitution validates Indigenous law, and its claim upon other constitutions.

⁷⁹ J. Tully (1995) *Strange Multiplicity: The Constitutional Accommodation of Cultural Diversity*, Cambridge, Cambridge University Press. Tully says the Ancient Constitution, recognizing cultural diversity, is founded upon the three constitutional principles of Respect, Consent and Continuity, p. 30. This set is opposed to the Empire of Uniformity (Chapter 3, The Historical Formation of Modern Constitutionalism, pp. 58-98), which is characterized as structurally and culturally monolithic; 'seven features' are identified in the demonstration of this.

⁸⁰ *Ibid.*, p. 30.

Indigenous polities impose obligations upon their members. Most of these obligations concern the cultural group and its interests and members, and naturally there are rights correlated to these obligations. Not least of these obligations is the command to maintain the land and culture and pass it on to the next generation, as it has been received. So the culture can be seen as a self-perpetuating entity, independent of any particular generation. This is the ultimate constitutional criterion satisfied.⁸¹ This has implications for both Indigenous art and law, and for the relationship between them. Indigenous art is a collective and cultural enterprise with a religious and legal function and significance within the tribal group. Its mistreatment is, therefore, not surprisingly, extremely offensive.

⁸¹ See Tully on cultural continuity, *op. cit.*, n79, e.g. p. 30.

CHAPTER FIVE:

PHILOSOPHICAL ARGUMENTS CONCERNING PROPERTY

Introduction

In *The Politics of Genetic Resource Control*¹ Stenson and Gray discard the theory of entitlement, as they call it, as a justification of Indigenous intellectual property, preferring instead to rely on communal rights justified according to a liberal theory based on individual autonomy. They dismissed the entitlement theory for two reasons.² First, even if we accept for the sake of argument that communities ‘can perform acts of labour’,³ entitlement would accrue to an individual member or to individual members of the tribe; to the individual performers of relevant acts, rather than to the tribe as a whole. Second, the criterion of individual invention denies ownership to special Indigenous claims, as the many individual innovators and innovations are lost in the prehistory of the tribe.⁴ Then, Stenson and Gray object to the entitlement theory’s applicability on three grounds: first, the absence of a single act of creation; second, the factor of duration; third, even if the duration of intellectual property were to be waived, any traditional potential right holders would now be dead.⁵ All five of these objections assume that suitable adjustments in the entitlement theory, like those proposed to reform the law so as to accommodate Indigenous

¹ A. Stenson & T. Gray (1999) *Politics of Genetic Resource Control*, Basingstoke, MacMillan Press Ltd, pp. 80-114 ; alternatively, see their (1999) ‘An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,’ *Environmental Ethics* 21: 177-90, pp. 183-90, which is approximately same material published independently.

² *Politics of Genetic Resource Control*, *ibid.*, pp. 85-6.

³ *Ibid.*, p. 86.

⁴ *Ibid.*, p. 89.

⁵ *Ibid.*, p. 91.

knowledge could not be made. They are implicitly criticising the inflexibility of a theory where that inflexibility they themselves have assumed. But this is an unjustifiable assumption, because either the authors are attempting to answer the question whether Indigenous knowledge should be legally protected according to current IP notions, or they are asking if Indigenous knowledge should be accommodated in some expanded form of *sui generis* intellectual property type such as the ‘Indigenous cultural and intellectual property’ explored in *Our Culture: Our Future*.⁶ Stenson and Gray are in fact asking the latter question. The relevant chapter, in advocating community intellectual property rights, advocates also that the genetic possessions of Indigenous communities should be granted legal protection under a special statute.⁷ By restricting their questions to whether or not Indigenous plant knowledge fits into an intellectual property regime and why this should be so, they are assuming the invalidity of one possible solution, that a new form of intellectual property should be constructed. Another way of articulating this crucial point is to say that they construe the question of the justification for the protection of Indigenous knowledge by asking, is it patentable?

The present chapter will try to see how much light the a theory of property will shed on the problem of whether Indigenous ‘intellectual property’ should be accommodated at law. The theory concerned is the so-called entitlement theory, as John Locke presents it in *Two Treatises of Government*.⁸ In addition to this will be the complicated and important issue of the distinction between property, per se, and

⁶ T. Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property* [prepared for Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies]. Surrey Hills, NSW, Michael Frankel & Co. See Ch. 2 in the present thesis for a discussion of the most relevant aspects.

⁷ Stenson & Gray, *Politics of Genetic Resource Control*, *op. cit.*, n1, Ch. 4, e.g. pp. 74-116.

⁸ J. Locke (1993) *Two Treatises of Government*, London, Dent and Sons. See Ch. 5 of that work: ‘Of Property.’

intellectual property, in particular. Locke is not much concerned with intellectual property in particular, and how much should be made of this fact is important to the success of the present chapter.

Theorising on this point has been attempted by other authors and will be included in the present chapter to help make the correct use of the distinction. Theories of property other than that of Locke have not been substantially included in this discussion, excepting modern discussions of these two authors. Other theorists, such as Bentham, Comte, Kelsen, and Arrow do not offer theories of property as such, so much as they apply externally, to questions of ownership and property, existing disciplinary, theoretical or moral commitments, such as economics theory and utilitarianism. Such approaches are less suited to present purposes than are theories of property per se, as the object in question here is that which justifies property as such, and what counts as an explanation of property at all, rather than how property policy should be constructed after the fact (of property as we know it). Also, the pre-eminent modern works on the philosophy of property and intellectual property give significant status to these seventeenth and nineteenth-century precursors.⁹ The present chapter is concerned with what property is and with what it is for, rather than with how property is reconciled with such various positions, or with producing a desired normative result. It is by no means predictable that Locke's theory of property, will fit, in a constructive or productive way, but the attempt is likely to be illuminating. For Locke, the theory of property formed part of a discussion of broader political matters. Locke was concerned to define the extent of legitimate political authority, and discussed property as part of his explanation of the origins of that authority.

⁹ P. Drahos (1996) *A Philosophy of Intellectual Property* Aldershot, Dartmouth Publishing Company Limited; S. R. Munzer (1990) *A Theory of Property*, Cambridge, Cambridge University Press; J. Waldron (1988) *The Right to Private Property*, Oxford, Oxford University Press.

Property is for the purpose of analysis isolable from the state; however a fuller meaning is available with the addition to this abstract approach the context of the state.

There are some things about property which are common to Western and non-Western notions, making it possible thereby to use the term 'property' in this sentence.

Transferability is not necessarily one of them, although this is a highly controversial assertion. It is certainly arguable that there are more central attributes to property than that, and that such attributes are trans-cultural. Examples of such central attributes would be exclusivity, access or holding, in some form, e.g. ownership or possession, and some aspect of conventionality. Conventionality distinguishes 'property' from 'possession'. One potential difficulty in speaking of property across cultures is the notion of collective ownership. The apparent lack of legal recognition of this by the state is perhaps only illusory. Collectives in ownership are in fact a matter of course in the modern legal institution of property, for example: corporations, clubs, cooperatives, family property, non-corporate business arrangements, any group purchase, and most importantly, public property. Clearly the difficulty of arguing the case for each of these varies in degree (technically, shareholders do not own corporate property), but the 'difficulty' is caused by the construction of a corporation as a legal person, and not by the necessity that property be individualised. What the state does not in fact recognise is not collective ownership, per se, but traditional, tribal, Indigenous ownership. This chapter aims to take up Stenson and Gray's challenge to the entitlement theory as a justification for Indigenous intellectual property.¹⁰

¹⁰ *Ibid.*, n1.

Property Theory and Intellectual Property Theory

Intellectual property receives a different sort of attention from tangible property.

Locke's 'Second Treatise'¹¹ is concerned predominantly with land as the object of property as well as with personal property,¹² and as such it deals with dispossession and implicitly therefore with conquest, and effectively, with dominion or sovereignty.¹³ It is disputable whether such a particularised theory extends beyond the range for which it was intended, to include intellectual property, for example. The component forms of intellectual property, e.g. copyright, patent, and trade practices, are usually treated as separate categories with specialised criteria for justification;¹⁴ or, grouped together, as against property other than the intellectual kind.¹⁵ Perhaps this is because there is sufficient material particular to intellectual property to preoccupy any theorist and make an integrated theory seem daunting or unwise. What is common to the categories of property law is the concept of rights held in a thing, while what varies is the nature of the thing in which rights are held.

The philosophy of intellectual property is concerned with justification. Usually the possibility of justification is affirmed, although not always, and what is disputed is the

¹¹ *Op. cit.*, n8.

¹² *Ibid.*, Second Treatise, Ch. 2, pp. 127-40, see, e.g. par. 32, p. 130.

¹³ Locke's theory of property had consequences for Indigenous dominion and European dominion on Indigenous lands, especially under his 'second proviso', see, *ibid.*, p. 130, and below, discussed under Locke.

¹⁴ E.g. E. Hettinger (1989) 'Justifying Intellectual Property,' *Philosophy and Public Affairs* 18(1): 31-52; L. S. Paine (1991) 'Trade Secrets and the Justification of Intellectual Property: Comment on Hettinger,' *Philosophy and Public Affairs* 20(3): 247-63; M. Alfino (1991) 'Intellectual Property and Copyright Ethics,' *Business and Professional Ethics Journal* 10(2): 85-109.

¹⁵ W. Fisher (2001) 'Theories of Intellectual Property,' *New Essays in the Legal and Political Theory of Property*, S. R. Munzer, Ed., Cambridge, Cambridge University Press, at 168-99; S. V. Shiffrin (2001) 'Lockean Arguments for Private Intellectual Property,' *New Essays in the Legal and Political Philosophy of Property*, S. R. Munzer, Ed., Cambridge, Cambridge University Press: 138-67; Drahos, *op. cit.*, n9.

specific nature of a proper account of such a justification. A notable example is found in Hettinger. In ‘Justifying Intellectual Property’¹⁶ he claims that intellectual objects are ‘hard to justify’, in that we use them in a way that does not prevent others benefiting from the simultaneous use of them.¹⁷ Only intellectual property law prevents that use. Sovereignty, security and privacy, which according to Hettinger have a clear role in justifying private ownership of necessities and homes, do not work well in justifying intellectual property, especially as the majority intellectual property right holders are corporations. Hettinger focuses on the predominant form of ownership of intellectual property, ownership by institutions. The logic of this institutional ownership has to be understood in terms of markets, the context in which institutions and intellectual property predominantly operate. This fact means that ‘[t]he strongest and most widely appealed to justification for intellectual property is a utilitarian argument based on providing incentives’,¹⁸ an argument favoured by Hettinger himself. His take on this argument is as follows:

[P]romoting the creation of valuable intellectual works requires that intellectual labourers be granted property rights in those works. Without the copyright, patent and trade secret property protections, adequate incentives for the creation of a socially optimal output of intellectual products would not exist. If competitors could simply copy books, movies and records, and take one another’s inventions and business techniques, there would be no incentive to spend the vast amounts of time, energy and money necessary to develop these products and techniques. It would be in each firm’s self-interest to let others develop products, and then mimic the result.¹⁹

How is ‘optimal output’ measured? As the most the market will bear? What is really a decisive factor, but one that is left out here, is investment. Those who fund research

¹⁶ *Op. cit.*, n14.

¹⁷ *Ibid.*, pp. 34-6.

¹⁸ *Ibid.*, p. 47.

¹⁹ *Ibid.*, 47-8.

are seeking a return. Property belongs to largely to private law, and to a large extent its nature is found in its being a private matter. Hettinger, however, remains faithful to his utilitarian position and observes how the utility of intellectual property is contradictory:

[i]t establishes a right to restrict the current availability and use of intellectual products for the purpose of increasing the production and thus future availability and use of new intellectual products.²⁰

Lynn Sharp Paine²¹ criticises Hettinger's utilitarian defence of intellectual property, first for the reason that '[i]t assumes that all of our intellectual property institutions rise or fall together...'²² and secondly because '... the rights commonly referred to as "intellectual property rights" are best understood on a model of rights in tangible and real property'.²³ The latter point is unfair, since Hettinger's ideas concerned production and innovation, but the former point is not. Paine claims that trade secret law fares the worst for Hettinger's model. On Paine's account, 'utility' is biased against all those things trade secret law is bound to protect. Paine argues, rightly, that each intellectual property type has its own rationality, which must be taken into account in questions of justification for each case. Hettinger's approach, although not dependent on real property as Paine claimed, is generalist.

While Paine's approach is superior, because it pays more attention to specific actual differences between intellectual property types, it is no more helpful than Hettinger's approach in confronting the question of Indigenous intellectual property. Utility will

²⁰ *Ibid.*, p. 48.

²¹ *Op. cit.*, n14.

²² *Ibid.*, p. 248.

²³ *Ibid.*, p. 248.

be of no use in justification of accommodation here, unless it is conceived as ‘Indigenous utility’. In an Australian ‘utility’ maximisation on the other hand, Indigenous people would barely feature in overall calculations of utility, being a tiny fraction of the whole population (about three percent). A justificatory approach to intellectual property that is more attentive to the peculiarities of copyright, for example, will not encourage its extension to accommodate Indigenous forms, as copyright law has by now compelling internal principles, which are radically at odds with Indigenous cultural forms.

Draho’s *A Philosophy of Intellectual Property*²⁴ is rooted in both seventeenth to nineteenth-century theory as well as in contemporary theory, and is generalist in its treatment of intellectual property objects, while it discusses them from various theoretical perspectives. It begins with Locke, Hegel and Marx.²⁵ Its arguments proceed from this exegesis, through economic analyses of property and theories of property as an instrument of power,²⁶ to regarding information as a Rawlsian primary good, and to a discussion of Kelsen, whose ‘instrumentalism’ is advocated against ‘proprietaryism’.²⁷ Draho’s generalist approach is probably allied in part with his treatment elsewhere of intellectual property as an international regime exemplified in its most recent manifestation under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).²⁸

²⁴ *Op. cit.*, n9.

²⁵ *Ibid.*, Chs. 3, 4, & 5, respectively.

²⁶ *Ibid.*, Chs. 6 & 7.

²⁷ *Ibid.*, Chs. 8 & 9.

²⁸ E.g. P. Draho (1999) ‘Global Property Rights In Information: The Story of TRIPS at the GATT,’ *Intellectual Property*, Aldershot, Ashgate, at 419-32; P. Draho & J. Braithwaite (2002) *Information Feudalism: Who Owns the Knowledge Economy?* London, Earthscan Publications Ltd.

Intellectual property is a creature of legislation. This however is not to say that it is greatly susceptible to change. On the contrary, it has been increasingly subject to the constraints of international treaty regimes since late last century, and is very resistant to change. Unlike tangible property, which can only be used, depleted or transferred, intellectual property is alterable in the legislatures in its duration, and by the types of rights it ascribes. It is constructed in its very nature by statute. It differs from tangible property in this way, in that it was created and maintained for a set of purposes, whereas tangible property involves the institutional recognition of the rightful possession of things. Drahos is aware of this distinction and simultaneously explores the nature of intellectual property on its own terms and in terms of other relevant normative ideas. In enquiries into the organisation of intellectual property in terms of policy, such as that of Hettinger's essay, an approach from extraneous principles such as utility, efficiency or productivity is unavoidable assuming the principles themselves can be validated. In an enquiry such as the present one, however, an immediate concern is the nature of intellectual property, and more particularly, the question of whether Indigenous traditional knowledge may in any way constitute it or be subsumed under it. It is not therefore the object itself with which we are initially concerned, but the rights of a person in a thing. If it turns out to be acceptable to recognise Indigenous traditional intellectual property as *sui generis*, the issue of correspondence to existing intellectual property forms is academic. The important implication of this is that such an inquiry need not get bogged down in the specifics of intellectual property law, but rather it may be satisfied by answering the question, who ought to be entitled to what?

Two substantial recent contributions to the theory of property are those of Munzer²⁹ and Waldron.³⁰ Munzer's *A Theory of Property*³¹ is a complex, compound and constructive theory that places property in a context of its social effects. Waldron's *The Right to Private Property*³² is more attentive to legal categories, and to the intellectual history of established theories. Munzer believes that there are three normative principles operating in evaluations of property arrangements where one principle may be decisive, and sometimes two principles may be in irresolvable competition. This approach is based in the notion that '... justification and evaluation are the central problems of the theory of property'.³³ The first two principles operating in this theory are each compound. The first is 'utility and efficiency',³⁴ the second is 'justice and equality',³⁵ and the third is 'desert based on labour'.³⁶ This is an unwieldy theory, although an admirable recognition of the fact that property arrangements exist in social contexts in which there really are plural issues and interests in and claims upon property and other institutions. Munzer's position need not be seen as relativist, for it is grounded in the fact that these claims are normatively different, due to their being different types of claim, because there are naturally different domains of claim competing for various elements of property. That is to say, there are different types of interest in property, even for a single given property holder, and the same applies to a given system of property as a whole. For the present chapter, Munzer's theory is too dependent on theories having a predetermined normative value, or concept of value. What is required is a theory that is more focussed on how to distinguish property from

²⁹ S. R. Munzer (1990) *A Theory of Property*, Cambridge, Cambridge University Press.

³⁰ J. Waldron (1988) *The Right to Private Property*, Oxford, Oxford University Press.

³¹ *Op. cit.*, n29.

³² *Op. cit.*, n30.

³³ *Op. cit.*, n29, p. 3.

³⁴ *Ibid.*, pp. 3-4, & Pt. III, Ch. 8, pp. 191-226.

³⁵ *Ibid.*, pp. 3-5, & Pt. III, Ch. 9, pp. 227-253.

³⁶ *Ibid.*, pp. 3 & 5, & Pt. III, Ch. 10, pp. 254-291.

non-property. The simple answer would seem to be to consult a law text on property, or better, survey current legislation. This approach is unhelpful, as it would only give us a list rather than a rationale. The question of the accommodation of Indigenous intellectual property is more akin, in part and in very general terms, to the question: ‘to what extent should a new form of information technology, given its particular features, be protected as intellectual property?’

Waldron’s text³⁷ is focussed upon the question of what property is, and he proposes two such types of theory: ‘special right’³⁸ and ‘general right’.³⁹ Waldron favours the latter, which reasons that all persons (perhaps through households) should be endowed with some property. It is a position that Waldron takes to be exemplified by Hegel’s writings on property. Special rights are associated with what Stenson and Gray termed the entitlement theory,⁴⁰ which is primarily associated with John Locke’s⁴¹ ‘labour theory’ of property entitlement.⁴² Stenson and Gray dismissed this theory as not successfully justifying Indigenous intellectual property and it is for that reason of immediate relevance for present purposes. Were they right to dismiss it?

Waldron’s distinction between special and general rights is an adaptation of the same distinction made by H. L. A. Hart.⁴³ Waldron begins by citing Hart’s definitions.

Special rights are those arising

³⁷ *Op. cit.*, n30.

³⁸ *Ibid.*, pp. 106-7.

³⁹ *Ibid.*, pp. 106-7.

⁴⁰ *Op. cit.*, n1.

⁴¹ See, *Two Treatises of Government*, *op. cit.*, n8.

⁴² In R. Nozick (1974) *Anarchy, State and Utopia*, New York, Basic Books, something like Locke’s thesis of natural property rights is used to justify existing property arrangements, limit taxation, and hence, justify a minimal state only, thereby implicitly demonstrating the apparent capacity of the Lockean theory of acquisition to generate whole theories of distributional justice.

⁴³ J. Waldron, *op. cit.*, n30, p. 106; H. L. A. Hart (1984) ‘Are There Any Natural Rights?’ *Theories of Rights*, J. Waldron, Ed., Oxford, Oxford University Press.

out of special transactions between individuals or out of some special relationship in which they stand to each other, both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship.⁴⁴

For general rights, Waldron cites Hart as follows:

(1) General rights do not arise out of any special relationship or transaction between men. (2) They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights. (3) General rights have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship of transaction ...⁴⁵

It is worth quoting Waldron's interpretation of these definitions in terms of a further distinction between rights *in personam*, and rights *in rem*, and how this concerns the scope of his text. He attempts to use the latter concepts to clarify what he does and does not intend by the former. It could not be written more concisely.

Let us look more closely at the distinguishing features of a special right. A first point is that it arises out of some special transaction or relationship, that is, a transaction or relationship which is, in some sense, peculiar to those who happen to have entered into it. A second point is that the parties involved in the right ... are limited to those who were involved in the transaction or relationship. ... Now these seem to be separate points and it is worth exploring the possibility that they might come apart. We need to introduce some terminology. Let us reserve the term 'special right' for rights satisfying the first of our points (and 'general right' for rights which do not satisfy it); and let us use the term 'rights *in personam*' for rights satisfying our second point (and 'rights *in rem*' for rights that do not satisfy it).⁴⁶

⁴⁴ Cited in Waldron, *ibid.*, p. 106, from Hart, *ibid.*, p. 84.

⁴⁵ Cited in Waldron, *ibid.*, pp. 106-7, from Hart, *ibid.*, p. 88.

⁴⁶ *Ibid.*, p. 107.

... the distinction between rights *in personam* and rights *in rem* is not co-extensive with the distinction between rights arising out of contingent events and transactions and rights which the bearers are conceived to have *ab initio*. Almost all the rights we will be concerned with in this work are rights against the world. So in the rest of this chapter, I want to concentrate on the latter distinction – the distinction between what I have called special and general rights.⁴⁷

In other words, Waldron has used Hart's distinction (i.e. definitions) and narrowed it to those special and general rights that are almost exclusively rights *in rem*. In 'special-right-based' ('SR-based') arguments rights are contingent upon 'some ... event or transaction', such as an act of labour.⁴⁸ Alternatively, in 'general-right-based' ('GR-based') arguments rights depend only on the 'qualitative character' of the 'interest itself'.⁴⁹ It remains to be seen whether Waldron's characterisation of Locke and Hegel are legitimate or reasonable. This will be considered below on returning to Waldron in separate discussions of Locke and Hegel on property.

A quick initial extension of Waldron's two types of theory to the problem of Indigenous intellectual property would run something like this. In the case of the special right theory, Indigenous peoples would arguably be entitled to their intangible possessions, having laboured collectively to produce them over generations and perhaps over millennia. A similar argument can be made regarding corporations (putting aside the fact that their legitimate intellectual property is wholly conventional), where they contract with scientists and researchers to benefit the company as a whole from rights in new technologies. In the case of the general rights

⁴⁷ *Ibid.*, p. 109.

⁴⁸ *Ibid.*, p. 116.

⁴⁹ *Ibid.*, p. 116.

theory, collective rights in objects held in common, such as Indigenous iconography, are hard to argue as the theory favours individual property. Waldron's general-right based argument might apply a little more productively with some modification. For example, Indigenous traditional intellectual property could be seen as a kind of joint venture, where property is held in common via the common consent of members who are each entitled to property, or since all members of an Indigenous group have an interest in the intellectual object, all might share in it. In any case Locke and Hegel must be tested in this way on their own terms.

Locke

Locke's *Two Treatises of Government*⁵⁰ was originally published in 1692. The work may be an answer to Hobbes,⁵¹ in that Locke takes Hobbes' assertion of the legitimacy of sovereign authority and attempts to show that this legitimacy is conditional. Nearer than Hobbes to Locke's own time is Filmer, who sought in *Patriarcha*⁵² to defend traditional authority. Locke's 'First Treatise' is also a reply to this defence, as an argument against the absolute legitimacy of traditional authority. It has even been claimed that this 'First Treatise' was modelled on another work⁵³ that was a direct attack on Filmer's *Patriarcha*. The 'Second Treatise' builds a theory of the foundations and exercise of legitimate civil government, against the arguments explored in *Patriarcha*. It is in this context of Locke's constructive theory of

⁵⁰ *Op. cit.*, n8.

⁵¹ See T. Hobbes (1957) *Leviathan*, Oxford, Basil Blackwell.

⁵² See S. R. Filmer (1991) *Patriarcha and Other Writings*, Cambridge, Cambridge University Press, which was not published until 27 years after Filmer's death and 12 years before the publication of Locke's *Two Treatises*, *op. cit.*, n8.

⁵³ See discussion of the relation between Filmer and Locke in J. Tully (1980) *A Discourse on Property: John Locke and His Adversaries*, Cambridge, Cambridge University Press, e.g. pp. 53-64.

government and society in the ‘Second Treatise’, in which his theory of property is to be found. Property is addressed in an early chapter that puts Locke’s discussion of property in his somewhat narrative account of the origins of government. This begins, on Locke’s account, before the advent of civil government, when there is the ‘institution’ of only *natural* law.⁵⁴ The law and property, that is to say, first appears in Locke in a ‘state of nature’,⁵⁵ as rational and theological, but not as institutional.

The state of nature is what Locke supposes existed before constituted societies. Much debate rages over whether this is meant to be figurative or actual. One thing is certain: in a state of nature people who were neither supported nor hindered by the presence of a state were yet bound by natural law. This had for Locke both a rational and a theological basis. The state of nature is one of ‘perfect freedom’,⁵⁶ and of ‘equality’.⁵⁷ This latter aspect Locke reminds us was described by Hooker as ‘evident in itself’.⁵⁸ Locke says,

... though this be a state of liberty, yet it is not a state of licence ... The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions. For men being all the workmanship of one omnipotent, and infinitely wise Maker; all the servants of one sovereign master, sent into the world by his order and about his

⁵⁴ *Two Treatises*, *op. cit.*, n8, pp. 127-40.

⁵⁵ This last concept is actually discussed in an earlier Ch. 2, *ibid.*, pp. 117-22.

⁵⁶ *Ibid.*, p. 116.

⁵⁷ *Ibid.*, p. 116.

⁵⁸ *Ibid.*, p. 116; these are Locke’s words; references to Hooker in the *Two Treatises* are to his, *Of the Laws of Ecclesiastical Polity* (1648) Cambridge: Cambridge University Press. The quotation following Locke’s reference to Hooker’s self-evidence of man’s natural equality is from Book 1, Chapter 8, of that work.

business, they are his property, whose workmanship they are, made to last during his, not one another's pleasure.⁵⁹

The state of nature is for Locke either a fact or an assumption.⁶⁰ The theory is revealed in this way when it is observed that everything Locke has to say about the state of nature concerns the conduct of individuals to one another as demanded by reason and by duty to God.⁶¹ Locke turns to Hooker at the end of that chapter for support for the idea of the factual status of the state of nature, but he then adds:

... all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society; and I doubt not in the sequel of this discourse, to make it very clear.⁶²

The two chapters following 'The State of Nature' are 'The State of War'⁶³ and 'Slavery'.⁶⁴ The subsequent one is entitled 'Of Property'.⁶⁵ Remember though that this still precedes Locke's discussion of the constitution of society, which he addresses in chapter seven and eight. Writers on Indigenous property, from Tully⁶⁶ to Gauthier,⁶⁷ have found it useful to refer to Locke's Chapter Five ('On Property') as it refers directly to Indigenous peoples (Amerindians) in relation to property, albeit in a rather unsympathetic manner. Although not recognising Indian title, Locke concedes the following:

⁵⁹ Locke, *ibid.*, p. 117.

⁶⁰ The words Locke uses to introduce the topic are, from the *Two Treatises*, *ibid.*, p. 116:

To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man.

⁶¹ *Ibid.*, pp. 117 & 120.

⁶² *Ibid.*, p. 122.

⁶³ *Ibid.*, pp. 122-5.

⁶⁴ *Ibid.*, pp. 125-7.

⁶⁵ *Ibid.*, pp. 127-40.

⁶⁶ J. Tully (1995) *Strange Multiplicity: The Constitutional Accommodation of Cultural Diversity*, Cambridge, Cambridge University Press. Here the author argues for Indigenous accommodation in the state, as recognition of Indigenous cultural continuity.

⁶⁷ D. Gauthier (1979) 'Book Review,' *Dialogue* 18: 432-40, where the author revives Lockean theory against the full potential extent of Indigenous land claims.

The fruit, or venison, that nourishes the wild Indian, who knows no enclosure, and is still an tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good to the support of his life.⁶⁸

Note the assumption that the Indian is in the state of nature. In any case, the Indian's right is due to natural reason, which establishes the preservation of the Indians, and to Scripture's assertion that God gave the world to his children in common.⁶⁹ Locke explains how property is acquired in the state of nature by beginning with personality and the acquisition of necessities etc., and in terms of the idea that the world is the property of all:

Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. ... [L]abour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.⁷⁰

This is Locke's theory of property in a nutshell. Only one more principle need be added to make it complete. To the proviso at the end of the last passage quoted, about leaving enough, must be added that the individual in a state of nature is entitled to 'As much as anyone may make use of to any advantage of life before it spoils ...'⁷¹ Locke explains the application of this theory more carefully than he does its rational grounding in the labour-based theory.

⁶⁸ Locke, *op. cit.*, n8, p. 128.

⁶⁹ *Ibid.*, pp. 127-8.

⁷⁰ *Ibid.*, p. 128.

⁷¹ *Ibid.*, p. 130.

The most important remark to make about this simple theory is that it concerns only property or persons in a state of nature. No persons are now considered to be in this state. Of things, however, some remain in a state of nature. A list of examples of this would include objects in the intellectual commons (i.e. thoughts, ideas, words, languages), fish and animals that are not preserved by legislation from being caught or reserved for anyone in particular, rainwater, air, sunlight, some seaweed and certain fallen timber, and the deep earth (in a special sense the deep-sea bed, see Chapter Two above, could be said rather to be owned by all rather than none). The full list might be a little more impressive, but not extensive, not compared with what is owned or similarly controlled, publicly or privately. The theory, apart from debating the status of Amerindians, is to help to construct a basis for the institution of property that we are familiar with, as well as for the societies themselves of which that institution is a part. Locke's intention is to show that the institution is rational as well as theologically sound and that its rationality precedes the modern states, or constituted societies, to which it is now attached. The societies into which individuals first gathered together for their mutual protection, there institutionalised (positively concretised) according to this theory, an idea of property that existed previously only as rational principle and divine will. This notion is the social contract,⁷² by which it can be said, in order to protect the lives, health, safety and property of a set of given individuals mutually, these individuals are to agree to abide by a common arbitrator, which recognises for their mutual benefit, their conventions, the natural law, and their individual holdings, as legitimate. Having established this contract (Locke calls it a

⁷² See, *ibid.*, Ch. 7, 'Of Political or Civil Society,' pp. 153-163 & Ch. 8, 'The Beginning of Political Societies,' pp. 163-178.

‘compact’⁷³) and a constituted society or state, the individuals, citizens, and their descendants are no longer in a state of nature. Their property is conventionalised and not purely rationally based, but nonetheless retains its ‘rational’ basis in its attachment to an archaic exercise of labour. Locke saw the Americas as representing or approximating a state of nature, unlike England or indeed the rest of Europe. In this way, according to Locke’s theory, America could be expropriated by Europe.

Can this theory be applied favourably to Indigenous peoples’ rights in intellectual property? In Locke’s view such peoples were, before conquest, subject to natural law, but not to actual law. Individually, they had on this account rights to what they could gather or hunt for food, that were conditional upon not leaving too little for others, and not allowing the surplus of what they collected to spoil. Locke’s rational vision would afford them no land, and no government, so he would have been very unlikely to grant them rights in their collective intellectual possessions. Would it have made a difference if Locke had been better informed about Indigenous societies, their structure and function, for example? Speculation is possible, but it would be more productive to consider whether the theory, abstracted from Locke’s work, is adaptable in that way, before attempting a reconstituted answer. The question can be broken down into two parts: the theory’s applicability to intellectual property, and its applicability to contemporary Indigenous property, i.e. lands.

Waldron’s discussion of private property in *The Right to Private Property*⁷⁴ does not encompass intellectual property as a special category. Drahos, however, in A

⁷³ *Ibid.*, p. 153.

⁷⁴ *Op. cit.*, n30.

Philosophy of Intellectual Property,⁷⁵ devotes an early expository chapter to Locke, and produces there an intellectual property oriented interpretation.⁷⁶ If Locke's theory has relevance at all for today, in terms of justifying property acquisition, its bearing upon intellectual property is probably greater than otherwise due to the fact that intellectual objects can be created anew, whereas common non-intellectual property is all but exhausted in terms of its positive recognition as property. This is to say that Locke's theory relies upon property that is undistributed, which is the case before someone invents or creates a new form, which will then become the subject of intellectual property rights. Drahos begins here with the intellectual commons, which he uses in relation to a 'strong labour theory'⁷⁷ of property, one in which rights generated by labour are seen to be 'extentional [in their] reach',⁷⁸ i.e. so as to deny a commons:

One possible direction in which such a [strong justificatory] theory could go is to claim that there is no such thing as the intellectual commons. Abstract objects, whether discovered or created, are always the product of individual intellectual labour and, therefore, the property of the intellectual worker responsible for their generation. Intellectual property legislation that sets limits on the private ownership of such objects invades the natural right of the owner. The crucial step in this argument is the assumption that there is no intellectual commons. Locke's analysis of property starts with the existence of the commons. It is God's gift. The challenge Locke faces is to explain the shift from the earthly commons to private property. If, as is possible, there is no equivalent of the earthly commons for abstract objects, building a case for the ownership of such objects becomes easier.⁷⁹

⁷⁵ *Op. cit.*, n9.

⁷⁶ *Ibid.*, Ch. 3, pp. 41-72.

⁷⁷ *Ibid.*, pp. 48-9.

⁷⁸ *Ibid.*, p. 48.

⁷⁹ *Ibid.*, p. 49.

The alternative, Drahos tells us, is to ‘define ... [the intellectual commons] as the set of undiscovered abstract objects’.⁸⁰ The labour theory would still work. Drahos goes on to consider the implications of the two provisos in Locke’s theory on his ‘strong theory’ interpretation, and then he explores some limitations of the interpretation as a practical instrument. He determines that the strong theory is ultimately unusable, and suggests that an approach to intellectual property from Locke ‘... should take the metaphysical context of labour theories of property and their accompanying schemes of community seriously’.⁸¹

Drahos proceeds to assume that in a Lockean insight into intellectual property there must be a notion of an intellectual commons. He then discusses, after Pufendorf,⁸² four types of community which may be considered in relation to a commons. One may be of use in conceptualising Indigenous collective intellectual possessions as property. This is the exclusive, positive community, in which property is held to belong to a particular group in such a way as to be under the direct (exclusive) control of the group, rather than merely being accessible by that group.⁸³ The three alternative communities were exclusive, negative community; inclusive, positive community; and inclusive, negative community.⁸⁴ Indigenous tribes hold their intellectual possessions as a group, and to the exclusion of other groups. The difference between inclusive, negative community and this Indigenous type of community ‘is that, in the case of the former, the commons does not belong to anyone. But anyone may capture and own a part of it’.⁸⁵ Without adopting Drahos’ assumption about the lack of a

⁸⁰ *Ibid.*, p. 49.

⁸¹ *Ibid.*, p. 54.

⁸² At *ibid.*, p. 57; S. Pufendorf (1964) *De Jure Naturae et Gentium Libri Octo*, New York, London.

⁸³ Drahos, *ibid.*, p. 58.

⁸⁴ *Ibid.*, p. 57-8.

⁸⁵ *Ibid.*, p. 58.

common, and ignoring his misgivings about the extensivity of the grant enabled by the labour theory, it makes a certain amount of sense with regard to Indigenous claims for intellectual property. Such a theory might say that those who labour, albeit over generations, to produce a culture with discrete representational elements, acquire property in such productions. The ownership of such productions or cultural elements would necessarily accrue to the tribe, or other identifiable group, due to the fact that the productions are a collective, cultural enterprise. One artist, for example, who holds copyright in an original work, may be using elements that are part of this cultural stock of images, which are identifiable with the tribe and which are jealously possessed in such a way that misuse or misappropriation would be a transgression. What is not sound about this theory is not that a labour account does not fit here, or that Indigenous intellectual property is more akin to public property, or that it may seem to fit better into Pufendorf's exclusive, positive community, but that what is being theorised here is already being asserted by Indigenous tribes according to a completely different logic. This appeal is not to communal labour, but to a particular kind of convention: broadly speaking, law. The same sort of appeal is made in terms of land.

To see if any progress towards a theory justifying Indigenous intellectual property can be derived via an application of Locke's theory to justify Indigenous claims upon land, Avery Kolers'⁸⁶ critique of David Gauthier⁸⁷ will be considered here briefly. Locke's argument, in his discussion of property, for the European appropriation of America is based partly on efficiency. This is to say that by European cultivation, America could then support many more individuals than could be supported under

⁸⁶ A. Kolers (2000) 'The Lockean Efficiency Argument and Aboriginal Land Rights,' *Australian Journal of Philosophy* 78(3): 391-404.

⁸⁷ Gauthier, *op cit.*, n67.

aboriginal methods of hunting and gathering foods.⁸⁸ This is not an argument from European superiority, per se, but simply that in the production stakes, winner takes all. The implication, however, is not only the justification of European habitation in America, but rather European sovereignty there. Kolers is interested therefore in Locke's second, or spoilage, proviso, as encountered above, and the derived agricultural argument.⁸⁹ The spoilage proviso says that in relation to property acquired from the commons by labour that which is not used is not justly acquired.⁹⁰ Kolers claims:

While few writers [following Locke] deny that injustices occurred incidentally to the process of European encroachment [upon Aboriginal peoples], each holds that dispossession of itself is not wrong; indeed, for some authors, *resisting* dispossession is wrong. I shall be centrally concerned to reject this judgement about the intrinsic permissibility of dispossession.⁹¹

It has already been observed above that Locke regarded Amerindian land use as inefficient, by comparison to European methods, and that this justified European encroachment by proprietary acquisition and the consequent extension of European dominion. This application is known as the 'agricultural argument', as adopted by Locke and his sympathetic followers such as Vattel.⁹²

Kolers looks at two controversial interpretations of this notion:

First, the agricultural argument requires that Locke's theory be compatible with the strong conception of spoilage, specifically holding that suboptimal use invalidates

⁸⁸ See, Locke, *op. cit.*, n8, On Property, esp. para. 41-3, pp. 135-7.

⁸⁹ Kolers, *op. cit.*, n86, p. 395.

⁹⁰ Locke, *op. cit.*, n8, p. 130.

⁹¹ Kolers, *op. cit.*, n86, p. 391.

⁹² *Ibid.*, p. 393.

title. Second, some writers argue that the existence of money obviates the spoilage proviso.⁹³

Kolers concedes that Locke's spoilage proviso works against the 'failure to maximise output'.⁹⁴ On the question of money, he writes:

The conclusion is not to deny that there are some ways in which money is a different kind of good from others. But in order to obviate one or more provisos, money would have to change the terms of the social contract.⁹⁵

Kolers disputes the ability of the spoilage proviso, including Gauthier's⁹⁶ and Flanagan's⁹⁷ recent revivals of it, to justify dispossession of Indigenous peoples for practical and rational reasons. What he does not question is why efficiency should be a relevant criterion for justifying dispossession at all. This convenient usage of the proviso is rooted in the conception of Indigenous people existing in a state of nature. Locke may be excused for this misconception, but Gauthier and Flanagan ought to be better informed. The reason for this observation and criticism is that if Indigenous people do not exist in a state of nature, then they have laws governing territorial extensity, and all that goes with that, and therefore, for them, 'property' is not subject to rational justification applicable to each acquisition event. Property is predetermined to those peoples, to a similar extent to which it is to any others. If the spoilage proviso does not operate in Western property arrangements, it cannot be expected to operate in Indigenous ones. The reason for this is that the two systems have more in common with each other than either does with a state of nature. On a related point the question of the effect of money on the proviso is a futile consideration, because money is the institution of currency, a component of a constituted society. Money, for example, is

⁹³ *Ibid.*, p. 393.

⁹⁴ *Ibid.*, p. 393.

⁹⁵ *Ibid.*, p. 395.

⁹⁶ *Op. cit.*, n67.

⁹⁷ T. Flanagan (1989) 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy,' *Canadian Journal of Political Science* 22: 589-606.

usually accumulated in various contractual arrangements, which are already proprietary in nature, and of course money is proprietary by nature. The value of one's labour is negotiated in terms of the market. Given what has been discussed here, Kolers' first interpretation of the proviso is equally irrelevant, even if it is reasonable.

The kind of argument being presented here against Locke depends upon a notion of Indigenous societies that has not been conclusively established. An insight was gained into this in the first part of the second chapter, when evidence as to the nature of particular Indigenous societies was examined. The insight was that these people live in societies, that these societies are rule governed, that this is a matter of cultural inheritance and continuity, and that these rules establish and are established through roles and ranks of authority corresponding to initiation. This will be explored more explicitly and conclusively in the following chapter. What these preliminary observations and reminders can mean for the discussion of Locke is that property in Indigenous societies, such as that claimed by the second applicant in *Bulun Bulun*,⁹⁸ to the extent of their social sophistication, is already not open to debate. Indigenous property disputes may erupt over personal possessions (which are likely to be marked with a recognisable tribal iconography), but Indigenous *sui generis* systems of intellectual property and land title are determined culturally as the knowledge of the group.

Before leaving Locke it will be worth looking briefly at Waldron⁹⁹ to see if construing Indigenous rights as special rights is of any use to the purpose of justifying

⁹⁸ *Bulun Bulun v Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513.

⁹⁹ *The Right to Private Property*, *op. cit.*, n30.

intellectual property, or further dismissing Locke. A special right¹⁰⁰ is, again, something which is dependent on some contingent event such as the acquirer's labour, rather than, alternatively, merely emanating from an acquirer or potential acquirer qua a person. The holder of a special right holds that right only in relation to the object associated with the event (such as labour) that makes it special. The general 'right',¹⁰¹ by contrast, is held in relation to no particular right. It can not truly or logically therefore be cast as a right at all, rather it merely construes property as a good in which all persons have a legitimate, but generalised, interest. More on this problem will follow. The special right does not extend the Indigenous claim any further than does Locke's specific exemplification of it, assuming the above tentative observations about Indigenous societies. This is so unless the contingent event rather than labour, as in Locke's account, can be construed in terms of the culture and institutions of a given Indigenous group. This is an extension of the concept of 'special right' to a corporate entity, but if that is allowable, then there need be no reason why Indigenous property as an institution, and the myths and practices tied up with it, cannot justify Indigenous property as of special right. The collective development of the institution, its maintenance and evolution, could be seen to entitle the people to their lands and to their protected cultural knowledge. A similar argument could be made for Western property. Whether this novel approach works at all, it is an appeal to a different kind of logic than that of Locke's labour theory. To depart from Locke's conception under the heading of 'special right', is to depart from any sensible conception of a theory claiming to justify property acquisition. 'Special right' has no particular rational content except what it is given in a particular form. To say the theory is useful in

¹⁰⁰ See discussion above, or in Waldron, *ibid.*, pp. 106-7.

¹⁰¹ See discussion above, or in Waldron, *ibid.*, pp. 106-7.

distinguishing a special right from a general right, when a general right is already nonsensical, also makes no sense.

Conclusion

The terms Indigenous ‘property’ or ‘intellectual property’, ‘Indigenous knowledge’, or ‘Indigenous art’, implies a conceptual structure. The same observation can be made in relation to ‘real property’, ‘intellectual property law’, ‘scientific knowledge’, or ‘modern art’. What this says about the nature of the problem of justifying the Indigenous cultural and intellectual property is that it is about justifying the conventional, and specifically the institutional. There is more to it than this, of course, as there is the question of appropriate accommodation. The distinction I am making, however, is prior to the one of accommodation. It is not the ownership of an intangible thing that is in question, but the validity of the particular concept of the ownership of the thing. This in turn can only be justified from within the culture in which it occurs. It can only make sense in this context. The additional question that then remains unanswered is the question of the validity of accommodation in the host legal system of the state. The prior question is the subject of the next chapter, and the subsequent question is the subject of the chapter following that.

The suitability of Locke’s theory to the justification of Indigenous property of any kind or its accommodation in the legal system of a state is limited by the assumption in that theory, of a state of nature. Aside from the judgement in Locke against the relative value of Indigenous land usage as compared with European land usage, the

argument as a whole must vary according to whether Indigenous peoples are seen to be within or beyond a state of nature. A state of nature is one in which each actor is truly autonomous, where individual competition is fierce, but primarily it is the absence of positive law, political sanction, and thus of constituted society. If Indigenous peoples are in that state, then Locke's theory might work for individual property acquisition. If an Indigenous society represents a kind of social contract, then property arrangements in each state are determined, and property is distributed according to a perceived pattern. The first option is not likely, as much property is collectively held, and culturally determined. More precisely, of the traditional, Indigenous property types that were surveyed in Chapter Two, all constituted a cultural inheritance, and all were rule governed, through that cultural inheritance. The latter option is at least arguable and a more realistic interpretation. That is, Indigenous peoples represent a kind of social contract; therein, they have grouped together and organised for the benefit of all members and future generations, they have established laws to benefit the group as a group, and they have a myth of constitution which is not merely a story of common origins but which constitutes their political identity, and justifies their claim to law and land. Of course no social contract ever actually took place as such. Arguably, the roots of it are to be found in prehuman forms. Higher apes, such as gorillas and chimpanzees live in groups, and defend themselves from outsiders (apparently, some chimpanzees will attack any chimpanzee outsiders). Perhaps layers upon layers of sophistication on this animal origin will explain, eventually, the modern state. The concept of the social contract has been viewed on a different level than the merely actual. It is a convenient tool to explain political organisation. As with many literary devices, it has the form 'it is as if there was in fact

a social contract', but as with such devices it points to something very real, and very difficult to express.

CHAPTER SIX:

A LIBERAL, INDIVIDUALIST ARGUMENT FOR INDIGENOUS INTELLECTUAL PROPERTY RIGHTS EXAMINED

Introduction

The Indigenous claims discussed in the previous chapter are highly particularised, richly contextualised, and ultimately localised claims. However, abstract justification is implicit in the claims made by the applicants in the court cases explored in the previous chapter: e.g. in *Milpururru & Ors. v Indofurn & Ors.*¹ The visual material concerned was considered too important to be exploited outside of its cultural sphere, e.g. in non-Indigenous craftworks. Then there are several kinds of justification associated with Our Culture: Our Future,² e.g. Indigenous economic development, and distinguishing authentic from inauthentic Indigenous products for sale. Indigenous people seem to be saying that certain things are of value to them, in a particular ways deserving of our respect. Tribal members, for example, seem to have a possessory relationship to their cultural knowledge, which they define in terms of rights and obligations. These present cultural possessors are beneficiaries in a cultural bequest, and, at the same time, they are the trustees to future recipients. This claim is complete in its own way, yet there is plenty of room for exploring, philosophically, the issues of justification raised by it. The following are some reasons why such an exploration should proceed philosophically: 1) first, philosophical explication does not already

¹(1994) 130 ALR 659.

² T. Janke (1998) *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property* [prepared for Aboriginal and Torres Strait Islander Commission and Australian Institute of Aboriginal and Torres Strait Islander Studies], Surrey Hills, NSW, Michael Frankel & Co.

form a part of the particular claims as they are; 2) where explicitly philosophical types of justification have been supplied they warrant criticism and further investigation;³ 3) any contribution to a debate should be welcomed until it can be excluded on its merits; 4) an issue of justice has been raised, and this warrants close attention; and 5) the Indigenous argument is partial in that it does not, for example, reflectively analyse the role of the state, except incidentally, yet that is exactly the context into which the claims have been lodged.

One explicitly worked out philosophical theory of the justification of Indigenous intellectual property already exists.⁴ The theory is based on the writings of Canadian philosopher Will Kymlicka, and has been articulated by Stenson and Gray. It is an argument in favour of community intellectual property based on the moral autonomy of individual members of minorities. The individual autonomy theory, as presented by Stenson and Gray, is intended to justify community rights to property in intrinsic objects, being or based on genetic materials traditionally possessed by the Indigenous or farming people or communities. As the theory depends on Kymlicka's conception of community rights, derived from individual autonomy,⁵ it could just as easily be applied to the protection of non-genetic, or even to cultural materials. Kymlicka's argument is that since peoples have a basis for collective rights, they are entitled to protect as theirs whatever they collectively consider to be theirs. Minority communal rights, we are told, are to be established because the individual autonomy of each member depends upon it, and this is in turn the highest value. Stenson and Gray agree

³ The individualist autonomy justification for cultural rights was instigated by W. Kymlicka (1989) *Liberalism, Community and Culture*, Oxford, Oxford University Press, and developed for applications in terms of community IPRs in A. Stenson & T. Gray (1999) *The Politics of Genetic Resource Control*. Basingstoke, MacMillan Press Ltd. Its rival theory in this context is the entitlement theory, of which Locke and Nozick are usually thought to be exponents; see the following chapter.

⁴ Stenson and Gray, *ibid.*

⁵ In Kymlicka, *op. cit.*, n3.

with Kymlicka, in accepting the following premises: 1) individual autonomy is the highest priority of political justice,⁶ 2) individual autonomy requires that the individual be unhampered in the making and revising of his or her plans (to the extent that the liberty of other individuals is not also hindered),⁷ 3) this planning and revision requires a cultural ‘structure’ (the individual’s own, which may be a non-state community – a ‘minority’),⁸ and 4) that, for members of cultural non-state communities, such cultural structures require maintenance through the establishment, by the state, of rights to be exercised by the community.⁹ Community intellectual property rights (IPRs) are held to be justifiable according to the basic premise of individual autonomy.

This thesis seeks to demonstrate the role that philosophy can play in the elucidation and justification of Indigenous copyright. The present chapter, towards this end, however, evaluates a role delineated for philosophy in the debate about ‘genetic resource control’,¹⁰ and is therefore largely concerned with a parallel area of intellectual property, the patent, or a patent analogy. Stenson and Gray want to establish an intellectual and practical framework for the regulation of tangible and intangible property in genetic resources. Their chapter on ‘autonomy-based’ justification for community intellectual property rights was also published as ‘An Autonomy-Based Justification of Intellectual Property Rights for Indigenous

⁶ See, *ibid.*, pp. 21-3, where Kymlicka observes that this prioritisation does not exclude the idea of the good; rather it allows the individual to choose his or her own idea of the good (cf. step 2, following). Kymlicka also challenges Rawls’ distinction between deontological and teleological theories, *ibid.*, pp. 22-40.

⁷ E.g. *ibid.*, pp. 10-11.

⁸ *Ibid.*, pp. 165-6, etc.

⁹ *Ibid.*, pp. 199-200.

¹⁰ See, Stenson and Gray, *op. cit.*, n3, especially Ch. 2 on the international regulation of genetic resources and some problems associated with it.

Communities’¹¹ and it makes a certain amount of sense by itself. In *The Politics of Genetic Resource Control*,¹² that chapter is joined by two others, representing two complementary arguments, in a three-pronged attack on what they call ‘proprietaryism’ in intellectual property regulation. Stenson and Gray argue that a firmly protected ‘common heritage of mankind’,¹³ together with the equitable, appropriate and just exercise of national sovereignty,¹⁴ as well as community intellectual property rights, provide the basis for a just global intellectual property regime, one that will best serve the needs of those affected by intellectual property arrangements in genetic resources. This effect is to proceed according to a corresponding limitation of the alternative ideology and practice, proprietaryism.¹⁵ This term comes to Stenson and Gray from Peter Drahos,¹⁶ who in turn attributes it to Philip Pettit;¹⁷ in this view, property rights are based on conventional claims as reflected by current law. It is a position that can elevate institutional legitimacy to a kind of moral legitimacy.¹⁸

Kymlicka’s theory is explored below for these reasons: because of its importance in the philosophy of Indigenous peoples, because of its near singularity in Stenson and Gray’s adaptation in the philosophy of Indigenous peoples’ intellectual property, and

¹¹ Ch. 4, *ibid.*, and A. Stenson & T. Gray (1999) ‘An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,’ *Environmental Ethics* 21: 177-90; this is characterised as a publication the same as Ch. 4 of *The Politics of Genetic Resource Control*, *op. cit.*, n3, as it follows the same argument, and traverses the same content in doing so.

¹² *Op. cit.*, n3.

¹³ The subject of Ch. 6, *ibid.*

¹⁴ National sovereignty in present context is the subject of Ch. 5, *ibid.*

¹⁵ Proprietaryism is the theme of chapter 3, *ibid.*

¹⁶ P. Drahos (1996) *A Philosophy of Intellectual Property*, Aldershot, Dartmouth Publishing Company Limited, Ch. 9.

¹⁷ P. Pettit (1980) *Judging Justice: An Introduction to Contemporary Political Philosophy*, London, Routledge & Kegan Paul. Pettit defines rather than advocates proprietary justice as legitimacy - the legitimacy of institutions - of which property rights are the consummate example. The movement of this idea from Pettit, through Drahos, *ibid.*, to Stenson and Gray, *op. cit.*, n3, constitutes something of a Chinese whisper in the way it accumulates substantive meaning.

¹⁸ That is, relevantly, in Drahos, *op. cit.*, n15, and Stenson and Gray, *ibid.*

most of all because of its apparent relevance to the development of a theory of Indigenous peoples' copyright. This last point is justified in the following way. If the legal protection of the traditional knowledge of biological diversity possessed by an Indigenous community can be justified, by establishing in turn that the community is entitled to collective rights so as to preserve the liberty of each individual member (as citizens of liberal states), then this can and should be applicable to cultural heritage, folklore and other intangible, and other cultural, possessions of the community. The argument does not depend on the nature of the possession. However, it will be demonstrated in this chapter that it is not the case that the individual autonomy of the members of a community justifies collective property. On the contrary, it will be shown that communal rights are not justifiable on any such general or extraneous principle, where the rights at issue are already customary rights. The present chapter will be limited to these immediate issues. A positive alternative will be developed later in the thesis.

Individual liberty is connected to the idea of the revisability of life plans (important in Kymlicka's story)¹⁹ in the following way: individuals, liberals say, are entitled to choose their own beliefs, allegiances and lifestyles to the extent that this does not interfere with the same rights held by their neighbours.²⁰ In the course of an individual's life, the individual's beliefs, allegiances and lifestyle may legitimately change; when this happens, the individual (according to liberalism) must be accorded liberty. The principle of liberty justifies revisability, but what justifies the priority of liberty in the liberal schema? The principle of liberty is explained according to a special notion of the self. Liberals place a great deal of faith in individual human

¹⁹ See n7.

²⁰ This is represented by Locke as religious toleration, and articulated more explicitly and more broadly by Mill and by Rawls.

nature. They trust that society will order itself best if individuals are left to their own devices, if the state is subjected, insofar as democracy allows, to individual wills, to individual conceptions of the good. The only task left to a given state is that of ensuring that liberties of its citizens are not affected by the competing liberties of its other citizens. The only justification for state interference in the life of an individual is to prevent or punish an individual for interfering in the liberty of another.²¹ Liberal justice is said to be a special type of justice, in which ‘the right’ is prioritised over ‘the good’. This is certainly true for Rawls, for whom justice (in a liberal egalitarian conception) is the fundamental political principle, and who determines the public good only after asserting the fundamental principles of political justice. It is true that for liberals the good is not excluded or denied per se, but only excluded at the political level; individuals are supposed to choose the good, and liberals only trust individuals to do this.²² Given that some individual liberties are valued in non-liberal societies, liberals are really trying to convey is that individual liberty is or should be the primary value, in the sense that all else is to be coordinated in terms of it in the political realm. In liberal theory moral argument assumes that ‘the good’ is only determinable by individuals.

The next step in Kymlicka’s argument is to say that for members of non-state communities, liberty requires unencumbered access to their communities, which in turn requires that these communities are protected from assimilation.²³ Liberty alone

²¹ I.e. the principle presumably applies equally to all liberal citizens and invited guests.

²² Kymlicka supports Rawls’ elevation of his own conception of justice in the political sphere above other values, in part for the purpose of allowing individuals to achieve their own good, and he tries to preserve this approach in his defence of cultural rights by claiming that preserving minority cultural structures promotes self-respect, respect for the individual’s notion of the good, for liberty, and for others. The values of the revisability of plans and of the priority of right are also of course central to Mill.

²³ See n8.

would not seem to support this, because allowing maximum individual autonomy might have the effect that their community might dissolve around them, and for Kymlicka this ought not to happen. He believes he can remedy this problem by re-emphasising the liberal endorsement of the revisability of plans. He redescribes the liberty to revise plans in terms of minorities as something traditional liberalism would have difficulty recognising the relevance of (although he argues against this²⁴). He claims that if the state protects the minority community in the appropriate way (depending on its status as national or ethnic), the individual community member (who is also a citizen of the state) will have an appropriate 'cultural community'²⁵ in which to pursue his or her own development as a member of his or her own cultural community. This is a weak point in Kymlicka's argument. It is also his only original contribution to liberal theory, as has been observed by some of his peers (see below).

Kymlicka's argument as a whole can be summarised in the following way: minority rights are justified as and where they secure the best environment in which to maximise the individual liberty of members of a cultural group, by protecting the cultural context in which these individuals are developing, in which they are making and revising their plans. Four components of this argument can be faulted in the following ways:

- 1) Individual liberty cannot be abstracted in isolation and prioritised (over other values) in the way that Kymlicka and other liberals would have us believe, without distorting the normative theory and practice of communities. This is especially apt where non-liberal societies are concerned.

²⁴ Kymlicka, *op. cit.*, n3, pp. 206-16: Ch. 10.

²⁵ *Ibid.*, p. 135; where 'cultural community' is distinguished from 'political community', the latter equates to citizenship.

- 2) As an aspect of this individualised liberty idea, the revisability thesis is similarly flawed. Individuals do require the liberty to carry out reasonable plans, but not the full-scale implementation of liberalism, and its prioritisation of individual liberty over all else. The good cannot be relegated solely to the individual subject, rather individual notions of the good are and ought to be continuously shared and negotiated via institutions, cultural media, and the interactions of family and civil society.
- 3) The requirement of revisability and the focus on individual development do not in turn require a given cultural context. Rather, a liberal cultural structure may be preferable. The cultural context of a minority will necessarily limit an individual member's liberty to develop in particular ways, unless the minority happens accidentally to be culturally liberal.²⁶ Any such ways Kymlicka considers to be illiberal he would have to prohibit, because individual liberty is paramount. On the contrary, the desirability of membership in a cultural community is based in identity with it and respect for it. Even if at first it seems determined by personal preference, this identity accorded by membership is hardly revisable just because it is concerned with identity for individuals as well as for communities. It is concerned with who a person actually is, to whom that person is connected, and with the social and cultural institutions in which they actually find themselves.²⁷

²⁶ This is recognised in: C. Kukathas (1995) 'Are There Any Cultural Rights?' *The Rights of Minority Cultures*. W. Kymlicka. Oxford, Oxford University Press, 228-56; discussed below.

²⁷ The raising of confident children may require a stable cultural structure, or structures, but this is neither with thanks to, nor in the service of the practical prioritisation of the political principle of individual liberty.

- 4) Although political rights could be used to prevent cultural and community erosion, it could not logically be done for the express purpose of advancing liberty. The values advanced would be those of the particular community concerned, a diversity of integrated cultural values, perhaps the value of group rights, and liberty, but only in the context of those other cultural values, and only for the prior purpose of protecting that cultural community. The liberty cultivated by the wider state community would only be advanced if without special protections for cultural groups, that liberal context would work against the liberty of the group, but this advance would be a consequence of the protection of the group, rather than its rationale.

The Role of Individual Autonomy in the Attack on Proprietarianism

Stenson and Gray in *The Politics of Genetic Resource Control*²⁸ are concerned to find the most suitable rationale for the regulation of genetic resources. To this end they examine four justificatory concepts, each relevant to defining the shape of such a regime. These are ‘proprietaryism’, ‘community intellectual property rights’, ‘national sovereignty’, and ‘the common heritage of mankind’.²⁹ The authors’ conclusion depends on the relationship they ascribe to these four. The second, third and fourth concept they see as properly relevant to a genetic resource regime, severally and together, while the first, proprietaryism, is seen as illegitimate,

²⁸ *Op. cit.*, n3.

²⁹ *Ibid.*, Chs. 3-6, respectively.

running counter to their approach.³⁰ The second concept listed above, community IPRs, is the one that is of most concern to the present chapter. First, the four concepts deployed by Stenson and Gray will be examined to see how they may relate to one another. Then their argument about community intellectual property rights can safely be extracted for a more detailed analysis.

In their discussion of ‘proprietary’ IPRs,³¹ Stenson and Gray first attempt to exclude both categorical and consequential arguments against patenting life. This is done so as to remove a controversy that might otherwise muddy the view of their subject.

Stenson and Gray believe that advocates of the ‘categorical’ objection make three assumptions:

[F]irst, that ownership entails domination; second, that intellectual property rights somehow entail the ownership of the essence of a thing; and third, that patenting living things is a significant change in the relationship between humans and the rest of nature.³²

Stenson and Gray reply that the ownership of living things is normally quite uncontroversial, but that ‘...patents confer ownership of a species or variety of organism and therefore represent a qualitative distinction’.³³ But the important difference here, they say,

...seems more of a quantitative than a qualitative difference; in which case the argument against patenting life becomes consequentialist rather than categorical.³⁴

³⁰ ‘Illegitimate’ is meant here in the sense of something that merely poses as legitimate. Another sense of legitimacy noted above in connection with Pettit on proprietorship, see n17, is in contrast to the usage here.

³¹ Ch. 3, *op. cit.*, pp. 30-73.

³² *Ibid.*, pp. 32-3.

³³ *Ibid.*, p. 34.

³⁴ *Ibid.*, p. 34.

Stenson and Gray have more sympathy for consequentialist arguments, but they believe that the solution to the problems exposed by these is to be found in theoretical explorations of intellectual property. Stenson and Gray's four consequential concerns³⁵ about patenting 'life' are: 1) 'animal welfare',³⁶ 2) diminished biodiversity due to 'genetic uniformity in agriculture',³⁷ 3) the privatisation of research,³⁸ and 4) its contribution to the relative impoverishment of the poorer countries.³⁹ In the next section of the chapter they discuss two theories of intellectual property, those of James Boyle⁴⁰ and Peter Drahos.⁴¹

Boyle's concern is that current intellectual property regimes fail to recognise the sources of some information, thereby producing a biased assignment of rights.

Stenson and Gray give two examples from Boyle: that of the leukaemia patient, Moore, whose cell-line from his liver was patented by the scientists who extracted them;⁴² and that of the 'rosy periwinkle' from which the firm, Lilly, manufactures a treatment for diabetics, while Madagascar, the source of the plant, accrues no benefits.⁴³ Boyle attributes this blindness of intellectual property law to the 'authorship myth' and to the entitlement or labour theory of property that are supposedly embedded in the principles of intellectual property law.⁴⁴

³⁵ These are borrowed by Stenson & Gray, *ibid.*, pp. 37-40, from the Genetics Forum's 1996 publication, *The Case Against Patents in Genetic Engineering*, Genetics Forum.

³⁶ Stenson & Gray, *ibid.*, pp. 37-8.

³⁷ *Ibid.*, pp. 38-9.

³⁸ *Ibid.*, pp. 39-40.

³⁹ *Ibid.*, p. 40.

⁴⁰ J. Boyle (1996) *Shamans, Software and Spleens: Law and the Construction of the Information Society*, Cambridge, MA, Harvard University Press.

⁴¹ *A Philosophy of Intellectual Property*, *op. cit.*, n16.

⁴² Cited in Stenson & Gray, *op. cit.*, n3, p. 42; Boyle, *op. cit.*, n40, discusses *Moore v The Regents of the University of California* 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991), throughout his chapter 9, 'Spleens', pp. 98-107. Moore disputed the patent, which was upheld by the California Supreme Court.

⁴³ Cited in Stenson & Gray, *ibid.*, p. 43; Boyle, *ibid.*, 128-9.

⁴⁴ Cited in Stenson & Gray, *ibid.*, pp. 42-3; Boyle, *ibid.*, problematises 'authorship' throughout.

Drahos is the immediate source of the term ‘proprietaryism’, a somewhat normative concept which Stenson and Gray attack. Stenson and Gray, after Drahos, claim ‘Proprietaryism’ to have three features. These are ‘Property Fundamentalism’, ‘The First Connection Thesis’ and ‘Negative Community’.⁴⁵ The first means that property rights are ‘prior’ to other rights and ‘inviolable’.⁴⁶ Stenson and Gray characterise the second feature in this way: ‘the first person connected to an object that has economic value ... is entitled to a property right in it’.⁴⁷ They further describe first connection, in Drahos’ words, as a ‘... personal act of demarcation’.⁴⁸ The third feature, ‘negative community’, is dependent on the notion of the intellectual commons.⁴⁹ In ‘positive community’ the commons is owned by all in an ‘inclusive’ or ‘exclusive commons’, and can be shared, whereas in ‘negative community’ the commons is owned by none, and can be appropriated by one (or many, individually), who may then exclude everyone else.⁵⁰ Stenson and Gray see ‘proprietaryism’ as the dominant theory in current intellectual property regimes, including those governing the distribution of rights in genetic resources. They see this as unjust, and agree with Drahos that the solution is an intellectual property instrumentalism in which ‘intellectual property rights should be used to serve our goals’.⁵¹ They look to Rawls’ philosophy to give this idea some shape, since property rights are not ‘primary moral rights’.⁵²

The first part of Stenson and Gray’s fourth chapter, entitled ‘Community Intellectual Property Rights’,⁵³ is empirical. It is the first of the three arguments they intend to

⁴⁵ Stenson & Gray, *ibid.*, pp. 44-6.

⁴⁶ *Ibid.*, p. 44.

⁴⁷ *Ibid.*, pp. 44-5.

⁴⁸ Stenson & Gray, *ibid.*, p. 45; Drahos, *op. cit.*, n16, p. 202.

⁴⁹ Stenson & Gray, *ibid.*, pp. 45-6.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 68.

⁵² *Ibid.*

⁵³ *Ibid.*, Ch. 4.

supplant proprietorship. It attempts to show that Indigenous and farming communities are exposed to economic exploitation, that some effort has been made to remedy this, and that there is growing consensus on this and yet there is little effective protection. Stenson and Gray seem to think that part of the problem is a lack of adequate conceptualisation and justification, because the next part of the chapter explores the entitlement theory of property introduced in their previous chapter. This is the theory associated with Locke, whereby property is acquired initially by an act of labour. A state of nature exists before the distribution of positive property according to a settled form of law and constitution, and after that only exist as in small residual way on the fringes of the accumulated property of given jurisdictions. Property rights in Locke's story precede the social contract, which then institutionalises existing property arrangements. Thereafter, property is acquired through purchase, gift, inheritance or appropriation through labour from the remaining commons. Stenson and Gray attest that various recent authors have tried to understand appeals for community intellectual property in terms of this Lockean theory, and they argue that the theory misconstrues the case. They argue that the justification of the intellectual property of Indigenous and farming communities according to the entitlement theory falls down, because it does not easily conform to the requirements of either 'authorship' or of labour. These explanatory and ostensibly justificatory accounts of intellectual property envision a single author or labour, not a series of collective authors or labourers. They pose two 'crucial questions':⁵⁴

... whether communities can be seen as actors capable of performing entitlement-creating acts, and ... whether the development of landraces qualifies as such an act.⁵⁵

⁵⁴ *Ibid.*, p. 85.

⁵⁵ *Ibid.*, pp. 85-6.

In answer to the first question, Stenson and Gray doubt that a community can ‘labour’, because ‘without a brain’ it is incapable of ‘executing a rational plan’.⁵⁶ On the second query they contend that

... the individual creators of a whole landrace are not identifiable, because they do not exist: there is no author; it is generations of the community who create landraces.⁵⁷

Thus Stenson and Gray dismiss the entitlement theory as a justification for protection of cultural knowledge.

Stenson and Gray attempt to improve the case for community intellectual property by replacing the entitlement theory with ‘an autonomy-based argument’.⁵⁸ This is a theory that aims to justify minority rights, and, specifically, community intellectual property rights, on the basis of individual autonomy. Excepting the leap from cultural rights to community intellectual property rights, their argument comes directly from the work of Will Kymlicka. However, they illustrate their point initially by a citation from Greaves. It is repeated here as it encapsulates their view:

... tribal peoples have only their culture to distinguish themselves from everyone else. Their culture gives them their identity and their sense of value as a people. Disseminating that culture to outsiders dilutes their sense of personhood.⁵⁹

Although the point is not recognised by Stenson and Gray, this ‘sense of personhood’ is not the same value as that which they eventually espouse, which is rather ‘individual autonomy’. Stenson and Gray sum up Kymlicka’s theory, from *Liberalism, Community and Culture*, in the following way:

⁵⁶ *Ibid.*, p. 86.

⁵⁷ *Ibid.*, p. 90.

⁵⁸ *Ibid.*, p. 93.

⁵⁹ Cited in Stenson & Gray, *ibid.*, p. 93; T. Greaves (1995) ‘The Intellectual Property of Sovereign Tribes,’ *Science Communication* 17(2): 201-13.

Respect for the equal right of individuals to the resources necessary to form their own conception of the good life, entails that we guarantee their access to the cultural framework which is a precondition of forming such a conception.⁶⁰

This is a liberal argument that makes the connection between individual autonomy and cultural community rights by emphasising the liberal notion of the importance of the liberty of individuals to make and revise plans, in this case, in the context of membership of a cultural minority.

The next principle discussed by Stenson and Gray, which is intended to complement the preceding one, is that of national sovereignty.⁶¹ The principle of sovereignty is a fundamental principle of international law. It is the principle whereby states exercise authority, where they cede that authority only by some form of agreement, or by conquest. The ‘national sovereignty’ argument, with regard to genetic resources and intellectual property, is that states should have control over benefits that accrue from such goods, as well as over the goods themselves. Control means that goods can be released or not, and that when goods are extracted from outside, the sovereign state can determine the benefit in exchange. Stenson and Gray are quick to note the potential conflict between national sovereignty on the one hand and community intellectual property rights, which are associated in their minds with self-determination, on the other.

The authors claim that national sovereignty cannot be categorically asserted, for the claims that sovereignty springs from the right to national self-determination and that it

⁶⁰ Stenson & Gray, *ibid.*, p. 94.

⁶¹ In Ch. 5, *ibid.*

prevents disputes over resources, fail.⁶² On the first claim there are two difficulties: firstly ‘... a notorious lack of coincidence between “nation” and “state” ...’⁶³ and secondly, ‘it is not self-evident that the state ‘owns’ the territory it occupies, still less ... the natural resources within that territory’.⁶⁴ Against the second claim they contend that

... rivalry between nation states has often resulted in wars over natural resources.

Moreover the justification is, at best, only consequentialist ... Furthermore ... it necessarily carries with it certain restrictions.⁶⁵

These arguments are confidently unfurled in a mere four paragraphs. Despite their misgivings, Stenson and Gray declare national sovereignty to be a ‘long-entrenched principle’,⁶⁶ and they go much further than this when they say:

National sovereignty over genetic resources is crucial for developing countries because it means they can control the outflow of these resources from these countries.⁶⁷

Developed countries and companies accept the national sovereignty approach, however, for economic reasons, for institutional and procedural convenience, and because it does not threaten intellectual property rights.⁶⁸

The problem of potential conflict that Stenson and Gray see occurring between national sovereignty and community intellectual property rights arises from their reading of Anaya,⁶⁹ who poses the infamous problem of whether self-determination in international law is to be granted to non-state peoples. If it were, states and their

⁶² *Ibid.*, pp. 118-19.

⁶³ *Ibid.*, p. 118.

⁶⁴ *Ibid.*, p. 118.

⁶⁵ *Ibid.*, p. 119.

⁶⁶ *Ibid.*, p. 119.

⁶⁷ *Ibid.*, p. 122.

⁶⁸ *Ibid.*, pp. 123-4.

⁶⁹ S. J. Anaya (1996) *Indigenous Peoples in International Law*, Oxford, Oxford University Press.

peoples would be competing at the same level for the same genetic resources. As it is in practice, however, only states have sovereignty, and as Stenson and Gray finally concur, arrangements can be made to benefit states and peoples, although this is not a necessary outcome, and the matter of justice in achieving such a balance is always an open question. As well they make a distinction between the kinds of resources to which states and communities are entitled:

community intellectual property rights are conceived as a form of intellectual property right rather than a form of sovereignty over tangible natural resources. And, crucially, in our conception, they apply to traditional varieties and botanical knowledge, not to raw natural resources whose value is not known. This is because, to recap, traditional varieties and botanical knowledge form a part of the culture of the group in a way that plants of unknown value do not. This entails a different set of legal rights from any set implied by a declaration of indigenous control over the natural resources of the inhabited area. Community intellectual property rights imply a set of intangible property rights over a circumscribed set of resources and knowledge, while sovereignty implies physical control over the whole set of natural resources in a given territory.⁷⁰

It may be reasonable to fear that this is an oversimplification. Even so, this strategy may affect the weaker, non-sovereign party most adversely.

The next principle of relevance to the problem of genetic resource control, as Stenson and Gray see it, is 'The Common Heritage of Mankind'.⁷¹ This has nothing to do with the idea of an intellectual common either as it is traditionally conceived or as it is conceived by its Third World advocates, because, rather than a common resource, it is

⁷⁰ *Op. cit.*, n3, p. 131.

⁷¹ *Ibid.*, Ch. 6, pp. 136-53.

a 'common benefit'⁷² that is intended. The intellectual commons, by contrast, is the pool of shared or available knowledge and ideas not secured as intellectual property. For example, before the steam driven tractor had been invented, the tractor and the steam locomotive constituted part of the intellectual commons and as such were available to be subjected to ingenuity and transformed thereby into a new form, the steam driven tractor, to which the inventor, or the inventor's corporation, could assert or assign rights. A Third World argument, objecting to the exclusivity of intellectual property, calls instead for its abolishment, thereby expanding the intellectual commons. Very differently, Stenson and Gray's account of 'common heritage' is derived from a 'global commons' idea from the law of the sea pertaining to the deep-sea-bed, and is enshrined in Article 136 of United Nations Convention on the Law of the Sea (UNCLOS). The deep-sea-bed was proposed as a global commons by Arvid Pardo, Malta's former ambassador to the United Nations. This principle in the Law of the Sea maintains, through the UNCLOS Authority, that the benefits of the deep-sea-bed are not monopolised through aggressive, exclusive, unregulated proprietary activity and that the needs of developing countries are taken into account.

Stenson and Gray believe that this 'common heritage' principle is sound. They believe that it can be rationally defended by an extension of Rawls' difference principle, as 'chosen by all rational agents in a hypothetical pre-political situation',⁷³ of the international arena. They observe two types of such theoretical attempts at the internationalisation of the difference principle. In Rawls' schema, the state was seen to be a 'cooperative venture between agents who are roughly equal'.⁷⁴ The first such

⁷² *Ibid.*, pp. 137-8.

⁷³ *Ibid.*, p. 138.

⁷⁴ Stenson & Gray, *op. cit.*, n3, p. 139.

type of theoretical attempt is exemplified by Beitz.⁷⁵ Stenson and Gray characterise Beitz as claiming that the level of cooperation across state borders, in the contemporary world of international business, requires the extension of the difference principle accordingly.⁷⁶ The alternative view comes from Richards.⁷⁷ On this view, Rawls has misconstrued the circumstances of justice: all that is really required for justice 'is the ability to see the other's point of view'.⁷⁸ For Stenson and Gray the outcome of either of these views is that:

In the original position, individuals would protect themselves against the possibility of ending up in a poor state by adopting the *prima facie* position that natural resources should be available to all in equal measure ... all natural resources are, *prima facie*, common heritage interpreted as *res communis*. However, if a different system would maximise the position of the least well-off, this different system is preferable to one of *res communis*.⁷⁹

Stenson and Gray do not make a sustained case for this view themselves, but they add a third type of normative element, in that they claim further support for the common heritage view in applicable international standards, in the form of the *Convention on Biological Diversity* (CBD) and Farmers' Rights. They identify benefit sharing as a primary substantive principle of both regimes.⁸⁰

Stenson and Gray declare common heritage and community intellectual property rights to be 'entirely congruous'.⁸¹ And common heritage and national sovereignty in

⁷⁵ C. Beitz (1979) *Political Theory and International Relations*, Princeton, Princeton University Press.

⁷⁶ Beitz, *ibid.*, p. 151; cited in Stenson & Gray, *op. cit.*, n3, p. 139.

⁷⁷ David Richards (1982) 'International Distributive Justice', *Nomos XXIV: Ethics, Economics and the Law* J. Pennock & J Chapman, Eds. Albany, SUNY Press, pp. 277-8; cited in Stenson & Gray, *op. cit.*, n3, p. 139.

⁷⁸ Stenson & Gray, *ibid.*, p. 139.

⁷⁹ *Ibid.*, p. 141.

⁸⁰ *Ibid.*, pp. 141-50.

⁸¹ *Ibid.*, p. 151.

the regulation of genetic resources are seen as compatible, too.⁸² The claims of national sovereignty, common heritage and community intellectual property rights are seen, severally and together, as just, and therefore all simultaneously valid in this regulatory environment. In a just world, Stenson and Gray want us to believe, these three principles would work together to push back and to keep at bay the proprietary alternative. In the world in which we live, on the other hand, this is not the case. Here, what Stenson and Gray have, with Drahos, termed proprietaryism, is a very self-satisfied status quo, and a preferable alternative to it, is practically out of reach.

Stenson and Gray's treatment of community intellectual property rights is the only place where they are directly concerned with promoting a particular form of intellectual property as such. It is also where they are concerned with Kymlicka. It is time for a closer look at this discussion. Stenson and Gray's use of Kymlicka is, as noted above, one among the three prongs of their attack against 'proprietaryism'. Two of these prongs are national sovereignty and common heritage of mankind. The remaining prong is community IPRs, and to this Kymlicka's argument contributes most of the underlying reasoning. The theory of cultural rights that Kymlicka claims to be justifiable according to the principle of 'individual autonomy' is extended in turn by Stenson and Gray to justify the recognition of community intellectual property. So, if Kymlicka is right and Stenson and Gray have interpreted him correctly, it may not seem too great a leap to reach the conclusion that Stenson and Gray's argument about community and Indigenous intellectual property is dependent on Kymlicka's argument and falls if and where it falls.

⁸² *Ibid.*, p. 152.

Stenson and Gray characterise Kymlicka's *Liberalism, Community and Culture*⁸³ as 'an attempt to reconcile ... liberalism and communitarianism'.⁸⁴ This is presumably because part of Kymlicka's theory, at the level of individuals, is liberal, and at the level of non-state communities its sympathies may seem to be more 'communitarian', despite his claim to find a liberal basis for cultural rights. Stenson and Gray think that Kymlicka has successfully deflected some of the communitarian criticisms against liberalism, but they are concerned chiefly with how 'liberalism does not necessarily preclude the possibility of collective cultural rights, and in certain cases even requires such rights'.⁸⁵ According to Stenson and Gray, Kymlicka has objected to liberals' misunderstandings of the cultural situation of individuals: 'treating each individual only as an equal citizen in a political community can have a fracturing impact on minority cultural communities'.⁸⁶ Liberalism, then, treats two hypothetical citizens of the same state who are also members of different cultural communities as if they were the same. They note Kymlicka's objection to this tendency:⁸⁷ in this story of uniformity, what is lacking is 'a rich cultural background' accessible by each member in their own culture.

[T]he reason why freedom of choice is guaranteed within liberalism is that it is recognised that the only valuable life is one that is led from the inside. People have to make their own choices if that life is to be one that is worth living.⁸⁸

Stenson and Gray note that Kymlicka sees liberalism as not a last word but as a means to an end; that end will be a good, or 'the good', but the individual must be at liberty to find it. On this argument so far then, as they present it, there are already four steps, cultural rights are sometimes required to protect culture; culture is valuable to cultural

⁸³ Kymlicka, *op. cit.*, n3.

⁸⁴ Stenson & Gray, *op. cit.*, n3, p. 94.

⁸⁵ *Ibid.*, p. 95.

⁸⁶ *Ibid.*, p. 95.

⁸⁷ *Ibid.*, p. 96.

⁸⁸ *Ibid.*, p. 97.

members because they need it to develop as autonomous individuals; individuals should be allowed to develop in this way; and liberalism enables such development. Having adopted Kymlicka's theory, Stenson and Gray are then committed to its limitations. When they seemed to want to say that community intellectual property rights are good for communities, they have ended up by saying community intellectual property rights are good for, and in certain circumstances necessary for individual autonomy, and that this is in itself good.

Kymlicka's Liberty

Kymlicka includes 'culture' among primary goods, and he makes a great deal of something which Mill made a great deal of long before Rawls, which is the importance for an individual of having the liberty to make and revise his or her plans. The principle of the revisability of plans is for Kymlicka the link between his liberalism and his liberal theory of minority rights, and so it is important to consider it in detail. Fortunately, Kymlicka is free with his discussion of it, not only in terms of cultural rights, but also in terms of its role in his liberalism per se. Since Rawls wrote his *Theory of Justice*,⁸⁹ liberalism has been under attack from communitarian thinkers. This work has drawn attention to liberalism's lack of having anything much to say about the place of any unrestricted conception of morality in the political sphere. The good, being relegated to individual subjectivity, is, with morality, excluded. It remains to be seen whether these charges can be levelled at Kymlicka and with what effect. If

⁸⁹ J. Rawls (1971) *A Theory of Justice*, Oxford, Oxford University Press.

Kymlicka's liberalism does not stand up, his theory of minority rights will have to be redrafted, as his whole project is to marry the two.

Kymlicka wants, in addition to accommodating cultural rights within liberalism, to defend liberalism against its critics. These critics⁹⁰ level against liberalism charges of 'excessive "individualism", or "atomism", [and] ... ignoring the manifest ways in which we are "embedded" or "situated" in various social roles and communal relationships'.⁹¹ Kymlicka's first task in *Liberalism, Community and Culture*⁹² is to characterize contemporary liberalism, as he understands it. Rather than being shallow or narrow, it revolves around the notion of the good life. But unlike explicitly teleological theories, it claims that

... we lead our life from the inside, in accordance with our beliefs about what gives value to life; ... [and] that we [should] be free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide.⁹³

Hence the good cannot be imposed upon an individual; hence also the importance to 'the good' of individual autonomy. Liberalism has little to say about the good except that it knows how to achieve it even without being able to name it. According to Kymlicka this does not mean equating liberty with the good. Liberalism is, for him, a deontological theory with a claim to a teleological goal. Kymlicka will have a hard time defending liberalism in this way, because liberalism on this account cannot theoretically articulate what it claims to hold dear.

⁹⁰ '[C]ommunitarians, socialists and feminists alike ...' Kymlicka, *op. cit.*, n3, p. 9.

⁹¹ Kymlicka, *ibid.*, p. 9.

⁹² *Ibid.*

⁹³ *Ibid.*, p. 13.

Kymlicka draws out this discussion in his second chapter⁹⁴ when he categorises criticisms of liberalism (that it is atomistic in its individualism and that it is sceptical about the good) as ‘misinterpretations’.⁹⁵ In Kymlicka’s following chapters, he tackles a particular manifestation of this problem, the matter of priority concerning the right and the good. Kymlicka begins by denying that this question is based on a misconception.⁹⁶ The allegation is that liberals unjustifiably prioritise the right over the good. The misconception is that liberals do this at all. Here Kymlicka follows Dworkin rather than Rawls, in that Rawls finds

a contrast ... between deontological and teleological theories ... [that is however] ... based on a serious confusion between two distinct issues: ... the *definition* of people’s essential interests ... [and] the *principles of distribution* which follow from supposing that each person’s interests matter equally.⁹⁷

Here Kymlicka is distancing himself from liberalism’s critics by asserting that they are criticising a more strictly Rawlsian liberalism than what he represents. If the distinction between himself and Rawls is realistic, then this assertion is true in that the recent, well-known criticisms of liberalism (e.g. by Taylor, Sandel, Walzer and MacIntyre) are criticisms of Rawls’ conception in particular.

On the first of Kymlicka’s issues, he relates Rawls’ discussion of utilitarianism. This is a theory that, on Kymlicka’s view, Rawls wrongly claims that utilitarianism gives priority to the good over the right. Rawls describes utilitarianism as a teleological rather than as a deontological theory.⁹⁸

⁹⁴ ‘The Right and the Good’, *ibid.*, p. 21–43.

⁹⁵ *Ibid.*, p. 17.

⁹⁶ *Ibid.*, p. 21.

⁹⁷ *Ibid.*, p. 21–2.

⁹⁸ *Ibid.*, p. 22–25.

This, then, is Rawls's major example of a teleological theory which gives priority to the good over the right. His rejection of the priority of the good, *in this context*, is just the corollary of his affirmation of the separateness of persons: promoting the well-being of the social organism can't be the goal from which people's rightful claims are derived, since there is no social organism. Since individuals are distinct, they are ends in themselves, not merely agents or representatives of the well-being of the social organism.⁹⁹

Kymlicka thinks Rawls has got utilitarianism wrong.¹⁰⁰ This does not weaken Rawls' point, against what he takes to be utilitarianism: that it does not facilitate each individual's pursuit of the good. Rawls' solution is to reverse the apparent or perceived weighting of utilitarianism and thereby prioritise the right over the good. Kymlicka on the other hand sees this as unjustified, going too far unnecessarily and thereby attracting unwarranted criticism to liberalism for which Rawls is seen as an elegant spokesperson. After examining five different generalised communitarian critiques of liberalism, Kymlicka goes on to discuss a particular communitarian view in Charles Taylor and Marxism. He then introduces the idea of community. The communities Kymlicka is concerned with are minority, non-state communities. He sees anti-communitarian liberals as being as misguided as communitarian critics of liberalism. Kymlicka gives to the citizens of a state the name 'political community',¹⁰¹ whereas he calls the members of non-state community a 'cultural community'.¹⁰² He says of a cultural community that it is the entity in which it is appropriate for individual members to make and revise plans.¹⁰³ This is what makes the connection that Kymlicka wants to assert, between group rights and individual autonomy.

⁹⁹ *Ibid.*, p. 24.

¹⁰⁰ *Ibid.*, p. 24.

¹⁰¹ *Ibid.*, p. 135.

¹⁰² *Ibid.*, p. 135.

¹⁰³ *Ibid.*, p. 135.

Community and Cultural Rights

Although Kymlicka is concerned to explain the status of immigrant communities and ‘national minorities’ in general, his case in point for demonstrating the cultural context of planning by individual members is the aboriginal communities of North America. American Indians are incorporated into the state ‘consociationally’,¹⁰⁴ according to Kymlicka, such that ‘the nature of people’s rights and the opportunities for exercising them, tend to vary with the particular cultural community into which they are incorporated’.¹⁰⁵ This tendency, he observes, is perceived as being in conflict with citizenship rights.¹⁰⁶

The accepted wisdom is that liberals must oppose any proposals for self-government which would limit individual rights in the name of collective rights. I think that is a mistake, one that has caused serious harm to the aboriginal population of North America, and to the members of minority cultures in other liberal democracies.¹⁰⁷

Kymlicka goes to some length to understand why this perception persists among liberals. What he offers them instead is not only a correction of the view that minority rights are inimical to liberalism, but a complete reversal of their cosmopolitan equality; he proposes that not only are cultural rights sometimes to be permitted by liberalism, but that sometimes they are necessitated according to liberalism.

Kymlicka says that when liberals like Rawls espouse the importance of one’s having the liberty to ‘accept or reject particular options ... [to effect, on Rawls’ account,

¹⁰⁴ *Ibid.*, p. 137.

¹⁰⁵ *Ibid.*, p. 137.

¹⁰⁶ *Ibid.*, p. 137.

¹⁰⁷ *Ibid.*, p. 138.

‘self-respect’¹⁰⁸] ... the range of options can’t be chosen’.¹⁰⁹ On the contrary, he says, we select

from the various options available, [from a given]... context of choice which provides us with different ways of life ... This is important because the range of options is determined by our cultural heritage.¹¹⁰

Kymlicka is here trying to say that our culture, which determines us initially, provides us with a paradigm of agency in that, initially, it gives us both the things available to choose and the very notion of their reasonableness as choices. Later we can introduce things from outside, and possibly even reject our culture when enough of the original paradigm has been replaced in this way. This is merely an initial premise for Kymlicka, for he comes quickly from this to the following deduction:

Liberals should be concerned with the fate of cultural structures ... because it’s only through having a rich and secure cultural structure, that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value.

On this point Kymlicka recommends adding cultural membership to Rawls’ list of primary goods. He assumes that aboriginal tribes and other national minorities are such cultural structures. In any case what he seems to be claiming here is that, at least in some cases, unless one’s cultural community is effectively preserved by the state, where it is threatened by erosion of some kind, one’s self-respect will be jeopardised, or one’s pursuit of the good will be barred, or one’s autonomy will be curtailed. It is evident that this is what he is saying, but, as the following discussion hopes to show, it is not so clear that this is what he has succeeded in showing.

¹⁰⁸ *Ibid.*, p. 164.

¹⁰⁹ *Ibid.*, p. 164.

¹¹⁰ *Ibid.*, p. 164.

Of the various commentators on Kymlicka, those who have sought to reveal the weaknesses of his argument have been liberals seeking to defend liberalism's universalism, to show that to institutionalise group rights is to jeopardise liberalism's impartiality, one of its central tenets, claims and promises, and one of the necessary structural components of its theory. Two of these critics are Jeremy Waldron, a cosmopolitan liberal whose work on property will play a role in the next chapter, and Chandran Kukathas, a liberal individualist who understands group membership in terms of freedom of association. The criticisms of Waldron and Kukathas are reviewed below.

Waldron's essay, entitled 'Minority Cultures and the Cosmopolitan Alternative', seeks to challenge what he typifies as a communitarian notion of the exclusivity of our attachment to community.¹¹¹ He focuses on the meaning, in this construction, of the term 'community',¹¹² and in particular on the meaning of 'ethnic community', by which he means 'a particular people sharing a heritage of custom, ritual, and way of life'.¹¹³ He says: 'I want to pin down the communitarian critique of the cosmopolitan style of life to' claims of ties of need, to land, blood, and people.¹¹⁴ Waldron thinks that the need for a singular and exclusive community is an 'assumption'¹¹⁵ of Kymlicka's *Liberalism, Community and Culture*. Waldron faults Kymlicka's notion of the need for a cultural structure as a 'fallacy of composition': the need for a cultural structure is an attractive idea, but reducing the need to a single 'framework' is

¹¹¹ J. Waldron. (1995) 'Minority Cultures and the Cosmopolitan Alternative,' *The Rights of Minority Cultures*, W. Kymlicka. Oxford, Oxford University Press, at 93-119, p. 95.

¹¹² *Ibid.*, pp. 95-6.

¹¹³ *Ibid.*, p. 96.

¹¹⁴ *Ibid.*, p. 96.

¹¹⁵ *Ibid.*, p. 105.

unwarranted.¹¹⁶ What Waldron will concede to Kymlicka is rather that we need ‘cultural materials’.¹¹⁷ However, Kymlicka may be right that we need a single, stable culture especially at certain critical moments and phases of our lives, but Waldron is right to question the inferences Kymlicka draws from our relationship to ‘culture’. Waldron then takes a second slant against Kymlicka, now against his idea of cultural security, and finds this self-defeating, in that cultures or cultural structures change, as a matter of course.¹¹⁸ This is of course problematic in the same way as our dependence on a ‘cultural structure’ in general. On both these points Waldron successfully undermines Kymlicka’s claims to the extent that the nature of their connection to individualist liberalism is unsubstantiated.

Kukathas’ case, against Kymlicka’s multicultural liberalism, in ‘Are There Any Cultural Rights?’,¹¹⁹ is different from Waldron’s, and it is more decisive, and more damning. Kukathas wants to judge Kymlicka against the backdrop of liberalism, and against Kymlicka’s own self-presentation as a liberal, in particular. Kukathas challenges Kymlicka’s claim that cultural rights protect individual autonomy. He says that this claim is sometimes false since the extent that cultural groups foster and sometimes demand member conformity rather than individual autonomy.¹²⁰ Even though Kymlicka develops a theory of multicultural rights that deals with the issue of cultural illiberality in *Multicultural Citizenship*,¹²¹ to limit the protection of a minority culture to those elements that do not offend against liberalism, Kukathas’ challenge

¹¹⁶ *Ibid.*, p. 106.

¹¹⁷ *Ibid.*, p. 107.

¹¹⁸ *Ibid.*, p. 108-110.

¹¹⁹ C. Kukathas (1995) ‘Are There Any Cultural Rights?’ *The Rights of Minority Cultures*, W. Kymlicka. Oxford, Oxford University Press, at 228-56.

¹²⁰ *Ibid.*, p. 241-2

¹²¹ W. Kymlicka (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, pp. 163-170; Kymlicka published *Multicultural Citizenship* in the same year that Kukathas published the essay presently discussed, *ibid.*, which might explain Kukathas’ failure to discuss it.

stands, because even cultural groups unsupported by liberal states maintain themselves through each member, in that the group's culture is represented and instantiated in each member. Conformity is occasioned, therefore, in the development of individual identities rather than by coercion or by any other extraneous act.

Kukathas writes on this point:

persons seeking to preserve the group identity ... would surely object that to elevate individual choice and suggest the course of 'liberalising' their cultures 'without destroying them' is to fail to take their culture seriously. ... Culture ... is the product of the association of individuals over time, which in turn shapes individual commitments and gives meaning to individual lives – lives for which individual choice or autonomy may be quite valueless. To try to reshape it in accordance with ideals of individual choice is to strike at its very core.¹²²

To conclude his position, Kukathas asserts that Kymlicka grounds his defence of cultural rights on what in fact undermines cultural minorities: individualism. The problem for Kymlicka is that he was determined to locate cultural rights in this normative morass of liberalism instead of in the special natures of those communities themselves.

A third level of criticism against Kymlicka can be introduced here. It is in two parts. The first is that Kymlicka fails to make the necessary leap from the requirement for individual autonomy (assuming for the moment that this is unproblematic) in the pursuit and revision of life plans, etc., to the inference that this requires a cultural structure, and by this cultural structure is meant an ethnic minority of one sort or another, and perhaps even the legal or constitutional protection of that structure. Part of this notion is true: we need a cultural structure for a whole range of reasons, from

¹²² Kukathas, *op. cit.*, n108, pp. 243-4.

development, education, work for making plans, and for generally acting in a social world. We do not, however, need a cultural structure to best secure our individual liberty above other values. All of those claims asserting the need for a cultural structure could conceivably be construed in terms of obligation or some other value besides liberty. Alternatively, a cultural structure could be defended on the basis of the good, rather than liberty or right, and then presumably justice and liberty would play a role also. Liberty, as an independent value, may be best secured in total isolation from other persons. Then there is the matter of rights. Nothing in Kymlicka's theory accounts for when it is right to recognise an aspect of the life of a community in law, let alone the proper extent. This is evidence of Kymlicka's determination to link logically his liberal theoretical commitments with his multicultural sympathies. Cultural structures make most sense not to singular external values, but to their members, but this is the next point to be made here.

The second part of this additional criticism, already implied above, is that Kymlicka is appealing to the wrong criterion. His argument for cultural rights on a liberal basis of liberty appeals to the wrong criterion. There is a criterion that could have been successfully appealed to, but it is not a liberal one. On the contrary, it is community. The cultural structure that is needed for making and revising plans is the community, and communities are rightly not understood according to theories of individual liberty. Communities are networks of sociality, contribution and cooperation. Members are the community for each other, they embody it collectively and individually, and at the same time they hold the culture in trust for the benefit of the future community. The culture changes, inevitably, but organically, unless forced. This argument, consisting of these two parts together, brushes closely against those of Waldron and Kukathas,

but it should not be seen as a substitute for them. The objections registered against Kymlicka by these two authors are vital to understanding the shortcomings of his theory. It should be possible clearly to see the limitations upon Kymlicka's project, in so far as it has been viewed here.

Non-Individualist and Non-Liberal Critics of *Multicultural Citizenship*

In *Multicultural Citizenship*,¹²³ Kymlicka extends his liberal theory of cultural rights expounded in *Liberalism, Community and Culture*¹²⁴ to include discussion of the significance of the distinction between national minority rights and polyethnic rights, and of the proper limits of cultural rights in terms of liberal principles and of individual human rights. In the later work the connection between liberty and cultural rights is present mainly implicitly, however, as the connection had been firmly established in the earlier work the justification of cultural rights on liberal principles recedes in *Multicultural Citizenship* to the level of an assumption, as the connection is not justified anew but rests on the justification asserted in *Liberalism, Community and Culture*. *Multicultural Citizenship* then explores the implications of liberty and cultural rights in terms of each other, in their proposed coexistence. Polyethnic rights are for Kymlicka those which attach to immigrants they are essentially non-discrimination rights. One of the main reasons Kymlicka does not award them more thoroughgoing group rights is that polyethnic groups do not generally appear in concentrations sufficient to occupy a territorial base. Other cultural groups, national minorities, do however appear to have such sufficient concentrations. This category

¹²³ W. Kymlicka (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press.

¹²⁴ *Op. cit.*, n3.

consists of groups with a political structure, language, traditions and lands that are identifiable as against the rest of the state, and includes federated polities such as Scotland and Quebec and Indigenous peoples. After this, Kymlicka's other main concern in *Multicultural Citizenship* is the extent to which cultural rights should be awarded. He argues that it is not inconsistent for liberal states to award cultural rights to minorities even extensively, such that the community as a whole can flourish and continue to provide cultural and political sustenance, in the way of self-esteem, to its individual members. To be consistent however the state must exclude the cultural group from practicing illiberal ways, and Kymlicka argues that this is possible without disrupting the whole that is the social life of the group. So cultural rights must on this account be distributed according to the nature of the group (national or polyethnic) and according to the demands of the liberal policy of the liberal state (and the same goes for individual human rights). Essentially, the problems with this theory are much the same as that of *Liberalism, Community and Culture* (the connection between individual autonomy and cultural rights), and there are some additional ones. Among these are why are not the rights of national minorities argued on the ground of justice (restorative not distributive; this would help Kymlicka distinguish between polyethnic and national minority rights), and why must cultural groups be 'liberalized' rather than simply being asked to conform *reasonably* with institutions of the state in which they are housed. The criticisms considered below are concerned with the connection asserted by Kymlicka between individual autonomy and cultural rights. Kymlicka's responses to his critics are also discussed.

Critics of *Multicultural Citizenship* are concerned either to judge Kymlicka's approach their to types of cultural rights or to the connection between liberty and

cultural rights. As we are only concerned here with one type of cultural group, a type of national minority in Kymlicka's language, only the latter type of criticism will be considered here. Rainer Forst proposes an alternative conception of liberal justification to Kymlicka based on a right to sufficient reasons grounding an intersubjective agreement and its consequences for cultural rights. This is a type of claim that aims to stand outside the cultural content of liberalism and equally of the cultures of Indigenous peoples. And Bhikhu Parekh claims that the views of those who seek cultural rights should have a bearing on the quality of the rights considered and on what counts as a legitimate account of such claims. Kymlicka takes these criticisms seriously and mainly seeks to ameliorate their impact on his theory.

Forst is not convinced that Kymlicka's concept of autonomy will support multicultural practice as he claims it will: 'the liberal notion of autonomy as "freedom of choice ..."' is neither a generally shareable notion of individual autonomy – and thus is insufficient as an impartial ground of justice – nor does it do all the work Kymlicka thinks it does to explain the value of cultural membership ...'.¹²⁵ Rather, Forst suggests a thinner notion than freedom of choice which instead

regards moral persons as having a basic "right to justification" in the sense that for every claim others make on them, and especially for every form of force to which they are subjected, they must be given adequate reasons justifying these claims and the norms on which the force rests. Persons are regarded – and respected – as autonomous in the sense that they are morally independent addressees and authors of intersubjective claims. I would argue that this form of moral respect and autonomy is the minimal basis of any acceptable conception of justice, and thus also of

¹²⁵ Rainer Forst (1997) 'Foundations of a Theory of Multicultural Justice' *Constellations* 4 (1): 63-71, p. 65.

multicultural justice. Rather than a specific *ethical* conception of what an autonomous and good life is, it gives a more basic, mutually non-rejectable *moral* conception of the autonomous person that is not committed to a particular view of the good life. The main difference between the two conceptions is the following: A person may not accept the choice conception of ethical autonomy as a precondition for the good life, but no (moral) person can justifiably – or reasonably, i.e., with good reasons – deny other their right to basic moral respect, whatever their notion of the good life may be.¹²⁶

Forst is here claiming to sidestep the cultural nature of Kymlicka's liberalism, so as to construct an alternative 'liberal' defense of cultural rights seemingly without the conflict of any principles of material culture (liberal or non-liberal) in the working out of multicultural politics. He identifies the main problem for *Multicultural Citizenship* as being the Kymlicka's claim to connect his own notion of autonomy with the importance of a cultural structure within the state.

Persons *belong* to their cultural community – this is the *identity* argument Kymlicka needs to stress but does not adequately capture in his notion of autonomous choice; but they are not *owned* by it – this is the *moral autonomy* argument that suffices to rule out internal restrictions as illegitimate on moral, not specifically "liberal," grounds.¹²⁷

Kymlicka believes that his theory runs into problems that any such theory (of multicultural politics) will inevitably run into. No group, culture, rationality or ideology has all the answers. While acknowledging the problematic nature of the liberal state's inevitable limitation of the rights of cultural minorities he believes that

¹²⁶ Such a notion, Forst claims, is 'not reasonable to reject'; *ibid.*, p. 65.

¹²⁷ *Ibid.*, p. 67

his working out of the problem could be done any better.¹²⁸ ‘... I do not see that it would help to adopt Forst’s proposal that we should abandon the liberal focus on personal autonomy for the Kantian focus on moral autonomy.’¹²⁹ Kymlicka complains that Forst fails to show why people would be persuaded by moral and not moral autonomy. The fact is as we have seen above that Forst’s proposal is given precisely in terms of sufficient reasons. It could be argued here that such sufficient reasons are what liberal autonomy presupposes and what it subsequently relegates to what individuals will work out throughout the course of their lives. Kymlicka goes on to say that that way that moral autonomy does not transcend the problems of liberal autonomy is that it is one type of morality like liberal autonomy against the culturally different morality of the minority. Being contractualist, however, Forst’s argument is necessarily for a negotiated outcome. Sufficient reasons asserted by both sides can be debated, and cultural and ideological differences understood and incorporated. At least this is a possibility that is prepared for on Forst’s account. Kymlicka goes on to complain that Scanlon’s contractualism on which Forst’s critique is based leaves those who lack the capacity to contract out of moral discussion altogether.¹³⁰ What Kymlicka fails to notice is that a contractual approach (where there is that capacity to negotiate) can add something to a moral discourse by insisting that those whose moral position is to be discussed are also participants in that conversation.¹³¹

Parekh objects to the liberal foundations of Kymlicka’s theory of multiculturalism and cultural rights in *Multicultural Citizenship*. First, Parekh argues that due to

¹²⁸ Will Kymlicka in ‘Do We Need A Liberal Theory of Minority Rights’ in his (2001) *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford, Oxford University Press, p. 64.

¹²⁹ *Ibid.*, p. 64.

¹³⁰ *Ibid.*, p. 65.

¹³¹ Where animals, children or others without the capacity to participate are the subjects of moral discussion there is at least on this contractualist model more than one voice in a moral agreement.

Kymlicka's insistence on liberal foundations to his theory, it has then nothing to say to non-liberal societies regarding multiculturalism. This is not however because nothing can be said to such societies. Parekh says:

Kymlicka sometimes suggests that since we live in a liberal society, we should conceptualize and defend minority rights in liberal terms. This will not do, for our society includes both liberals and nonliberals and is characterized by a constant struggle between them. To call our society liberal is arbitrarily to appropriate it for the liberals and to rule out nonliberals by a definitional fiat.¹³²

So far, Parekh is not showing a fatal flaw, but only a serious limitation of Kymlicka's theory. However, he is drawing our attention to the fact that 'liberty' in liberalism is to be shared among the liberal members of a liberal state. Even within such a state non-liberal peoples can readily be found, whose claims against the state cannot be justly decided on liberal principles. Parekh observes that related to this although Kymlicka recognizes the value of culture, he does so only in terms of the liberal ends of autonomy and self-esteem. Parekh notes that although Kymlicka tries to start empirically with how liberal-multicultural societies work, he does not do the same with the cultural minorities that in part constitute them, rather he views these groups immediately in terms of the 'liberal' state. Kymlicka

Expects Amer-Indians, Inuits and other non-liberal communities to take a liberal view of themselves, that is, to view and relate to their cultures in a way that the liberal does to his, and he defends them only to the extent that they behave as respectable liberals.¹³³

¹³² B. Parekh (1997) 'Dilemmas of a Multicultural Theory of Citizenship,' *Constellations* 4(1): 54-62, p. 58.

¹³³ *Ibid.*, p. 59.

At the next level of objection Parekh shows that the self-determination of cultural minorities should not so easily be constrained by the state on any a priori absolute principle as Kymlicka thinks. Parekh thinks that this position threatens a group's right to self-preservation. 'To privilege individual autonomy and choice is to render impossible a stable community in any meaningful sense of the term, and thereby to undermine the very capacity for autonomy and choice.'¹³⁴ The class of minority group issues to which Parekh is referring to here is Kymlicka's notion of the liberal prohibition on a group's imposing internal restrictions' on its members. It is the universality of Kymlicka's claim for the correctness of this prohibition to which Parekh is objecting.

In response to Parekh, Kymlicka starts off by conceding that there is something to his claim that basing 'a theory of multicultural citizenship on a value which is itself the heritage of just one cultural tradition'¹³⁵ is 'part of a paradoxical and incoherent enterprise',¹³⁶ but that this is exaggerated. Kymlicka thinks that members minority groups are open to the liberalism of the states within which they seek, like everyone else, to prosper. Against Parekh's implication that if cultural minorities were liberal this would preclude multicultural theory, Kymlicka says:

There is no evidence that the convergence on liberal values between majorities and minorities has diminished in any way the level of intensity of conflicts over the accommodation of ethnocultural differences. These groups may agree on liberal-democratic principles, but they disagree on the implications of these principles for concrete questions ...¹³⁷

¹³⁴ *Ibid.*, p. 51.

¹³⁵ Kymlicka, *op. cit.*, n128, p. 60.

¹³⁶ Parekh, *op. cit.*, n132, p. 59, cited in Kymlicka *ibid*, p. 60.

¹³⁷ Kymlicka, *op. cit.*, n128, p. 60.

Kymlicka thinks the exceptions to this are too small to impact on multicultural politics in general.¹³⁸ He thinks also that liberal democracy does not prevent the practice, within cultural minorities, of cultural or religious life as a whole:

Parekh ... exaggerates the extent to which my approach rejects or precludes the idea that cultures can have intrinsic value, or form a sacred trust. There is nothing in my approach that prevents individuals from adopting such an attitude towards their culture. This is one of many attitudes towards one's culture that is fully permissible within a liberal society. What is true, of course, is that my theory does not rest upon such an attitude. It is the instrumental, not the intrinsic, value of culture that grounds claims for political powers and resources in my liberal theory.¹³⁹

Here Kymlicka has identified precisely the problem with his theory, that culture is instrumental as opposed to being sacred, or of intrinsic value. Despite Kymlicka's goodwill, the implementation of liberal policies by culturally liberal agents will be interpretive. Kymlicka remarks, 'as Parekh says, this is just one way of conceiving the role of culture in political theory'.¹⁴⁰ This is as if the alternatives were of equal significance. Rather there is a hierarchy at the top of which is the treatment of culture first in terms of itself. Kymlicka asserts, supposedly against Parekh, that:

Developing a coherent liberal theory is not a trivial step, since the overwhelming majority of real-world political disputes between ethnocultural groups in the West are precisely over the application of liberal principles.¹⁴¹

Firstly, most minorities do not live in liberal democracies. Second, do not 'real-world' political disputes constitute exactly the issue in question here?

¹³⁸ *Ibid.*, p. 61.

¹³⁹ *Ibid.*, p. 62.

¹⁴⁰ *Ibid.*, p. 62.

¹⁴¹ *Ibid.*, p. 62.

Chapter Five of Kymlicka's *Multicultural Citizenship*¹⁴² recapitulates the core justificatory argument from Chapter Seven of *Liberalism, Community and Culture*.¹⁴³ His new explorations in the former more recent work only explore the limits of his idea of cultural rights in terms of the categories of national and ethnic minorities, of the demands liberal societal culture and of human rights. These newer parts of his on-going work leave the central justificatory argument untouched, while exploring new implications of it. This is bound to create new problems as the old argument brings inherent problems with it into these new areas. Questions of justice and the good are still obscured as Kymlicka continues to insist on the ultimate priority of liberty over community and of the right over the good. Forst has shown that liberty may not lead the most reasonable outcome by not privileging sufficient reasons in the practical search for satisfactory minority outcomes. Kymlicka is very much aware that multicultural politics depends on the willingness of politymakers, and his framework can learn from the negotiation friendly democratic proceduralism of Forst. Parekh has asserted the value of culture in itself, from the perspective of its participants, as constituting their identity and expressing their values in such a way as not to be simply reducible to its component values or comparable with discrete other values.

Conclusion

All of Stenson and Gray's problems with respect to Indigenous intellectual property rights are self-generated at the theoretical level, including their adoption of Kymlicka's problems. Kymlicka's error, which is shared by Stenson and Gray's, is

¹⁴² Freedom and Culture, *op. cit.*, n123, pp. 75-106

¹⁴³ The Value of Cultural Membership, *op. cit.*, n3, pp. 162-180.

the hasty constructivism of his attempt to apply a readymade liberal model to minority rights, which already has a necessarily non-liberal, cultural content. This theoretical material, of Kymlicka's construction contributed a framework, which enabled he and his readers to view an empirical problem comprising numerous varying cases.

Kymlicka employed this strategy with greater success in *Multicultural Citizenship*,¹⁴⁴ to the extent that it is more dependent on empirical information and experience (including the experience of his own prior work), than on the explicit backbone of a liberal theory of cultural rights. It could be argued that, through a different theoretical framework, the same issues could be problematised, and some of the same conclusions reached, all except the fundamental one about the compatibility of liberalism and cultural rights. When Kymlicka discusses the importance of cultural preservation to cultural members, or when Stenson and Gray, in their own specific example of this, assert the importance of PGRs to their traditional, collective possessors, they all appeal to reasons that would seem likely to be in the minds of those concerned: cultural preservation for oncoming generations, avoidance of diminished self-respect, or control over what they believe they are entitled to. This then has to be redescribed and justified in liberal individualist terms. For Kymlicka this is the exercise of a prior commitment, and for Stenson and Gray it is the selection of the theory they believe best suits their purposes.

It must be remembered that the criticisms of Kymlicka by Waldron, Kukathas and the present author apply equally to Stenson and Gray. None of these critics chose to attack liberalism directly as that would have constituted a much larger task and Kukathas and Waldron argue from within liberalism itself. Therefore, to the extent

¹⁴⁴ *Op. cit.*, n1, p. 23.

that Waldron is right about the diversity of our experience of choice among a variety of cultural structures, Stenson and Gray's theory of community IPRs is undermined, and because Kukathas is obviously right about the illiberal effects of the liberalisation of illiberal groups, Stenson and Gray have some rethinking to do. And because Kymlicka's theory involves appealing to external criteria, which the communities would be unlikely to recognise, Stenson and Gray's theory is similarly misguided. It is already evident from the previous chapter that Indigenous people have their own clear ideas about what they want protected as intellectual property, and why. It is also evident that this has, in the examples in that chapter, little to do with individual liberty, and everything to do with the body of custom carried by the tribe. Why something is important in this way is only open to the arbitrary nature of individual preference within narrow constraints established in all likelihood before the birth of the chooser. Even though plant materials are often regulated in one way or another in a tribal situation, where they are not so culturally regulated, the procedures the tribe follows in order to make a collective decision affecting a plant species in their possession, is likely to be culturally regulated.

CHAPTER SEVEN:

INDIVIDUALIST THEORIES VERSUS CULTURE AND INSTITUTIONS

Introduction

So far, this thesis has discarded both liberal individualism and a natural law theory of property, in the face of anthropological facts. Looking back, some common elements in the criticised philosophical attempts at justification come into view. The present chapter will show that these liberal and natural law¹ theories are not only theoretically related, but also that they share *related* weaknesses in their understanding of some classes of Indigenous claims to intellectual property.

It has already been shown, in Chapter Six above, that Kymlicka's theory² will not, when there is any kind of a cultural, conventional or substantive claim, provide a justification for community or Indigenous intellectual property rights, as his theory has no tools for engaging directly with such claims. In general Kymlicka's theory will not achieve what it set out to achieve: by incorporating the idea of 'cultural structures' into a liberal theory, it reduces culture in terms of liberty. The alternative Lockean natural law theory also fails in its specific application to the present problem of

¹ Natural law here refers to Locke's theory of property, although it in fact ranges over contractarianism and proprietorism, even on Locke's original account, John Locke (1993) *Two Treatises of Government*, London, Dent and Sons, see esp. Ch. 5, Of Property.

² In W. Kymlicka (1989) *Liberalism, Community and Culture*, Oxford, Oxford University Press.

attempting to secure Indigenous cultural and intellectual property, and in its general claims to justify property acquisition in a state of nature that have been problematic from Locke's original conception to the present.³ Locke's theory of property acquisition has been shown, in Chapter Five, to have a particular lack of efficacy when faced with the task of justifying or denying ownership when *conventional* or positive property obtains in a thing.

It so happens that Locke's and Kymlicka's theories share more than a few elements in common, and that they also share in common a more general philosophical domain. Some of these elements are ideas of individual liberty, toleration, and secularity, the confusion of normative and analytical theory, and, at the explanatory level, the idea of a social contract. These theories could both be termed individualist theories of abstract political reciprocity, although such abstract reciprocity is held to hinge on a different principle in each case: individual labour and property on the one hand and individual liberty on the other. These theories institutionalise reciprocity in one abstract form or another by operating at the level of part analytic, yet part normative models. These models become problematic when their limitations as abstract are forgotten and they are applied to particular and concrete problems, distorting the problem by subordinating valid and operative intrinsic values to its own. The element of abstract reciprocity common to these theories is really a super-theoretical idea, or assumption, common to a string of theories from the seventeenth century onwards. The theories in this string are the theories of social contract, toleration, utilitarian

³ The theory posited as alternative by Stenson and Gray, *ibid.*, and against which they align their Kymlickan argument, is the labour theory of entitlement to property as in its best known representative John Locke, *op. cit.*, n1, Ch. 5, Of Property.

theory, and liberalism, in its various forms.⁴ One characteristic these theories have in common is that they are counter to theories appealing to culture, community, authority, tradition, and divine right. Hegel's theory manages to appeal to both liberty and tradition, and to wed the two without subordinating one to the other. It does this in part by appealing to reciprocity of a culturally grounded kind. Hegel's liberalism is cultural liberalism. The point to be made in the present chapter about abstract theories of individual liberty and social contract is their limitation, and their shared assumption of a constructivist epistemology underlying this limitation. What they fail to offer and what they are unable to do is produce a satisfactory analysis of culture and community in terms of their political programs. The worst results of these theoretical endeavours are seen when they are applied to non-Western cultures.

Individual Liberty

The individualist idea of liberty presents itself as superior to Indigenous culture, in that Indigenous culture has been deemed worthy of protection only in the promotion or service of individual liberty. Kymlicka argues for cultural rights on liberal individualist grounds. In claiming that Indigenous rights can and should be maintained concurrent with individual liberty, he constructs an appealing thesis. The reason advanced for this thesis is a contrivance, and misconstrues the values of culture, institutions and polity. He advises that a cultural structure, whether identifiable with the state or not, provides the stability necessary to the development

⁴ In constructivist theories of abstract reciprocity, reciprocity is always mediated in terms of an additional concept or principle, such as utility, individual liberty or the social contract. In J. Rawls (1971) *A Theory of Justice*, Oxford, Oxford University Press, there would be two principles, equal liberty and the difference principle, embodying a contractarian mechanism, pp. 60-67.

in citizens of the ability to choose the good for themselves, and that this legitimate end requires a liberal government.⁵ But culture can never be subordinated to liberty, as liberty is a solitary abstraction whereas culture is concrete, internal and actual; in its diversity it is very likely to have room for liberty in some culturally grounded form. It may be that Kymlicka just happens to hold liberty and culture as values, but he claims the connection.

Liberalism may be consistent so long as it recognises its assumptions, and *limits its claims on this basis*. But this limiting is what Kymlicka fails to do. His liberalism assumes that political discussions about value must be reduced to political procedure reflecting the evaluation of liberty over other values, and that culture has no value unique to itself. For Kymlicka, therefore, culture has no recognised value on its own terms so as to be meaningful to its members. Kymlicka gives to culture a psychological value in his theory, relating it through this to liberty and individualism.⁶ Kymlicka's assumptions presuppose the answer to political and other problems before the questions have even been asked, especially for specific cases. Claims against states by their cultural minorities are almost invariably cultural in nature. (Some claims are tied to the position of a minority polity only as a constituent of a state, such as for improvements in infrastructure, yet even such claims may have a cultural character.) Cultural claims are appeals by cultural members for recognition of all or some aspect of the culture itself. It is what is valued, and it is more valued perhaps when it is threatened. Cultural claims are made by individuals, but by 'cultural

⁵ Kymlicka, *op. cit.*, n2, p. 165, says:

Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them.

On the previous page he had linked, after Rawls, self-respect and 'a rational plan of life'.

⁶ See, *ibid.*

individuals', that is, as a special type of citizen. The clear and decisive distinction between cultural and other claims is qualitative one, reflecting the content of the political culture itself. Liberal individualism offers no tools to engage with the claims of culture.

These are some of the limitations of individualist liberalism, but what is it actually for? It is fundamentally a social program rather than an analytical tool. Those who advocate it do so as a political insurance policy. Such intellectual entrepreneurs take out an investment in liberty, seeking protection from traditional authority, conservatism, political and cultural extremes, majorities, socialist policies, the state, its history, the culture of the individual members and non-market sources of power. To achieve this protection, the idea of reciprocity is raised as the pre-eminent political virtue and given its most atomistic interpretation, centred on the most fundamental and immediate unit possible, the individual. This is the abstract reciprocity of autonomy, liberal reciprocity. Liberalism is apparently supposed to work like this. First, in exchange for doing whatever he pleases, the individual permits others to do the same. Then, in order to prevent an unreasonable, or inefficient, conflict of wills, arising from this exchange, individuals are prevented from acting against each other's person and property. This is the institutionalisation of reciprocity, coordinated solely in terms of the individual liberty of the citizens themselves, who must conform to an abstract, universalised construction on the basis of that liberty.

The demands liberal individualists would make upon each other may be few. However, the demands the theory places on truth and justice and a whole host of other values and virtues are too severe to allow one to entertain the theory seriously. The

cause of liberty will come into conflict with a community and its traditions within which, ironically, liberty must be expected to function, because it cannot function alone. Atomistic liberalism, in order to engage the state, reduces it to an abstraction. According to liberalism, a set of atomised individuals could be assembled and have their liberty as individuals constitutionally established. If these individuals are truly blank slates, they will not even share a language. If on the other hand each individual comes equipped with his own morality, religion and culture, then these rather than liberty will form the greater part of the constitution of society. A further problem remains. The move from a non-liberal society to a liberal one could not be achieved without removing the non-liberal individuals. A related problem⁷ is the false perception of liberal theory as 'neutral', so that certain actual peoples can be classed as non-liberal and there under the banner of liberty they can be held not to deserve the same treatment as liberal peoples (except to the extent that they are liberal).

Whatever else liberalism is, it is a theory of political reciprocity that abstracts and universalises reciprocal individual liberty. This institutional reciprocity on one of a set of abstract principles is its connection with a family of theories that can be distinguished on similar grounds. Such a set of theories probably also includes libertarianism, majoritarianism, social contract theory and possibly utilitarianism. In each case as with liberalism there is the institutionalisation of reciprocity, prioritised in the form of one or another political principle. Initially this occurred alongside theories of divine right, wherein these different values were affirmed together, while later secularism became quite independent of religion and of hereditary sovereignty. One type of social theory that belongs to this category is that of the social contract. In

⁷ Raised in J. Rawls (1999) *The Law of Peoples: with The Idea of Public Reason Revisited*, Cambridge, MA, Harvard University Press.

social contract theory, which has a variety of roles, normative and analytical, the members of a given society have contracted, or ought to contract among themselves for their mutual social and political benefit. This is clearly a form of institutionalised reciprocity in which the group of contractors gain sovereignty, or vest sovereignty at the contractual moment or moments. This idea is usually intimately related to ideas of the state of nature, natural law, property and constituted society, as in Locke's account. It is essentially a constitutional theory. The state of nature is that condition in which individuals are held to be prior to the contract. The natural law operates by God or reason in the state of nature, and it ascribes non-positive rights in 'private property', which are initially dependent on a suitable act of acquisition. The social contract to establish the civil polity then immediately recognises these rights and transfers to them a positive status, and a constitutional framework. The civil polity is composed of both private property holdings and social contractors. The social contract, the state of nature and the natural law theory of property acquisition by labour are interdependent elements of a theory of all three elements for Rousseau as for Locke, and in this theory are the seeds of liberty and of individualism. This theory therefore warrants separate treatment, and is treated as such in the next section.

Social Contract and the State of Nature

Social contract theory presents various problems. One is its claim to account for political authority. Against other forms of authority it has to assert the value of the 'general will' or authority surrendered to in exchange for security, above possible

rival political or personal values.⁸ The theory does not explain how the general will or sovereign authority is to be either, measured, transferred into legislation or policy, or implemented *in a practicable manner*, i.e. how it is actually to be determined and then translated into action. It is simply not the majority, or there would not be a problem of implementation. Most disconcerting, however, is the elusiveness of the very nature of the social contract. Its advocates do not generally assert belief in an actual contract, made at some time in history, which clearly demarcates the state of nature from constituted society, and yet they write at times as though this contractual transition has actually happened. It would seem that whether there is a social contract or whether there can be one is not dependent upon any actual transaction between the supposedly contracting parties. It is not a contract to be found in any constitutional document. The language of ‘contract’ is indeed metaphorical. It supplies a narrative to explain and justify, on whatever terms, political sovereignty. The British constitution, for example, is a long sequence of moments (including some of a restrictedly ‘contractual’ nature such as Magna Carta) which together make up the constitutional law of that country, but this sequence is not what either Rousseau or Locke are referring to as a social contract. Even where there appears to be a constitutional moment resulting in an identifiable document, as in the Australian and US Constitutions, the ‘contract’ is composed of several existing colonies that in the constitutional moment collectively subsume themselves into something greater. Locke and Rousseau are saying of constituted society that ‘it is as if there were’ a social contract. What it attempts to explain are legal legitimacy, political obligation, social cohesion, the unity or correct alignment of state and people, and the coordination of the subjective will of the people and their proper governance.

⁸ Jean-Jacques Rousseau (1998) *The Social Contract*, Ware, Wordsworth Editions, Ch. 3: Whether the General Will Can Err, at p. 29, asserts the general will, derived from the social contract, always to be right.

Locke's, and Rousseau's, theories of social contract are only somewhat different. Locke's is theological, derived from the natural law tradition and concerned ultimately to validate the notion of natural limits to sovereignty.⁹ Rousseau's theory secularises the notion of the general will, for the purpose of ordering society around collective subjectivity.¹⁰ Locke asserted that private property preceded the constitution of political society and its positive law. For Locke, God has a role in the formation of political society based on natural law, which always agrees with scripture. Locke says in *Two Treatises of Government*:¹¹

God having made man such a creature, that, in his own judgement, it was not good for him to be alone, put him under strong obligations of necessity, convenience and inclination, to drive him into society, as well as fitted him with the language and understanding to continue and enjoy it.¹²

For Locke, political society is just an extension of the family. Rousseau too affirms the practical and rational as bases for the 'social pact'. He says:

I assume that men have reached a point at which the obstacles that endanger their preservation in the state of nature overcome, by their resistance, the forces which each individual can exert with a view to maintaining himself in that state. Then this primitive condition can no longer subsist, and the human race would perish unless it changed its mode of existence.¹³

The social contract is perhaps the point at which their theories meet. For Rousseau, the power of the idea is in its role as a rational vehicle, for the general will. For Locke the idea of the social 'compact' is given explanatory function towards another end:

⁹ *Op. cit.*, n1, Second Treatise, Chs. 7 & 8, pp. 153-77.

¹⁰ See, P. Riley (1986) *The General Will Before Rousseau: The Transformation of the Divine into the Civic*, Princeton, Princeton University Press. For Rousseau on social contract see, *The Social Contract*, *op. cit.*, n8, esp. Book One, Ch. 6, 'The Social Pact', pp. 14-16.

¹¹ *Op. cit.*, n1

¹² *Ibid.*, p. 153.

¹³ *Op. cit.*, n8, p. 14.

that of sovereignty as constituted initially by the common will. In neither case is the social contract the end in itself. For Locke as for Rousseau political reciprocity is coordinated between the natural rights of individuals that are transformed into positive rights at the moment of the contract.

Property Arguments

For Locke and Rousseau, positive property rights are dependent upon the social contract. For Locke and Rousseau, property relations are formed in the state of nature prior to the social contract, and for Locke and Rousseau these relations are honoured after the contract comes into effect. For Nozick, property relations in his state of nature thought experiment, arise alongside the ‘protective associations’,¹⁴ which vie for supremacy, and ultimately for sovereignty. On these accounts, the state is not to adjudicate on the foundations of property rights that are prior to or coincidental with it, but only to recognise them. For Rawls, on the other hand, ‘parties’ should all agree to, and thus obligate themselves ‘contractually’ to a system of justice that they would choose if they had no knowledge of their relative status on the other side of that contract or agreement.¹⁵ On this story, property relations should follow as a consequence of this agreement that is intended to benefit all.¹⁶ Pettit has called Locke’s and Nozick’s view ‘proprietaryism’,¹⁷ simply because property itself is the coordinating principle of the theory after the moment of constitution; it hinges on ‘existing’ property relations being given legal legitimacy, rather than on a pure notion

¹⁴ R. Nozick (1974) *Anarchy, State and Utopia*, New York, Basic Books, pp. 12-17.

¹⁵ *Op. cit.*, n4, pp. 11-21; 118-183.

¹⁶ *Ibid.*

¹⁷ P. Pettit (1980) *Judging Justice: An Introduction to Contemporary Political Philosophy*, London, Routledge & Kegan Paul. See chapter on Proprietaryism.

of justice (although justice is held to be satisfied in the initial acquisition of property in the state of nature, and this just status quo is maintained in through legitimate transfer). Pettit calls this a theory of justice as institutional legitimacy.¹⁸ It constitutes a theory of justice in that it puts forward a conception of justice, but unusually it proceeds by recognising justice in the legitimate and dominant manifestation of a substantive and objective institution, property. Legitimate here means acquired legally, or not unlawfully, as an inheritance, by purchase, or acquired from a state of nature where and to the extent that one still exists after the constitution of political society. It must be remembered that a property relation is legal inherently, and so presumably a part of the justification for the proprietarian view must be legal in nature. For Rousseau, on the other hand, the potential harshness of natural property relations is radically dependent upon the general will, which is ‘always right’.¹⁹

Proprietarian denials of Indigenous property rights assume the lack of the conventionality of Indigenous property. A variant strain of Locke’s theory, however, would seem to allow a much ‘greyer’ approach than that of the black and white, all-legitimate-property-is-just approach of Nozick. The argument stems from Locke’s second proviso to his labour theory of property entitlement, and it manages, Locke and his followers would argue, to get around the fact of Indigenous property and Indigenous dominion,²⁰ in order to say that there are degrees of property acquisition, and that an acquisition of higher degree trumps a lower one.²¹ This theory unfolds as

¹⁸ Pettit, *ibid.*, defines proprietarianism on p. 75 in terms of ‘legitimacy’: ‘The doctrine which proposes the equation of justice with legitimacy may ... be dubbed proprietarianism.’

¹⁹ *Social Contract*, *op. cit.*, n8, p. 29.

²⁰ Here the term ‘dominion’ is intended to mean all that obtains to an Indigenous traditional group and its practices, knowledge, beliefs and its otherwise effects; possession in a setting that is both collective and conventional.

²¹ In A. Kolers (2000) ‘The Lockean Efficiency Argument and Aboriginal Land Rights,’ *Australian Journal of Philosophy* 78(3): 391-404. The author criticizes T. Flanagan (1989) ‘The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy,’ *Canadian Journal of*

follows. Lockeans do not recognise the conventional nature of Indigenous property and see Amerindian and European property claims as competing claims in a state of nature. Locke's support for the theory is in the form of his argument for European expropriation of the Amerindians' possessions.²² The second proviso to Locke's theory of property acquisition is the spoilage proviso. It says that in order legitimately to acquire a thing such as a parcel of land, by Locke's primary requirement, an act of labour, no part of that thing must go to waste.²³ The Amerindians, in their foraging, hunting and fishing, were not utilising the resources around them according to a European idea of maximum efficiency. This picture of the tribal usage of the land may have been accurate in economic terms, but was oblivious of the cultural context. By this comparison, Locke held the Amerindians to be legitimately disentitled. Authors in the twentieth century have revived Locke's argument as the 'efficiency argument' and the 'agricultural argument'.²⁴ The more extreme version does not merely justify dispossession, but proscribes Indigenous resistance. Fortunately, such arguments hang on a grave error.

The error is initially Locke's. It is his incorrect assumption of an Amerindian state of nature that allows him to evaluate the efficiency of Indigenous land use as a poor contender against the modern seventeenth century methods of primary production in England. If Locke had been able to recognise the territoriality, clans, totems, hierarchies, religions, cultural and political differences, and political allegiances of the Amerindians, it should not have mattered that the incoming European agricultural methods were more efficient at production, as the presence of these elements in

Political Science 22: 589-606, and D. Gauthier (1979) "Book Review," *Dialogue* 18: 432-40, for their loose approximation of Locke's 'spoilage' proviso.

²² See *Two Treatises*, *op. cit.*, n1, pp. 133-9.

²³ *Ibid.*, pp. 131-4.

²⁴ See Kolers, *op. cit.*, n21, on Flanagan and Gauthier, also *op. cit.*, n21.

combination establishes the presence of cultural polities. These naturally constituted societies shared hunting grounds and sacred places and relied on customary law as the institution of cultural unification and perpetuation.²⁵ It was not a state of nature. The land was a patchwork of valued interests and possessions, of sophisticated networks of peoples, as is the case especially in Canada and Brazil today. The error already described, was, however significant. It was an error that belonged to Locke's predecessors, and which Locke was perpetuating.²⁶ His next move, though, has to be seen as an act of intellectual dishonesty. He goes on to contend that Indigenous dominion really depends on the relative quality of land use according to a European scale, while European property and dominion are not in question. The idea that a certain concentration of activity attracts a certain merit, and trumps anything below that point, is the contentious element. This idea of a somehow relative institution of property is merely an opportunistic argument for conquest and dispossession. It operates by bracketing the institutional nature central to the identity of actual property. Presumably this is because too much interest stirred up around that notion might reveal something inconvenient: that there was Amerindian property and dominion, and that 'efficiency' was a red herring. There is no excuse for reviving this argument in the twentieth century when Indigenous ways have by now been studied for a century and a half. If private property in land is the guarantor of political and social participation, then it is the formal medium of political reciprocity. Without title deeds the Amerindians could expect no serious reciprocity to be given them by

²⁵ Locke's description of the Amerindians in *Two Treatises* either assumes a state of nature or considers Amerindian cultural and institutional life as irrelevant to the discussion of Amerindian property and dominion. The cultural context of the 'Indian's' economic behaviour is in Locke entirely absent; see *Two Treatises, op cit.*, n1, pp. 28-9, 32-3, & 35-9.

²⁶ The significance of the fact of America's habitation was a thorn in the side of the colonisers from Columbus' voyage onwards. F. Victoria (1917) *De Indis Et De Ivre Belli Relectiones*, Washington, Carnegie Institution, provides a sixteenth century example from these European quarters of advocacy for the worth of the Amerindians and for their humane treatment. Locke, although not as extreme as his sixteenth century counterparts, represents the opposing argument; see *ibid.*

Europeans, and they would be judged according to the standards of these newcomers applied to their agricultural practice.

Primary Goods

In 'primary goods', adopted by Drahos and Kymlicka from Rawls, a kind of social contract converges with individual liberty, to divide the burden of political reciprocity, but not so as to alleviate the cultural problem of Indigenous cultural property.²⁷ Rawls' rational actors, having submitted to the veil of ignorance, and selected the difference principle and the principle of equal liberty, will be led on by this decision and the need to cooperate further, to select a set of primary goods to be shared in accordance with the two prior principles. Kymlicka and Drahos each add a good of their own to Rawls' list.²⁸ Kymlicka's contribution is culture, and for Drahos it is information. Neither goes to any great lengths to justify this adoption of the idea of a primary good for their particular ends, but rather each borrowing is a rhetorical strategy in the course of the further pursuit of these goods of culture and information. Kymlicka seeks initially to give liberalism some way of engaging with culture, and ultimately to make possible the justification of cultural rights from a liberal platform. So he ties 'culture' to the pre-existing and rationally defensible Rawlsian liberal principle that is most sympathetic to this enterprise, the primary good. His intuition about the flexibility of this concept is confirmed by the adoption of it by Drahos, who uses it as a principal basis for his argument against proprietarianism, as conceived by

²⁷ J. Rawls (1974) *A Theory of Justice*, *op. cit.*, n4, pp. 90-5; 'good' in this theory is developed further in Ch. VII, pp. 395-452.

²⁸ Kymlicka, *op. cit.*, n2, pp. 166-78; P. Drahos (1996) *A Philosophy of Intellectual Property*, Aldershot, Dartmouth Publishing Company Limited, Ch. 10: Justice as Information.

him. In *A Philosophy of Intellectual Property*,²⁹ Drahos proposes as an alternative to proprietarianism, the principle of ‘instrumentalism’. He defends justice as information, as a primary good, in terms borrowed from Rawls.

An approach to the question of Indigenous intellectual property from ‘information’ would obscure claims based on conventionality such as those discussed in the present work, as it reduces the objects of such claims to a problem for distributive justice. ‘Culture’ on the other hand would come much closer to the mark, as it would at least permit the posing of conventionally based claims. Drahos’s instrumentalism is already a loose conception, and for the Indigenous ‘problem’ in particular, ‘information’ offers no particular advantage. Drahos does not attempt to accommodate Indigenous claims and so cannot be accused of failing on his own terms. Nonetheless, his inability to respond to cultural claims must be seen as a limitation for present purposes.

Kymlicka reduces culture, unacceptably, in terms of a prioritised individual liberty. That is, culture is a good only because it serves individual liberty, by providing the initial environment in which a rational agent’s self-respect can develop to enable him to be capable of choosing his own good.³⁰ Another way of looking at this view of culture is as external. To a certain extent, culture can only be seen from the inside. A given culture is privy to its members. Even though many attributes can be observed from the outside, the culture also has an internal nature that can only be experienced or related from within. Kymlicka’s external view avoids the substantive, subjective meaning and value of particular cultures. Therefore, Kymlicka’s distribution of

²⁹ *Ibid.*

³⁰ Kymlicka, *op. cit.*, n2, pp. 164-78.

cultural rights will not be culturally informed. This is not to suggest that the distribution of cultural rights, on this view, can never be informed by the recipient culture; for the host state cultural rights will constitute a distributive matter among other distributive matters. Cultural rights will be dictated to the tribal group rather than being recognised where they already strive to operate. However, as it has been the point of this thesis in part to show tribal cultures are valued by tribal people as an end and not only as a means. To see cultures in relative terms is simply not to see them at all; a given culture is seen, by each of those who represent it, as constitutive of their identities. If collective rights are to be awarded they ought at least to reflect the culture or its elements they are going to affect. Otherwise, what point can they have? A liberal approach to collective rights, such as Kymlicka's, may happen to produce collective rights indirectly, but they will only do so by recognising, at least implicitly, the culture concerned as an end in itself. Kymlicka is right however to assert the values both of culture and of individual liberty, as both are goods. He errs in their abstraction and, still more, in his elevation of liberty as prior in importance. In order to preserve his liberal credentials along with his interest in multiculturalism, he makes the choice to raise individual liberty above culture. This has consequences for the kind of connection he is now to make between the two. Culture must now be seen in terms something else, namely liberty. Tribal culture, according to Kymlicka, has to be seen in terms of state culture, community in terms of liberal culture.

Kymlicka's liberalism is not especially contractarian; except where (borrowing from Rawls) he asserts culture to be a contract based public good. In doing so he submits to the Millian value of rational end choosing, even though it is also attached to Rawls's idea of self-respect. He has ultimately more in common with Mill's individualism

than with Rawls's contractarianism. His faith in the individual's ability to find the good is Millian, but its dependence upon 'self-esteem' and 'primary good' gives it its Rawlsian flavour.³¹ In individualist liberalism, including Kymlicka's, the individual must be trusted to choose the good, even if she or he errs along the way, and indeed even if she or he fails utterly. Individual right must be protected towards this end. Individuals must be free to act as they please, except against each other. As has been shown above, even Kymlicka's communitarian concession to 'cultural structures'³² must be couched in these terms. Rawls constructs a theory of fairness that does not belong to liberal individualism in its more extreme forms, such as Kymlicka's and Mill's. Rousseau also transcends individualism, by making his contract the base for a joined notion of subjectivities that is given a singular actuality, comprising but not reducible to individual members. In both Indigenous and state societies, even those calling themselves liberal state societies, there is always something more than individuals and their liberty: this is both observable and desired by any community of members, as this is exactly their separate and collective identities and their bonds.

Hegel

Is the social contract idea supportable? Hegel answers in the negative, but he makes concessions towards the idea, suggesting that Rousseau was right as far as he went, but that in going only so far he distorts the meaning of freedom.³³ Hegel's identification of what Rousseau neglected to consider will prove useful for

³¹ See Kymlicka, *ibid.*

³² *Ibid.*, pp. 15-7, & 169-71.

³³ R. Williams (1997) *Hegel's Ethics of Recognition*, Berkeley, University of California Press, pp. 265-6.

considering the limitations of social contract theory. Hegel's ideas on this subject were formed in relation to Fichte, whose concept of the social contract was based on the idea of recognition.³⁴ Fichte affirms recognition (as an assumption of Rousseau's social contract), but Hegel rejects the social contract and affirms recognition.³⁵ Recognition is for Hegel the means by which freedom is constructed on an inter-subjective and hence objective rather than merely subjective basis.³⁶ The advantage of Hegel's view in general is in his insistence upon the idea of the concrete actual in any political discussion as rational. On Hegel's view the universal and the particular must be seen in terms of one another, and to divorce them would be an unwarranted abstraction philosophically speaking. Reciprocity, like freedom, on this account is not reducible to any single arbitrary priority value or principle, but is culturally embedded. Reciprocity as recognition means as cultural reciprocity.

Hegel rejects the idea of a social contract in part because he does not find one in actuality. What he does find in its place, he chooses not to construe as a social contract, not because it does not contain or reflect *elements* of a social contract, but because construing the internal workings of the state as a social contract distorts the meaning and significance of what is actually there. What Hegel does find, according to Williams, is the contrast between the state and civil society:

... for Hegel the state must not be confused with civil society ... The state takes ... humanising mutual recognition a step further by raising it to the universal level; that is, the state recognises its members as citizens. The state is the realisation of freedom, and freedom has the shape of self-recognition in the other.³⁷

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 266.

³⁶ *Ibid.*, e.g. pp. 47-59.

³⁷ *Ibid.*, p. 263.

Social contract has a kind of formal recognition in it, but Hegel is here seeing an intersubjectivity that is dynamic, concrete, universal and substantive all at once. If a contract could be seen as something on-going, renewing itself at every moment, and implicitly determinable from the acts of the parties, then perhaps the contract model might still apply to Hegel's satisfaction, but the model has not been so flexible. In Fichte's theory by contrast, recognition is balanced, and for Hegel, effectively cancelled, by 'security'.³⁸ In Hegel's case, freedom is characterised as concrete, rational and as involving mutuality.

For Hegel, the substantive principle ... is inter-subjectively constituted in mutual recognition; moreover, it is social and itself capable of action.

[Subjective freedom] is for Hegel the principle of subjective arbitrary choice. Taken by itself in abstraction, it is formal and empty. Subjective freedom ... receives its content from substantive freedom ... and the correspondence of the two is not external heteronomy but a mediated autonomy.³⁹

For Hegel, Rousseau's social contract is unacceptably abstract. Hegel's view of Rousseau requires some clarification as to its nature.

Hegel in the *Philosophy of Right* criticises Rousseau and his social contract directly. He begins by describing negatively what that contract crucially omits:

Unfortunately, however, as Fichte did later, he [Rousseau] takes the will only in a determinate form as the individual will, and he regards the universal will not as the absolutely rational element in the will, but only as a 'general' will which proceeds out of this individual will as out of a conscious will. The result is that he reduces the union of individuals in the state to a contract and therefore to something based on their arbitrary wills, their opinion, and their capriciously given express consent; and

³⁸ *Ibid.*, p. 282.

³⁹ *Ibid.*, p. 264.

abstract reasoning proceeds to draw the logical inferences which destroy the absolutely divine principle of the state, together with its majesty and absolute authority.⁴⁰

The social contract establishes for Hegel a freedom of the wrong kind, one that does not, without qualifications that are foreign to the social contract idea, establish or support the state. Primarily this can be seen in terms of freedom and subjectivity. Both are for Hegel grounded concretely in, are objectified in, the state itself, as the end of a process that had the state as its end.⁴¹

Conclusion

Following are five observations concerning Indigenous accommodation and discourses of Indigenous accommodation. These arise from an awareness of natural law, social contract theories including that of Locke and individualist forms of liberalism. Forcing abstract models of reciprocity onto problems with an essential cultural basis produces no benefits.

1) Indigenous claims such as IPRs are cultural by nature. Indigenous peoples value their institutions and the components of their cultures as goods. That these are goods is not dependent on any external justificatory structure. The limitations of liberal

⁴⁰ G. W. F. Hegel (1952) *The Philosophy of Right* [trans. Knox]; *The Philosophy of History* [trans. Sibree] Chicago, Encyclopaedia Britannica, pp. 80(c. ii)-81(c. i): numbered paragraph 258. Hegel goes on to apply the discuss the problems of Rousseau's approach for there practical problem of the French Revolution:

For this reason, when these abstract conclusions came into power, they afforded for the first time in human history the prodigious spectacle of the overthrow of the constitution of a great actual state and its complete reconstruction *ab initio* on the basis of pure thought alone, after the destruction of all existing and given material. The will of its re-founders was to give it what they alleged was a purely rational basis, but it was only abstractions that were being used; the Idea was lacking; and the experiment ended in the maximum of frightfulness and terror.

⁴¹ See the previous chapter, re: Hegel's *Philosophy of History*, *ibid*.

theory force it to misconstrue this primary nature of Indigenous cultural goods, in favour of liberal ends.

2) There are a number of strategies the state must choose from in the facilitation of Indigenous liberalisation, none of which are satisfactory: coercion, bribery, neglect, proselytisation, or by unmediated exposure to civil society and commerce. So, a problem of the liberal agenda in relation to Indigenous cultural claims is how it is to proceed in terms of non-liberal Indigenous peoples.

3) Institutions are shared by past, present and future generations. It is possible to value the stability of minority institutions and cultural structures as they produce rational end choosers as citizens of the state in which the minority exists; however, those cultural structures are constituted by those cultural members and their families. To ask them to validate their cultures in terms of individual liberty is illiberal.

4) Categories are conveniently constructed in Lockean theory so as to undermine Indigenous title, polity, and to some degree culture and institutions. Ideas of property and dominion are confused. So too are property and efficiency. The state of nature is invented, or adopted, and hastily ascribed to Indigenous people. Indigenous possessions are subjected, in the process, to natural law, to labour, to Christendom, and not to authoritative Indigenous conventions.

5) Proprietarian intellectual property regimes will always present a problem for Indigenous claims, in that they will not recognise Indigenous knowledge, or instead sell it to the highest bidder. Therefore, Indigenous claims, model laws and

declarations should be so constructed as to be neither too esoteric in terms of existing regimes, nor too vulnerable. The power of the language of regimes needs to be utilised, not confronted head on, but without sacrificing the integrity of Indigenous knowledge.

The Indigenous claims at the centre of this study concerning the recognition of intangible cultural objects with a collective and sacral dimension such as the traditional Indigenous paintings from northern Australian at issue in the copyright cases (discussed in Chapter Two) are claims for the recognition in the broader community and its law, pertaining essentially to existing institutions. These institutional claims, while not for sovereignty, dominion or autonomy, do assert the presence of the relevant cultural polities in both the collective nature of the claim, and the particular cultures invested in and represented by the institutions concerned. The institutions at issue are the clan, its laws, and its religion as well as its art. This confluence is the only object at issue. Ideas of labour and of liberty, and any related ideas, applied externally to effect an abstract justification, wholly or partially independently of the multi-institutional nature of the claims concerned, are bound to obscure that object, and obfuscate such claims. In fact, abstract reciprocal ‘models’ of the justification of accommodation must be avoided to ensure that where culture and institutions are concerned, they must be allowed to stand for themselves, not in terms of one or another principle. That being said, one practical model from Indigenous experience, within the state context, must suffice as perhaps the only tolerable model by which to understand institutional accommodation. This model is not the accommodation of customary law, although this should be celebrated within its own limits as this has been incorporated in the service of the justice system to enhance its

operation where Indigenous offenders and disputes are concerned. The more appropriate model is the still somewhat problematic recognition of traditional title. Here again this institutional recognition embodies and represents the culture, it enables the preservation of sacred sites, practices, and traditional lands, it allows law, religion and art to have a place. The idea of traditional Indigenous cultural and intellectual property allows this picture to be completed; for Indigenous religion, law, art and polity to be recognised on Indigenous terms, and concretise, in a more complete way, what the secure access to traditional lands, where it has occurred, has sometimes allowed.

Arguably, as the problem for the applicants in the cases reviewed in Chapter Two was not only one of the state, but of exposure to civil society, the recognition of traditional title has permitted a vital link to civil society for Indigenous clans and larger groups. Such traditional polities that have managed to secure Aboriginal title have often made use of this legally recognised collective status to forge agreements with local governments and corporations through Indigenous Land Use Agreements (ILUAs).⁴² This undoubtedly encourages the development of business relationships, negotiation skills and legal knowledge, and presumably permits the accumulation of business experience, income and assets.⁴³ Some groups have even taken charge of the style and

⁴² Under the Native Title Act Indigenous Land Use Agreements (ILUAs) can be registered with the Native Title Tribunal Registrar by the native title-holders and another party to the agreement (another native title holder, a corporation or local government) and will be binding at law. See index at <http://www.atns.net.au>, or seek information about ILUAs on Australia's NNTT website <http://www.nntt.gov.au>. Examples of ILUAs dealing with local government and corporations respectively are the Narungga Local Government Indigenous Land Use Agreement (at Yorke Peninsula, see entry at <http://www.atns.net.au>) and the Barrow Creek CLC Indigenous Land Use Agreement (involving two mining companies Newmont Gold Exploration Pty Ltd and Normandy NFM Limited and an Indigenous group Barrow Creek Central Land Council, see entry also at <http://www.atns.net.au>).

⁴³ Such knowledge and experience comes from dealing collectively with other collective or corporate entities. As business relationships are a formal endeavour legal knowledge and skills form a part of the package of benefits to the Indigenous group. Dealing with local governments or mining corporations

content of state education provided to their people.⁴⁴ Some have set up corporations and independent businesses.⁴⁵ All of this experience is invaluable in giving to traditional Indigenous society its own brand of civil society, and one that acts as a link with civil society in Australia and beyond, which positions the Indigenous groups as, not recipients, but unique participants. Most significantly the ILUAs allow native title-holders to participate on their own terms. The recognition of Indigenous intellectual property will serve to strengthen not only Indigenous self-reliance and self-maintenance in their most profound cultural commitments, but also strengthen and develop their participation in civil society as traditional Indigenous communities, by clarifying what about their culture is not negotiable, and thereby strengthening their relative bargaining position to where it ought to be. In the same way this will complement existing customary law to the extent that that is now recognised. Indeed it could be seen to expand the present extent of this very recognition.

gives Indigenous native title groups a stake in the commercial sphere, which such groups have been lacking. These arrangements can provide employment, training, funds and ultimately the means for dealing with the world autonomously. See the websites, *ibid.*, also for specific ILUAs.

⁴⁴ E.g. Culunga Aboriginal Community School near Perth WA listed among many other independent schools at the Aboriginal Independent Community Schools website <http://www.aics.wa.edu.au>.

According to the school's own webpage

(http://www.aics.wa.edu.au/content/theschools/info/culunga_aboriginal_community_school.shtm?15 accessed 10/2/2006) the school satisfies the criteria of local educational content, for example, by teaching Nyoongar history, culture and language and by encouraging students to take part in traditional dance and didgeridoo playing. According to the same webpage the school satisfies the criteria of local educational style by ensuring, for example, that the language and culture components are taught by a Nyoongar elder and that '... Aboriginal people significantly direct the school and act as role models'.

⁴⁵ E.g. the "Ganja" Housing Aboriginal Corporation among the thousands of Aboriginal Corporations whose documents can be viewed online at the searchable Registrar of Aboriginal Corporations <http://www.orac.gov.au/>. Aboriginal incorporation is provided for by the Commonwealth *Aboriginal Councils and Associations Act 1976*.

CHAPTER EIGHT:

TOWARDS INDIGENOUS MORAL RIGHTS AND THEIR JUSTIFICATION

Introductory

This thesis has explored the nature of traditional Indigenous cultural and intellectual possessions. It has explored the limits of the law in relation to the protection of these possessions. It has explored philosophical attempts to justify the protection of such possessions based on arguments from Locke or from Kymlicka. In the course of this exploration it has been shown that when the real nature of Indigenous cultural possessions is brought into focus, it can be seen that these particular types of philosophical justification do not fit. They do not fit because both the Kymlickan and the Lockean arguments assumed their reasons. The justification must be grounded on the problem. Lockean theories of property assume that labour will be the determining criterion, but labour cannot be dominant in a living tribal society in which property relations are institutionally determined. Followers of Kymlicka assume that individual liberty ought be the primary end to be given consideration where national minorities are concerned. This is despite the fact that political ends and cultural values are a matter for the group. For state law and policy practical considerations must take minority political and cultural ends into account. Kymlicka's individualism is merely an assumption, and it is most problematic when applied to tribal societies. His mistake is to insist that his cultural politics be grounded on his liberal individualism. The

mistake of those such as Stenson and Gray who carry his message into the politics of Indigenous intellectual property is to assume uncritically that Kymlicka has solved the problems of justifying national minority group concessions.¹ In fact, what these followers of Kymlicka's have done is to import Kymlicka's assumptions into their argument.

The problem at issue in this thesis is, specifically, that revealed by the copyright cases with which the thesis began. The problem is that the Australian courts do not recognize the cultural content of traditional Indigenous art in a way that reflects its importance to the clans. So, for the courts, breaching the copyright in the works puts a commercial opportunist at odds with the Indigenous artist, not with the clan. But from the clan's perspective the artist is a vehicle for the expression of the clan's very being. This is also necessarily the artist's perspective, as the artist knows that he or she is painting the clan's ritual iconography. Indeed, such artists led evidence of this in both *Bulun Bulun's* and *Milpurrurru's* cases.² Copyright protection is insufficient, as it does not do what it ought to do, which is to tell the truth about justice and the nature of the problems it addresses and deliver the best justice it can. To 'tell the truth' is not a figure of speech; rather the phrase gives expression to the educational function of the law. The law does not only do justice, but expresses what parliament has determined, or permitted, legal justice to be. An omission on the part of the law indicates the law's incapacity to do justice. It will be shown below why, on the issue

¹ A. Stenson & T. S. Gray (1999) 'An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,' *Environmental Ethics* 21: 177-90 and (1999) *Politics of Genetic Resource Control*, Basingstoke, Macmillan Press Ltd. See chapter 6 of the present thesis for discussion.

² *Bulun Bulun & Another v R&T Textiles Pty Ltd and Another* [1998] 41 IPR 513; *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659. Discussed in chapter 2 of the present thesis.

of the protection of Indigenous intangible ritual objects, the silence of the law is unacceptable.

The traditional objects, even when they are 'Aboriginal art', have not ceased in their traditional role. Their imagery is still totemic imagery. Their release to the wider community, in particular, into the art world and, in the case of the bark petitions, into the world of politics, was a deliberate ploy on the part of the Indigenous communities to educate the non-tribal world about their tribal lives and notions, and in particular about the tribal relationship to land.³ For decades tribal art has been a window into tribal culture, but it remains also a mirror to reflect the clan back to itself. These two roles of traditional Indigenous art now define each other. When these objects are mistreated by an unscrupulous entrepreneur, by way of reproduction for sale, what is directly attacked is, perhaps unwittingly, something *intimately* cultural that is simultaneously a gesture of goodwill aimed at securing the wider community's recognition of the cultural group exposed in the gesture. It is an attack on the trust and hope invested in the clan's gesture, as well as on the clan that has made itself vulnerable in this gesture. Protecting the tribe from this attack must mean that a breach ought to be regarded as a wrong against the clan, rather than against merely an individual creator's rights.

In the first part of what follows in this chapter 'representation' is discussed, encompassing self-representation to self and negotiation as self-representation to the other. Self-representation here means clan self-representation to itself beginning in the

³ Howard Morphy (1998) 'The Art of Northern Australia,' *Traditional Aboriginal Society*, W. H. Edwards, Ed., Melbourne, Macmillan Education Australia, p. 9; Howard Morphy (1998) *Aboriginal Art*, London, Phaidon, pp. 138-42; Ian Keen (1994) *Knowledge and Secrecy in an Aboriginal Religion*, Melbourne, Oxford University Press, p. 4; see also Keen's discussion, in the same work, of rights to particular ceremonial icons based on clan estate, p. 56.

pre-colonial period and continuing to the present. In this the clan through its ritual art represents itself to itself symbolically as a guide and a mirror. In the colonial period, in which negotiation has become a way of life, Indigenous ritual art gains a new function, in addition to self-representation to self, which is self-representation to the other. In exchange for releasing its ritual material as art the clans gain a tool to educate the society about them. Any such image may now have both functions. In terms of Indigenous traditional art there is this potential recognition in its self-representation to other, and its self-representation back to tribal self. When a commercial opportunist breaches copyright that person is doing more that is wrong than merely that, they are also subverting the clan's legitimate attempts at proper self-representation in the state and in state society. To remedy this a new act is propose, one that inaugurates a new regime of Indigenous moral rights at the very least. These will permit the legal recognition of the communal cultural value of ritual painting and not interfere with copyright, including conventional moral rights, as they now stand.

Representation

Tribal self-representation to self is a traditional function of Indigenous traditional art.

In order to assess the nature of the damage caused to the traditional objects when they are misappropriated, the cultural function of these objects must be revaluated in terms of their wider context. That function has not always been the same, but to understand its modern function its original function must be understood. A pre-colonial function of traditional imagery has persisted down to the present, although its context has changed and an additional function has been added. The essentially pre-colonial

function that has persisted is that of articulating the tribe's relation to itself. It was essential, in the absence of writing as such (and all that goes with it, such as documentation and records, writs and deeds), that the tribe had symbolic interaction with itself. Part of this function was served by 'story' or 'myth' and by the songs of ritual, part of it by the organization of ritual performances. Part of this function of a clan's⁴ self-representation to itself is maintained through the daily interaction of tribal life, which reinforces the notions and norms particular to the clan through language and behavior. The remainder of this symbolic function is performed by traditional art. In pre-colonial times, as it is today, the place of tribal art was and still is to be part of ceremony. Like the ceremonies themselves, this art is often complex, and it conforms to strict rules. It is not primarily a creative endeavour - except as an expression of the whole tribe - but a communicative one. Communicating to the spirit beings, and to members of the clan, the pictures are often a visual representation of the clan's particular story and are constructed out of the clan's specialized iconographic repertoire.

The type of painting in question is the end product of a process that is necessarily cultural. This is to say that no individual invented any particular elements of tribal art. The art evolved communally. It is, however, painted by an individual artist, who has been schooled in producing a fairly limited set of images. These images are received from previous generations and, it is believed, ultimately from ancestor spirits. The images are received by the clan and by its artists, whose job it is faithfully to reproduce them. The image is theirs in the sense of being identifiable with them in particular. It is theirs as part of their identity *and* by means of its production. This has

⁴ The word 'clan' is used because the activity, etc., described is particular to *a* clan or typical *of* clans rather than tribes. Particular paintings, stories and songs belong to particular clans, all of which are related to the paintings, stories and songs of other clans in the tribe.

a totemic element, in that the painting is of the same totem as the clan. The production and use of customary imagery are subject to customary rules.⁵ The function of these cultural images is to represent the clan to the clan itself. Whether this is in the specific context of a funerary rite or in some other context it serves the purpose of bringing the clan together just as such, as well as bringing it together for its collective purposes. The images are thus not merely cultural products; they are institutional entities. That is, they have an active role in the reproduction of culture and institutions. This role is bound up with fundamental norms and values of the tribe, moiety and clan. In short, clan imagery is, traditionally, what the clan's shared identity coheres around.

Negotiation characterizes the ongoing relation between the Australian state and the traditional Indigenous group.

Negotiation with Australian society is an unavoidable condition of Indigenous life. Traditional Indigenous art is now has the role of clan self-representation to the 'other', in addition to the traditional role of clan self-representation to self. To make sense of that new role, the function of 'negotiation' in Indigenous lives must be understood. Tribal self-representation depends in part on negotiation with the state. Indigenous self-determination not only depends on negotiation, but it is necessarily a kind of negotiation in practice.⁶ This conclusion is derived from the observation that the relationship between tribal Indigenous peoples and the state can never be finalized unless either the tribe or the state is dissolved, or they are separated. This idea comes from James Tully's notion of constitutional negotiation between the state and the

⁵ See chapter 4 above, *passim*.

⁶ Andrew Hunter (2000) *Conceptualising Indigenous Self-Determination as Negotiation* [Honours Thesis], Avail. Joondalup Campus Library, Edith Cowan University, pp. 29-40.

‘constitutions’ within it.⁷ As Anaya characterized it, Indigenous self-determination is ongoing.⁸ It is also, therefore, a never finally settled matter. As there are no rules for this arranged marriage, negotiation is an inevitable feature of the relationship between the state and the tribe. No treaty, in the international law sense, can now be signed between the state and any of its Indigenous peoples, who are not now sovereign.⁹ Tribes and their states are not legally separate from one another and neither are they simply unitary. When in 1963 various Yolngu peoples of Yirkala took its paintings (on the frame of a petition) into the Australian Parliament it was trying to improve its bargaining position by showing that it has something genuinely and traditionally of value at stake in its pragmatic claims.¹⁰ Similarly, arguing in the courts for ‘cultural knowledge’ to be accepted as ‘an incident’ of native title is a kind of intellectual bartering with practical ends.¹¹

Tribal self-representation to the state society is a part of Indigenous and state intercultural negotiation and a new function of tribal art.

In its function of engaging the other art operates today in ways which are both formal and informal. It takes place in the courts; between tribal groups and all of the levels of government from local to federal; between tribal groupings and corporations in contract and in discussions; between one tribal group and another; between tribal

⁷ J. Tully (1995) *Strange Multiplicity: The Constitutional Accommodation of Cultural Diversity*, Cambridge, Cambridge University Press, p. 54.

⁸ S. J. Anaya (1996) *Indigenous Peoples in International Law*, Oxford, Oxford University Press, pp. 81-2.

⁹ ‘Treaty constitutionalism’, see Tully, *supra*, n7, p. 117, has comprised a part of the Indigenous politics of Canada, but this has been haphazard. There have been no Indigenous peoples’ treaties with Australia.

¹⁰ See Morphy, *Aboriginal Art*, *supra*, n3. pp. 254-8.

¹¹ The Ward cases (see chapter 3): *Ben Ward & Others v The State of Western Australia & Others* [1998] 1478 FCA; *State of Western Australia v Ward* [2000] FCA 191 (*The Miriwung and Gajerrong Case* (2000) 199 FCR 316); *Western Australia v Ward & Ors* [2002] HCA 28.

groupings and the general public; and between tribal groupings and private citizens. This negotiation sometimes takes the form of transactions such as the purchase of tribal art. Tribal imagery as a kind of cultural knowledge filters into public and private galleries. Tribal self-representation to the other is a way of educating the non-tribal population about the nature of tribal life - for example, by showing that a certain landmark is part of the identity of a given tribe.

It is hard to say when this Indigenous self-representation to the other through art began. There may well have been nineteenth century precursors. In any case, it is possible to say when this self-representation became a movement. This was immediately following the delivery in 1963 of the bark petition in which Arnhem Land clans asserted their connection with their particular clan estates through tribal iconography. After this, traditional art was seen as a way of expressing the traditional attachment to clan lands, from the north coast to the Central Desert and beyond the boundary of the Northern Territory itself. With the realization that the legal recognition of traditional title would hinge on non-tribal peoples' understanding or ignorance of the nature of tribal life, it was a short step to the addition of instruction about tribal life in general to the existing function of the traditional Indigenous art movement of showing the connection of clans to their particular lands. Friends of the movement appeared in the form of collectors, dealers and art production facilitators. An international market appeared and seemed to indicate the success of the movement in terms of its aims. The question remained, though, whether this apparent success was really the case.

The paintings did seem to convey a tribal sensibility, whether of the patterned world of the desert surface or of generative activities of the dreaming-beings of the north coast. The distinctiveness of traditional Indigenous painting was observed from Alice Springs to New York. The pictures expressed a unique set of worldviews in which land was treated as spiritualized or as a participant in a totemic drama with stylized flora and fauna. Some paintings would need a commentary for a fuller understanding, but the Indigenous art movement had prompted this seeking after a further understanding. This was an opportunity serendipitously seized upon. The ‘Europeans’ were prepared to expose themselves to Indigenous culture and they were willing to pay for the pleasure. Cultural material would become exposed in this process. The tribes decided that the risk was worth taking, because of the significance to them of the potential benefit. Indeed, the Kunwinjku encouraged the release of their cultural knowledge as art.¹² The risk was the denigration of ritual material and knowledge. The potential benefit was a new kind of negotiated success: recognition, through the transfer of cultural knowledge in the form of aesthetic pieces. This is why Indigenous control of, and consent to, the release of cultural information is so important and misappropriation so damaging. Misappropriation attacks what is culturally valuable just when it is made vulnerable, in good faith.

Tribal self-representation to the wider community through art was one moment in a history of initiatives toward being understood. Others include ethnobotany (sharing knowledge), cultural tourism, sharing stories, sharing skills (from tracking to basket weaving), helping station owners find water, and rescuing hapless motorists, pilots and horse riders; and this is not to mention Indigenous crossover arts like rock music,

¹² Keen, *supra*, n3, p. 4.

blues, reggae and country, contemporary dramatic arts, modern/traditional dance and non- and semi- traditional visual arts. This deliberate release of knowledge through painting was also a moment of ‘constitutional’ negotiation.¹³ It was an offer of something for something, in the sense of negotiation as exchange. It was an offer of exotic and peculiar art in exchange for - as well as remuneration - the recipient receiving a cultural message, ‘memes’ of cultural information smuggled out with each picture. Thereupon this information would be raised to the status of art, and taken in by the viewers in all their earnestness of artistic appreciation. Herein the exchange has become a delivery system for cultural knowledge. The ultimate aim of all such acts of the delivery of cultural understanding, through art, was recognition.

The constitutional negotiation between the tribes and the state is ongoing.¹⁴ It is mostly informal, and exchanges are not always what they seem. It is bargaining to reach an unattainable settlement. A ‘constitutional settlement’ between the tribes and the state is never within reach explicitly, formally, finally or completely, and the ultimate settlement is not actually conceivable, in that it is prevented by cultural incommensurability. Small surprising gains are regularly made along the way, and these are often those that matter most. The reversal of *terra nullius* was one gain, but it was quickly diminished by the legislature. One result of *terra nullius* is the growth of trust and willingness to deal between mining companies and Indigenous peoples. The flourishing of the various industries that have benefited outback Indigenous peoples are also great gains. These include pharmacological research, ‘bush food’, the pharmaceutical industry and tourism. Customary punishment is often taken into

¹³ See Tully, *supra*, n8 and n11.

¹⁴ Hunter, *supra*, n7; Anaya, *supra*, n10.

account by the courts, albeit inconsistently.¹⁵ The Indigenous art movement gave many things to Indigenous communities, including a new kind of respectability as tribal. It gave them understanding, because underlying the land claims could be seen venerable associations of clans holding particular estates in parallel.

Dignity, Justice, Truth and Living Cultures.

There are, centrally, a number of ideas that remain to be explored before a specific law reform proposal is discussed. These are dignity, justice, truth and living cultures. Essentially, the wrong done in reproducing the object in an inappropriate format without consent is to degrade what is, for the tribe, sacred, and, in so doing, to claim that what is sacred for the tribe is not significant for the wider society and so does not merit special legal protection. It is also to imply that the tribe does not constitute a living culture in which the sacred imagery constitutes a vital and central part. The concepts mentioned above will now make sense in this context. Dignity is what the tribal members deserve. They released their imagery in good faith to show their sacred duty to the land along with their sacred receipt of it from their ancestral beings who bequest it to them for eternity. Having exposed their imagery in this way, in good faith, for this sacred and political purpose of educating the wider community of their situation, they hoped, rightly, that it would be treated with respect. Justice cannot be determined on Western notions alone. An intercultural wrong only has its full

¹⁵ See Victoria Williams (2003) 'The Approach of the Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper, West Report on Aboriginal Customary Law in Western Australia, avail: <http://www.lrc.justice.wa.gov.au/Aboriginal/ACLpublications.htm>. The Northern Territory of Australia has just adopted a *Sentencing Amendment (Aboriginal Customary Law) Act 2005* (NT).

significance realized, here, on the terms of the cultural community offended. Truth is not one involved culture or the other, nor one notion of justice or the other, but it transcends both cultures and both notions. Both living cultures are legitimate manifestations at every level: political, normative, cultural and sacred. Living cultures are spiritual entities manifesting values of community and actualizing community. But there is no one single or singly right and true form. The truth (of living cultures, of their worldviews) is all of them and it is beyond all of them.

Dignity

Indigenous tribes released their imagery to show their sacred duty to the land and their sacred receipt of that land and its Law bequeathed to them as a sacred trust by their ancestral beings.

Dignity is an appropriate notion to guide the wider society's treatment of the clan's sacred material. This material is, after all, identifiable with the clan, and it also contains that which is sacred to the clan as its highest element and organizing principle. The clan's paintings or ceremonial images are devices that are functional in the clan's highest collective purposes, funerary and initiatory rites among them. These purposes are cultural obligations maintained by the elders. The highest things in their cultural terms are these sacred duties, which the clan's paintings express. And although they are now a guide to cultural obligations and values for others in the wider society, they also remain at the same time primarily a guide for the clan, an expression of its collective purpose. As a result of this, the paintings are things that should be afforded the greatest respect. To denigrate them is to denigrate the tribe's

collective cultural purpose and, by identification, all of its members. The act of misappropriation, mass-reproduction and sale by an opportunist denigrates something sacred by making it mundane. This wrong severs the intangible property from several things, and this severing instantly denatures the property.

- First, it is severed from its true owners, a living cultural community;¹⁶
- Second, it is severed from its meaning in that living communal context;
- Third, it is severed from its role as the instantiation of cultural knowledge, as something that is a part of its owners and that thereby transcends the first two things severed.

Justice

An intercultural wrong can only be given its full meaning on the terms of the cultural community offended. Universal principles are engaged by and manifested in the cultural element.

Without the cultural perspective of the Indigenous clan, the wrong done to the tribal sacrament can be viewed in terms of Western notions of wrong.¹⁷ This is what the court was restricted to doing; in fact it was doubly restricted as it was also restricted to legal notions of wrong. In the judgements given by the Federal Court of Australia (FCA, hereafter, the Court) a number of elements of the wrong were recognized at

¹⁶ Ownership is here the exclusive possession and its recognition as such by the relevant persons, the clan itself.

¹⁷ In other words the wrong can be artificially separated from the culture wronged by way of an experiment.

three levels.¹⁸ The first level is that of the law upheld, the second that of the award given, and the third that of the recognition of wrong done but not acted upon. The law as upheld is that of the claimants' allegation, which was held to be against the law as claimed by the claimant.¹⁹ This level included the fact that the images were owned and the fact that they were taken without consent. At the second level of the award, the Court went further, in Milpurrruru's case, than it was able to do at the first level, by recognizing the cultural nature of the wrong (or, of the wronged) in the way in which damages were awarded and in their amount.²⁰ The third level was the admission of the cultural nature of the wrong by the judge in way that was not reflected in the upholding of the law or the award of damages.²¹ The judge in Bulun Bulun's case went further at the last level by entertaining the relevant potential scope of the operation of equity, had things been different.²² What remained to be recognized was the particular cultural and communal nature of the objects at issue and of their true possessors and ultimately of the wrong. Even at the second level of recognition (which did result in cultural damages distributed along cultural lines in Milpurrruru's case) the particular nature of the objects and the role in a living culture was not recognized, rather what was recognized was only that they were 'cultural' and Indigenous. What, then, was omitted, from the judgements (in both the upholding of the law and the award of damages), was, not only important aspects of the objects, but their primary and most important aspects culminating in their being active components of living cultural and institutional traditions concerned with the direction and self-reproduction of clans according to sacred Law.

¹⁸ Bulun Bulun's and Milpurrruru's cases, *supra*, n2.

¹⁹ *Ibid.*, both cases.

²⁰ *Milpurrruru v Indofurn*, *ibid.*, at 688-99,

²¹ *Bulun v R & T Textiles*, *supra* n2, at 525-32.

²² Von Doussa J in *Bulun Bulun v R & T Textiles*, *ibid.*

Truth

Truth transcends both cultures. Both are living cultures and are legitimate manifestations of truth at every level.

Each affected cultural community in this intercultural wrong (the state and the affected clans) possesses its own truth. The truth of the affected clan communities has been wronged here, in the inappropriate usage of their ceremonial imagery. The Western truth is not at issue. The value that was being expressed in this misappropriation of cultural material was the value of illegitimate entrepreneurialism, a value that Western institutions clearly prohibit (especially, perhaps, as genuine entrepreneurialism is a value Western institutions protect²³). The cultural West's truth of the good of entrepreneurialism was, therefore, under attack from the opportunist respondents and not from the applicants. The Court recognized this, but did not recognize in a constructive way the truth of the good of tribal values (and the legitimacy of tribal obligations) that were at stake also. The main issue for the Court was the wrong against painted works (of individual creators protected by copyright law), but the main wrong against those works was against their cultural nature, as they essentially were cultural production. For them the artist was a vehicle, but the clan was the source. The truth of those works was their cultural *identity*. The truth of that culture manifested in those works was, in turn, its organization around a religious

²³ Different circumstances could perhaps eventuate in which some agent acting in good faith approached a tribal artist and obtained that artist's consent for the use of an image as a corporate logo and then face the wrath of the tribal custodians. In that case the cultural wrong may be committed unknowingly and despite efforts to avoid or minimize harm. It was not being upheld here in the opportunistic reproduction of the tribal imagery. This would constitute no particular conflict with Western laws or notions (unless, perhaps, it was negligent or otherwise in breach of some other contingent principle). It would still constitute a cultural wrong.

principle. A cosmology, a myth, a Law and a collective purpose are all integrated in support of the rules, determinations of kinship, political reality (e.g. structural relationships to other clans) and people and their roles to form the commonality that is a living community. The active principle of this integration and support was contained in the medium of ceremony in its elements of story, song, dance and art, all reflecting the clan in its highest manifestation and highest aspirations. These are the truth in the service of which, are its more practical truths.

Living Cultures

Living cultures are manifestations of particular communities. There is no one single, or singly right and true form of community.

Unlike science religion is institutional, its truth is scriptural, revealed, received. It is subjective, but it depends on an objective manifestation for this subjective realization. The objective manifestation, required for this subjective realization, is a living cultural community, the fabric of which, its religion, is a living waft. If each community has its truth, as it does, they are each in possession of *the* truth. The community of scientists is not a self-sufficient political and cultural whole. Rather, it is a specialized limited community composed of the members of another communal cultural whole, or wholes, such as a state community or a smaller part of one. In a community that is a political and cultural congruence that is a communal whole where religion does still play a significant leading part, the religion expresses the highest aspirations of the community and the most general subjectivity (intersubjectivity) and

shared purpose of the community. In Indigenous Australian clan's, ceremony is the most concentrated repository of the sacred. That sacred of ceremony is carried over, directly, into traditional ceremony imagery abstracted from that context as 'paintings'. They are not 'Nobody's' interest; free to the lowest bidder. Nor do they belong to their individual 'creator' (the medium of *tribal* knowledge). Rather, they are a communal concern and a spiritual component of that community. They form part of the objective side of that community and provide a foundation and a buttress for the subjective side (enabling the formation of the intersubjective, or cultural, side). A traditional painting is a thing of beauty that can be kept by the clan, but it bears the cultural knowledge within it to spiritually nourish the clan, to maintain its important sacred obligations and rites of passage, to bring its message to life in the clan.

Misrecognition of the traditional works in question by unauthorized commercial reproduction subverts the gesture of diplomacy in the sharing of the works, pollutes the goodwill in the act, by exploitation, and recontextualizes the cultural message, changing, thereby, its meaning.

To misappropriate someone's work, by copying, for commercial gain and without proper credit, attribution and consent, is, implicitly, to deny that person's ownership, in addition to whatever specific and contingent harms are entailed. To do this when that very work is at once the vehicle for a living tradition and the communicative, educative and diplomatic act of negotiation of an Indigenous people, whose recognition is always, at a certain level, in question (as there is no finally attainable Indigenous status), is to cause the misrecognition of that people, whether through cynical or ignorant opportunism. Such an act against traditional tribal works is to subvert their function as self-representation to self and, nowadays, self-representation

to other. In the tribal Indigenous self-determination, an ongoing pursuit of a potential in the state, this subverting act impedes the cause of recognition. The tribes and ‘their’ clans along with other groupings are part of the wider society and are seeking to be recognized as such. If the tribes can know that they are recognized, they have achieved their purpose of self-representation to the other, and they can safely represent self to self *as recognized by* the, now more intimate, other. To misappropriate the tribal imagery involved in this is to hijack the process and convert it to purely subjective ends.

Reform

The copyright remedies supplied in the courts were insufficient for the legal recognition of the fundamental nature of the wrong, which was a cultural wrong.

The remedies supplied by the Federal Court of Australia in both in *Bulun Bulun*’s and *Milpurrruru*’s cases went as far as recognizing the breach of the individual Indigenous artists’ rights.²⁴ There were also some appropriate cultural influences on damages in one case and a discussion of the possibility of equity’s capacity to recognize cultural rights, if things had been different, in the other.²⁵ The possibility of recognizing the cultural wrong done was not available to the court. Yet the primary nature of the wrong was cultural. Traditional Indigenous paintings are canonical and their artists are the servants of that canon. Not all paintings by members of Indigenous tribes are canonical, as some are composed of a significant portion of invention also. In the paintings at the centres of *Milpurrruru*’s and *Bulun Bulun*’s cases there was an

²⁴ *Supra*, n2.

²⁵ *Bulun Bulun v R&T Textiles* at 525-32 and *Milpurrruru v Indofurn* at 688-99, *ibid*. See chapter 2.

overriding tribal stamp in the symbolic or figurative pictorial manifestation of clan sites, totemic and clan-specific iconography and dreaming imagery, as was recognized in expert testimony.²⁶ The remedies given did not denounce the desecration of ritual objects, because there is no Australian law recognizing the value of ritual objects. There is no law supplying a remedy against the desecration of ritual objects. Without the introduction of such a law, the Indigenous copyright cases are merely interesting but ultimately unproductive legal experiments.

Sui generis Indigenous Moral Rights (IMRs) could supply the appropriate remedy by identifying the true nature of the misrecognition effected by imposing an appropriate fine, and by not conflicting with the purpose and operation of copyright.

To correct this oversight in the law a new legal notion would have to do two things. First, it would have to protect the traditional objects in such a way as to reflect the tribal normative content of such objects. Second, it would have to do this without conflicting with the law of copyright.²⁷ The first criterion is really the demand to be *sui generis* in the legislative sense – that is, not substantially derived by analogy from any existing category. This is so as to avoid ‘translating’ the objects in the protection of them as other than what they in fact are. The new category must recognize the communal, traditional, cultural and institutional elements of such intangible objects and their exclusive association with particular clans. A customary law based approach should not be excluded, but customary laws cannot be received into law by being reconstructed in legislation due to too great and diverse variation of its forms among the

²⁶ *Ibid.*, *Bulun Bulun v R&T Textiles* at 516-20; *Milpururru v Indofurn* at 662.

²⁷ Conflicts with other laws should also be avoided, but copyright is the chief concern due to its granting rights to intangible, creative works in word, image, performance (where recorded) and, in particular, to those types of works, and those particular individual works, precisely at issue.

clans and so the opportunity for a successful action should not be made to depend on it. Customary law could though possibly be led in evidence to show the nature of Indigenous moral rights and degree of their breach in particular cases as required.

The second criterion reminds potential legislators, that, as the tribal works, at issue here, are painted by individuals, existing copyright law will continue to apply to those works. It is also very unlikely that an exception would be made to the individual rights of copyright holders. Therefore, it is reasonable and pragmatic, given this, to construct the new category so as to avoid a conflict with the current regime. Such a category is capable of explicitly recognizing ritual value. As a final, supplementary, consideration might be that of making the legislation workable also inside a broader notion of Indigenous cultural and intellectual property.²⁸

The proposed new category is that of Indigenous moral rights. These satisfy the criterion of being *sui generis*, first, by being exclusively Indigenous in their application.²⁹ Within that mandate of scope, they are moral rights. That is, they encompass rights of attribution of the work to the clan and of the integrity of the clan's cultural work.³⁰ IMRs can easily be made to satisfy the criterion of not conflicting with copyright law by *not ascribing ownership* to the tribe. This may seem like an unnecessary and excessive concession to the status quo, but it is both necessary and just, given the following considerations:

- the tribal (clan) interest in the work can be explicitly recognized

²⁸ Especially important if this is how it has to be.

²⁹ Or tribal.

³⁰ Other moral rights, than those already operating in the Australian *Copyright Amendment (Moral Rights) Act 2000* (Cth), can be included such as the right of disclosure. See C. Banks (2000) 'The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators,' *Griffith Law Review* 9(2): 334-47.

- the individual copyright holder in a given work is a member of the clan (a claimed copyright holder in a tribal work to whom the work has not been assigned, is in breach of copyright by having copied the work from its tribal painters and therefore is not the copyright holder),
- on the occasion of an artist's absence³¹ IMRs would still operate (but not one reassigning ownership)
- IMRs would exist in parallel to copyrights, including ordinary moral rights.

This is by no means an exhaustive list of relevant considerations.³²

IMRs will be enacted on their own or as part of a broader act.

IMRs have not been termed tribal, or clan, moral rights, due to the possibility that non-tribal Indigenous objects and tribal objects that, for some reason, do not qualify are to be afforded protection.³³ The proposed gesture is based on the foresight derived from the experience of other Indigenous legal regimes being very inflexible and stopping short of cultural recognition. This issue of Indigenous cultural and intellectual property is possibly the last on the agenda for Indigenous peoples.³⁴ Indigenous folklore and cultural heritage regimes have not managed to capture an

³¹ Von Doussa J in *Bulun Bulun v R&T Textiles*, *supra*, n2, p. 531, discusses how equity might have operated 'had the position been otherwise'.

³² The following might be some such additional considerations: remedies are, similarly, parallel (but not in size); copyrights can be assigned, by the artist, to the tribe; possibly, there should be allowance for the ill advised assignation of copyright, in which case every care should be taken to discover a loophole.

³³ Practically, a new category of law may need to be broader than IMRs, i.e. an Indigenous Cultural and Intellectual Property, Intangible Cultural Heritage and Folklore Act, but this would not constitute a reason to exclude IMRs from such a category, nor even from its central part.

³⁴ The other areas, such as aboriginal title and citizenship, are somewhat 'settled' and still others are only receiving, and will probably only receive, 'fine tuning', such as the recognition of customary law. The overdue and unresolved issue of heritage and folklore is part the present topic of ICIPRs.

Indigenous conception of self.³⁵ Therefore, as Indigenous cultural and intellectual property rights are fledgling, it is particularly important that they be got conceptually right. Indigenous cultural and intellectual property rights should have a traditional core that is truly *sui generis* and a non-tribal periphery. The '*sui generis*' is what has been missing from Indigenous legal regimes, including Indigenous cultural heritage and folklore regimes, but also from that of native title. Indigenous legal regimes have tended to 'de-culture' the rights they generate by reconstructing them too often and too far on Western notions, perhaps through ignorance, perhaps because of a perceived threat to other existing regimes. IMRs allow for the traditional core to be preserved, and can even be adapted to accommodate customary laws.³⁶

Conclusion

The cost of the absence of this proposed legislation has been shown through the demonstration of the role of traditional Indigenous art as representation, and through the subversion of that representation by misappropriation.

Successful self-representation for tribal minorities is an ideal state, a potential for flourishing, for surviving well. It is best characterized in *this* way, rather than as a right or a duty. To be in control of the representations of oneself is the ideal. For clans and tribes the ideal is highly significant. It was argued above that tribal self-representation to self is a traditional function (exercised by cultural polities by various means) of ritual art, which, in the colonial context, takes on a new role and a new

³⁵ As they are analogies on a Western conception which seems to put its heritage and folklore at a greater remove than tribal notions ceremonial life are from the tribe.

³⁶ Customary law ought to be recognized for explicit reception for particular ceremonial circumstances; perhaps in combination with IMRs.

dimension. The new role is the understandable one of making oneself visible, of reminding the wider Australian society of one's Indigenous clan status.³⁷ Self-representation to self comes to include self-representation to the other.

The work of a minority, in integrating itself into the larger society, is a constant venture. Opportunities for this venture may arise at any time from the strangest quarters. They present themselves for conversion in the service of the minority's need. One of the most important operations of appropriate cultural integration and differentiation by negotiation is the representation of the group's cultural whole to the wider society and to the state. The potential here is for recognition, and the benefits range from self-esteem, to economic opportunities, sympathy from the wider community, cooperation, official understanding, institutional correlation, goodwill, harmony, relationships, experience in commercial and public dealings, willingness to deal on all sides and efficacy in explaining needs and obligations.

³⁷ Indeed, recognition of the other is a matter of degree according to variations of cultural difference. Self-representation to the other is a task for non-tribal Indigenous groups also, but for tribal ones, the cultural forms are, largely, prescribed.

CHAPTER NINE:

CONCLUSION

Introduction

The legislative protection of Indigenous institutions, ceremonial objects and cultural knowledge should not be subsumed under copyright, native title or any other relevant existing categories of law as a sole approach to reform. Instead, legislative protection should actualise, in the Australian jurisdictions, something of value that existed before the acquisition of sovereignty by the Crown, and which survives to the present. This ‘new’ institution would not, however, be *simply* an activation of a pre-existing one from local culture. It would activate traditional Indigenous sacra, its iconography and its normative content in the Australian jurisdictions by recognising existing clan rights, and responsibilities, in relation to them. But it should also go further by appropriately recognising the Western legal context into which it is to be introduced. This could be achieved by making traditional rights of exclusion, and rights and responsibilities of cultural control, active also against the rest of the Australian community, to preserve traditional privileges, etc., in this new context. This is what the specific act must do, either to the exclusion of anything else, or in addition to other tasks. If this minimal double task of new legislation is not its sole objective, then it must be seen as the core of more ambitious legislation. For this directly concerns the point at which Indigenous traditional property differs from Western property. It reflects the uniqueness of traditional Indigenous art as the vehicle through

which traditional Indigenous culture presents itself and it reflects what is rational and sustaining in Indigenous culture. There is no general advantage in claiming that the customary component of Indigenous intellectual property should be the sole component of an act protecting Indigenous cultural and intellectual property, or that certain other components ought to be excluded from broader protection or protected separately. However, all that the thesis has justified, at this practical level, is that traditional Indigenous politico-sacral objects¹ ought to be protected in a new category of law, but with traditional rights and obligations retained, and extended against the wider community.

Beyond this, contextual considerations of law reform are in order. The first consideration relates to ‘traditional knowledge’.² Aside from the core to new legislation with which this dissertation is directly concerned, there may be reason to include traditional knowledge in an act for the protection of Indigenous cultural and intellectual property. Traditional knowledge is protected under the *Convention on Biological Diversity* (CBD), but *only in relation to in situ biodiversity conservation*. There are bound to be occasions upon which Indigenous knowledge falls between its definition for biodiversity conservation and the scope of protection to be allowed for politico-sacral protection. It will therefore remain unprotected in such cases. It is beyond the scope of this dissertation to argue for such protection, but the existence of traditional knowledge that falls ‘in the gap’ may provide some grounds for the extension of protection from a core to a more inclusive category of Indigenous cultural and intellectual property. The same could be said for Indigenous heritage

¹ This term is adopted to distinguish, efficiently, the customary Indigenous cultural and intellectual property with its collective and religious nature, such as the traditional art discussed in Chapters 2 & 5 above, from other Indigenous forms and possessions, such as the non-traditional, non-ceremonial, non-collective, and non-customary types.

² *Convention on Biological Diversity*, s. 8(j).

objects. Indigenous heritage that is intangible, or that is not adopted for protection by one of the Indigenous heritage bodies, is not currently protected. New Indigenous cultural and intellectual property legislation may be required to protect that too, where the current regime is lacking. In which case, the wide scope of new law must not disturb its trans-institutional function of accommodation. If its scope is to be wide and inclusive, it might also aptly reflect an important characteristic of Indigenous cultural and intellectual property, which is its nature as embodying a series of intersecting spectra: from traditional to modern, customary to non-customary, individual to collective, and etc. If this approach is taken, due weight must be given to different points on the spectra. The politico-sacral component must be given its own integrity in the scheme of things as a pre-existing institution, or it will readily be degraded, and another opportunity for its accommodation will be lost.

Conflicts with copyright requirements stemming from international obligations can be avoided by framing the legislation in terms other than strictly on copyright terms.³ This is proper in any case, as the new category and the objects at its centre are already inherently *sui generis* in terms of their accommodation and reception.⁴ International law may be a consideration for the formation of new legislation in a couple of ways. Firstly, future international law may in some regime provide for the protection of Indigenous cultural and intellectual property, in addition to the limited protection of the *CBD*, but this cannot accurately be predicted, nor can such a development be counted on, nor productively waited on, as there is no telling now what form a

³ Although copyright can be avoided as a solution its potential clash with new Indigenous IP regimes cannot be simply wished away. Such a regime can be made to be parallel or complementary to copyright in one way or another. See preceding chapter.

⁴ Australian and other national copyright frameworks are increasingly subordinate to the powerful international copyright regime, which makes domestically initiated copyright remedies reciprocally effective for members of other states. This and the great complexity of the *Copyright Act 1968* (Cth), makes it unlikely that reform of a specialised nature will be seen.

successful candidate instrument will take, nor when this will occur. In addition, international remedies and instruments are notoriously 'soft', when it comes to domestic law and political behaviour, especially so in the realm of human rights, and still more so in that of group rights. The second point relates to the *CBD* provisions relating to traditional knowledge. Traditional knowledge may or may not be recognised explicitly in new Indigenous cultural and intellectual property legislation. Either way, a newly constructed category would be bound to overlap with 'traditional knowledge' for the purposes of biological diversity conservation, even if the minimal approach, of the protection of politico-sacral objects and directly related rights alone, is taken. One creature of statute that would not overlap in its present development, but which would rather neatly intersect into its central Indigenous politico-sacral element, is native title.

What is centrally at issue here is the creation of a new category of statute law. An alternative approach, amending existing intellectual property, Indigenous heritage, and other legislation, would be inefficient, and not comprehensive. Only a new single, specific act could have the breadth to cover Indigenous cultural and intellectual property contingencies, and, equally important, only such an approach could hope to do justice to the *sui generis* nature inherently at the traditional core of the category. Also, only such an act could supply the breadth and uniqueness to accommodate the translation of Indigenous institutions and cultural objects into an institution of the state jurisdiction. Finally, only a *sui generis* act can avoid direct clashes with existing statutory rights, such as copyright. Perhaps this category can be constructed on two planes for smooth operation between its different parts. First, the general, new category could be recognised, and it could be a cause of action in itself under

specially devised criteria. Then, underneath it, a select number of sub-categories could be set up to operate simultaneously with the general category. This would ensure the protection of unique, central categories, such as politico-sacral objects and rights, or traditional performance, or new artistic styles based on tribal particulars. These could constitute causes of action on their own unique terms, and where these failed or were likely to fail, the general new category could then be resorted to. The relationship of the customary parts of Indigenous cultural and intellectual property to native title could be explicitly expressed, or implied. Any implications for the recognition of customary law could be cooperatively decided before the construction of suitable legislation. Consideration would have to be given as to how to integrate this new category with still other areas of law and policy. As it is a new category, however, it will, thankfully, not have to be squared against an existing one at its core, but only at its periphery.

Justification

The thesis argument shows that legal recognition should be given to cultural minorities in general by showing that they should be given, in at least this instance, in particular. They should be given this recognition when the state acts in such a way as to draw the obligation to recognize its particular minorities in a particular way. The particular instance that qualifies here, for legal recognition, is where the state, in acquiring practical sovereignty over tribal peoples and their institutions, exposes them to its law. Without legal recognition of the tribe's objects and institutions, the law of the state implies, by this lack, that, at best, the tribe is something that it is not, such as,

inherently, a mere political interest group, whereas this is only incidentally a component of its nature in the context provided by the state. This situation is created by the state and must be rectified by the state. What is being claimed is not incompatible with the Australian legal system. Sovereignty is not being claimed for Australian tribes, as that would be incompatible.⁵ To be compatible with the Australian legal system is to be not incompatible with the Australian legal system. It would be just for the state to act in this way to ameliorate further cultural exploitation and legal non-recognition and to restore the Indigenous institutions and what they protect to be visible in the Australian community and their exploitation actionable in Australian jurisdictions.

Indigenous tribal groups have a structure and function that is non-liberal. This is not to say that Indigenous individuals cannot both participate in democratic decision-making and fulfill their non-liberal tribal roles. Kymlicka is not concerned with the content of claims for accommodation within the state (except to distinguish between two types of minority, national and immigrant). His procedure amounts to judging a thing against the form of a different thing rather than letting them work through a relationship on the basis of the terms and natures of both or subjecting them to a comparison without prejudice. Kymlicka is aware of some specific Indigenous claims against the state, but he has no means and no desire to evaluate them or even encounter them on their own terms, as before considering any claim he has decided the standard against which any claim should be measured, his own individualist notion of liberty.

⁵ Recognition of tribal sovereignty in its unqualified sense is, for the courts and the legislature, self-contradictory and extra-jurisdictional, as their jurisdictions are, along with the Constitution of Australia, founded on Australian legal sovereignty.

Locke's theory of property is in two parts: a natural law part and a 'constituted' society part. Locke applied the natural law part to Amerindians because he assumed them to be in a state of nature. Locke's theory is for determining what ought to be considered natural property, among the category of objects not already positive property. His larger concern was to show that positive property has a separate basis from sovereignty, i.e. one's property does not depend on the maintenance of a particular sovereign. This basis was natural law; on his version and regarding property, the labour theory. The natural property of a territory of neighbours would be transformed with the arrival of their 'social compact', into positive property, which, from then on, together constituted the new society, and severally, the stakes of its citizens in that commonwealth. Aboriginal Americans had no rights to land, according to Locke, as they had no positive property nor constituted society, *and* their use of resources, their tenuous 'natural' title was, *compared to* Europe's, inefficient. Locke's theory is normative in various ways, but the labour theory does not, and cannot, apply to positive property.

The philosophical problem central to this thesis concerns the appropriate justification of rights over these objects. Discussion of this problem leads to issues about the nature of justification. These wider issues include the justification of different logical and epistemological approaches, as well as justification with a normative focus. Justification ought to begin with analysis. Stenson and Gray's analysis, represented by their choice to justify their position by reference to Kymlicka, tries to make Kymlicka's theory meet with their problem of why community intellectual property rights should be recognised. Kymlicka's analysis was devised with particular political situations in mind, namely two types of minority, ethnic and national. Traditional

Indigenous groupings tend to fall into his 'national' category. Kymlicka was attempting to say about this category a number of things: cultural rights could be defended, supporting cultural rights was not incompatible with liberalism, and that individual liberty could itself be utilised in this defence.⁶ In pursuing this goal, Kymlicka puts his political position before his philosophical analysis. In asking whether there should be cultural rights for national minorities, it should first be asked, what are the natures of such minorities and the rights they claim? Otherwise, the enquiry is ungrounded. The particular *cultural* groups concerned are landed bodies with traditional structures and claims. Kymlicka himself asserts this, but he then assumes that the same type of justification will work here as for ethnic minorities, and that individual liberty ought to be part of the support for cultural rights. His main aim was to show the compatibility of cultural rights with liberalism. He is thereby forced to demote in importance the fundamentally cultural nature of such claims. In adopting Kymlicka's theory, Stenson and Gray bring his analytical problem into their own argument. It is true that Stenson and Gray are primarily concerned with genetic resource control in one publication, but in another they specify 'Indigenous communities', in any case, genetic resources often have in Indigenous societies a cultural component (hence the protection of 'traditional knowledge' by the *CBD*).⁷ More importantly, Stenson and Gray's argument, relying on Kymlicka, invites a much more general application, just because Kymlicka's argument is based on the universal concept of liberty, not on some concrete object or right. In adopting Kymlicka's method of argument, Stenson and Gray adopt his individualist analysis along with its

⁶ E.g. W. Kymlicka (1989) *Liberalism, Community and Culture*, Oxford, Oxford University Press, and (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press.

⁷ A. Stenson & T. S. Gray (1999) 'An Autonomy-Based Justification for Intellectual Property Rights of Indigenous Communities,' *Environmental Ethics* 21: 177-90, and (1999) *Politics of Genetic Resource Control*, Basingstoke, Macmillan Press Ltd.

general applicability beyond Stenson and Gray's emphasis on genetic resources, patents and plant knowledge. If cultural rights of a particular sort are warranted, because cultural rights of a general sort are warranted, then the particularity matters not.

Stenson and Gray are right to reject the labour theory and would be right to reject it even as justifying the denial of the recognition of Indigenous property and possessions. As an argument for or against, it fails because it was designed under the complete misconception of the nature of Amerindian society, where its success was already dubious. Therefore, its application here also suffers from a faulty analysis. The theory argues that property is acquired by an act of labour.⁸ Then by extending this to Indigenous peoples, the argument runs that they either have or have not, depending upon the theorist's viewpoint, acquired property through their labour. Finally, the 'efficiency argument' attempts to relativise varying acts of labour, effectively to give different strengths to different property claims. There is an intuitive plausibility to this application of the theory. Indigenous people have created unique landraces or cultural objects through their collective 'labour' (they simply lack intellectual property law's preference for an identifiable individual author). Indigenous property has been argued against on the same grounds. Locke in producing his version of this argument merges the two concepts of property and dominion, perhaps in order to disguise the collective occupation of the land. On a closer viewing of Indigenous claims of property, there appears to be something fundamental that the theory is unable to account for. This lacuna (also missing from theories of individual liberty) is culture. Indigenous people claim what is theirs,

⁸ J. Locke (1993) *Two Treatises of Government*, London, Dent and Sons.

simply as positive possession through totemic identification. Landraces may be thought more easily to fit a Lockean theory, as they are produced by an active selection process constituting labour, although collectivisation of the notion of labour would have to be defended. Cultural objects are also produced by 'labour', but where they are possessed, this possession is fundamentally cultural. Where there is, in the object, an institutional element, the property in the object is cultural, and, fundamentally conventional, as well. Such objects, including the ones discussed in this dissertation, usually have a material basis of some kind, but in the way they are held, they are entirely cultural constructions. They can be understood, let alone legitimated, only in terms of the attendant culture. They are often held in a network of cultural rights and responsibilities. An appeal to 'labour' is in this context therefore a weak argument, so weak as to be almost irrelevant. Entitlement theory, justifying or denying cultural property, would be based on just this lack of analysis of the true nature of Indigenous possession.

Given that the practical appeal of this thesis is to and in terms of the Australian jurisdictions, in that it is a claim for legal recognition, it is both reasonable and necessary to accept Australian sovereignty. This said, Indigenous sovereignty, if it could have been said to exist, was ceded to the English Crown over two hundred years ago. What traditional Indigenous peoples have is not sovereignty in the sense in which states have sovereignty. Many Indigenous polities have survived in the state context, however, until the present, and maintained their institutions too. One such institution is traditional Indigenous art. This is a component of Indigenous ritual; it expresses the religious and political core of a clan, the clan's story. From this story, and the clan ancestor depicted therein, are derived the rules of the tribe relating to kinship, ritual

and other obligations, rights, and knowledge, including those concerning painting. In this way, the art object reproduces itself. It is the possession of the tribe through time, and a vehicle of the tribe's reproduction of itself. The status of this object in the larger community is in question. It is misunderstood, and abused, and, in so far as it is the instantiation of tribal knowledge, with its abuse tribal knowledge and tribal life are misunderstood and abused. Even where remedies are granted against this abuse, this is done according to Western concepts (art, artist, artefact), and not in such a way as would preserve the institution and its attendant cultural group. Explaining its importance would therefore be helpful in aiding its protection and respectful treatment. How can official status be secured for it? This can only be achieved by an acknowledgement from the state. The defence of the status of these Indigenous objects must be made as an appeal to the state, that is, on the state's terms. The object already has an institutional status, of a different order, and the state respects institutions. Surely, it should respect the institutions it has effectively adopted. It should acknowledge this adoption. The 'different order' that distinguishes the state from the Indigenous polity is a 'historical' one. The Indigenous polity properly represents, from the perspective of the state, its very origins. The state's notion of property is not something it invented, but something it inherited and developed. This inheritance is really a chain of inheritance going back into prehistory, to something more like traditional Indigenous property. Indigenous property, like pre-historic property, is and was rational on its own terms. The state is able to recognise this Indigenous cultural and institutional rationality, which still asserts its validity, as the origin of its own rationality.

Conclusion

Indigenous objects and their cultural and institutional contexts must be taken for what they are. In consideration of the accommodation of Indigenous cultural and intellectual property, these objects must be given a place appropriate both to their traditional status and to the contemporary state context. It is not enough for tribal people and anthropologists to understand their operation in traditional society. The state's people as a whole must be brought into proper contact with these ancient 'documents'. It is not only the function of the law to provide relief it is also educational as to the standards of justice demanded by the given society. The law of Australia must be in a position to assert that its subjects know or ought to know of the status of, and respect due to, Indigenous cultural and intellectual property, and particularly traditional art, ceremony, song and story. The law should be in a position to affirm that the state has duly taken on board the gamut of Indigenous institutions that survived the acquisition of sovereignty by the Crown to the present day. If copyright law and native title do not accommodate the collective cultural element of traditional forms, then a new statute can easily fill the gap. Indigenous traditional forms were in the past and are still today the instruments of cultural survival for tribal groups. They are also today, especially since the explosion in the market in traditional Indigenous art, instruments of self-preservation for traditional Indigenous life in the context of the modern state. This dissertation has tried to show that these traditional Indigenous forms have a legitimacy that is no more denied by the acquisition of sovereignty by the Crown than was the carrying of Indigenous culture in tribal hearts. That legitimacy is at sufficient remove from the accumulated rationality of contemporary state institutions, that its accommodation offers no threat of a clash,

while its relation to those latter institutions is sufficiently close, intelligible, and important to its traditional possessors, that it must duly be recognized as a legitimate category for protection. It is beholden upon us that the high level nature and multiple institutional function of traditional Indigenous art must not go unrecognised in our law.

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