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## THE LANDLESS PEOPLES AND THEIR RIGHT TO LAND

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It has not yet sunk into the consciousness of European-Australians that, in any definition but our own, we are indeed living on Aboriginal land. Neither by agreement, treaty, nor purchase have we obtained legal possession of Australia from its prior owners. Such legal cases as Aborigines have been able to bring against us have been answered wholly in terms of British Australian law, under which we have defined Aboriginal occupation as non-existent (under the *terra nullius* principle), thus enabling us to justify our presence by refusing to acknowledge Aborigines' prior ownership and use of this land. This circular argument takes place wholly within our terms.

However, with recent changes in international law, it becomes more and more difficult to continue on these lines. In the case of South Africa and Namibia, as in the case of certain Western Saharan nomadic tribes, ownership has been judged by the World Court to be clearly with the indigenous inhabitants. To quote from a draft paper on the legal status of Aboriginal Australians:<sup>1</sup>

When Captain Phillip arrived at Sydney Cove...Aboriginal peoples were in occupation of the lands that...Phillip annexed as a possession of the crown of the United Kingdom. They governed themselves according to their own systems of law, and according to those systems they had rights in respect of the lands. Since 1788...their status, and their rights in respect of the land, have been defined by Australian courts according to the law recognised by those courts.

Though they were, after a period of uncertainty, defined as British subjects, that status did not confer on them the privileges of other Australian citizens, and indeed:

this status, when combined with the effects of the settled colony doctrine, had drastic consequences for the rights which Aboriginal peoples had in 1788 according to their own law in relation to the lands they occupied. In short, these rights were obliterated.

An argument has recently broken out among lawyers as to whether the colony should be regarded as 'settled' (which implies a peaceful occupation) or 'conquered'. But for the status of conquerors, some agreement, treaty or document would be required to show that Aborigines had accepted that status. In fact, they do not accept it. To quote a recent statement by the Northern Queensland Land Council:

Two hundred years soon you break our law,  
Two hundred years soon, we make war.  
Don't you think it's time for peace?  
Pay the rent.  
Sign the lease.

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It is not easy, even within the bounds of our own legal system and of our Constitution—which declares that the property of citizens may not be alienated without due compensation—to argue any longer that Aborigines had no rights to the land they had occupied since time immemorial, or that they had neither law nor a conception of ownership—even though, as Justice Blackburn put it, it was easier to see them as being owned by the land than as owners of it, in our conception of the ownership of property. Meanwhile, in particular in Canada and North America, countries similarly colonised though with more recognition of indigenous rights, the pressures of evolving international law which go against the continued use of the *terra nullius* argument, combined with the clear illegality of South Africa's occupation of Namibia and with the fact that the British Commonwealth is increasingly seen as at risk of dissolution over the South African question, have already made the question of the rights of indigenous peoples in an enclave situation a difficult and sensitive one.

This fact has more to do with ecopolitical questions in Australia than might seem to be the case, for remarkably enough, and in spite of its dominant attitude towards Aborigines, Australia is in the forefront of a development new to policies of conservation anywhere in the world.

This has come about through Federal acceptance, though with reservations, of the Woodward Report on the question of Aboriginal land rights, and of the (again limited) application of the Woodward recommendations under the Aboriginal Land Rights Act (NT) 1976. Though, so far, only in the Northern Territory, this has resulted in Aboriginal ownership of certain tracts of land to which they have been able to demonstrate, to legal satisfaction, immemorial ties of occupation and relationship. (This has been defined, under our system of land title, as 'ownership'—a concept foreign to Aboriginal relationships with land, and applicable only as a legal fiction in their view, but essential to our legal system of land title.)

This has placed Aboriginal people in possession of lands, some of which had already been recognised as of immense significance to conservation. This was especially in the area already accepted by the Federal Government as of such conservation value that it was designated for declaration as a national park. The area, of course, was what we now call Kakadu. Aboriginal 'owners' accepted the Woodward Report's recommendations that such areas should be leased back to the Commonwealth Government, which was then the authority in the Northern Territory, to be managed with Aboriginal participation as national parks. Aborigines were to be trained as rangers and for other roles in the park, with an effective voice in management, and one which should not be gainsaid unless an independent authority overruled their views. In 1978, the Kakadu Aboriginal Land Trust leased the lands to the Commonwealth National Parks and Wildlife Service under those terms.

It is not perhaps surprising that this initiative has not yet been wholly successful, in that Aboriginal views of management of land and tourism have not in fact always been those accepted by the park authorities, but, as a model for Aboriginal-European collaboration, along with the Cobourg Peninsula wildlife sanctuary, Kakadu does offer

'the opportunity for action in which European and Aboriginal objectives have much in common and provide scope for genuine Aboriginal participation.'<sup>2</sup>

These initiatives are now seen by Aborigines elsewhere as presenting a chance of attaining land rights, some control of tourism and other development in lands of essential significance to their lives and culture. Moreover, they provide a continuing income through the Trust, and the chance of employment in their own territory.

Kakadu has been quoted elsewhere, too, as a precedent of hope to other indigenous peoples. To quote from a recently published paper:<sup>3</sup>

Appeals for national and international protection of special ecosystems and endangered species seem to bring more ready response and funding than do pleas for cultural survival, and peoples in Central America, Australia, New Guinea and the Canadian north are beginning to recognise that national parks may be a new card in an old game of trying to hang on to land and life.

For instance, Stevens mentions a possible biosphere reserve to protect rainforest in Costa Rica, in which the Kuna people of coastal Panama, who made the first approach for park declaration, are 'playing a central role in planning, patrolling and administering the area of the prospective park reserve', in which there would be a core area of rainforest reserved for tourism and scientific study, with the rest 'zoned for traditional Kuna use' (p 27). In the Canadian North-West Territories, Inuit may be agreeing to the establishment of a 13,000 square kilometres national wilderness park with hunting and fishing rights reserved to them. In New Guinea, a considerable number of wildlife management areas have been set up, reserved for conservation and controlled resource use under local community management.

These moves represent the beginning of a radical change in the relationship between conservationists and indigenous peoples. The first national park to be established—Yellowstone—was set up in 1872, at a time when the notion of 'wilderness' as something worth preserving for its own sake was new, but Yellowstone was not set up as a 'pristine wilderness' on the lines later laid down by such societies as the Wilderness Society and the Sierra Club. In fact, it was still being traversed by American Indian tribespeople until more than fifteen years later,<sup>4</sup> but, as in Australia, North American tribes were soon hustled into 'protected' reserves. The slow growth of the national park concept in Australia, and the fact that few Aborigines remained outside the reserves after the end of the nineteenth century, has meant that there is now no reliable record of Aboriginal occupation of areas now reserved under national park status, except where national parks have been very recently declared in areas invaded only lately.

Meanwhile, a major challenge has now emerged to the Western Australian Government in such an area. This lies in the sandstone plateau and gorges in the upper catchment of the Ord River, known to us for some reason as the Bungle Bungles but to Aborigines as Purnululu. Arrogantly hailed as a European-Australian 'discovery', this extraordinary area has in fact always been the homeland of a number of Aboriginal groups, and the Aborigines responsible for the area are now faced with the possibility of a major national park declaration over the area and are desperate to retain or regain some control over its future and uses.

Since the establishment of a cattle industry in the Ord Valley and the earlier 'dispersal' of the people, the Ord River and its catchment have been so seriously damaged by grazing that, in order to protect the dam on the Ord from further siltation, much of the land has now been closed to grazing as a regeneration area. Grazing has caused heavy loss of Aboriginal food species both in plants and their associated wildlife. Grass seeds once used for grinding into flour are no longer available at all, and other plant species are either locally extinct or diminishing. However, Aborigines of the region retain much knowledge and skill in living off the land. During the wet season, employment on cattle stations was scarce and Aborigines were forced to leave and 'live off the land using traditional resources and technologies'.<sup>5</sup> The loss and diminishing of their food resource species concerns them deeply, and they wish to take measures, if they can, 'to retain and revitalise these species'. If they are able to continue to live in and manage their country—national park or no—they would take action to reclaim it; fencing off areas from feral and domestic hooved animals, and calling meetings of all Aboriginal people in the area to pool knowledge and debate 'current and future ecological, economic, political and religious management of the Bungle Bungle region' (p9).

The sandstone massif itself remains an area of high significance to them both as spirit sites and traditional ancestral country. It is highly fragile, the sandstone domes and cones being very vulnerable to erosion, and whatever is done to promote tourism or intensive use will have to be very carefully planned and monitored if the spectacular striped sandstones are not to be exposed to destruction. To the Aborigines whose country it is, the religious and traditional values of the site are paramount—to tourists, with neither knowledge nor respect for such matters, nothing is sacred.

Given a real role in, and ownership of, the Bungle Bungle area on the lines suggested by the Cobourg and Kakadu precedents, with leaseback to the government concerned for a term of years, the fragile values of Purnululu could be retained and restored. Moreover, though this is not an aspect considered, for the most part, by national park authorities, the regeneration and revitalisation of the area's plant and animal species could have rich results in reviving and perpetuating systems of Aboriginal land management, religious ceremonies, and knowledge of the country based in a depth of traditional experience to which European managers can never aspire—even if they wanted to. The survival of peoples and of their cultures is nowadays considered morally essential, as a human right. As part of Aboriginal culture, the survival of traditional management practices and of deep relationship between the people and their country seem at least equally a right. Moreover, as among the few Aboriginal peoples remaining who still have access to such knowledge, the people of the Bungle Bungle region retain information which could be vital not only to the future of their own country, but of other areas degraded and spoiled by European use, and to our newly-recognised need to evolve towards a sustainable and stable economy of land and people.

With a proper plan of management, under Aboriginal ownership and title, such a national park could provide a model for the new concept of 'inhabited national parkland', with Aborigines able to protect and preserve their country while making

it available for reasonable access and enjoyment for tourists. The Bungle Bungle region is particularly significant for such initiatives, containing as it does 'competing land-use interests: conservation, pastoralism, Aboriginal interests, tourism and mining'.<sup>6</sup> The failure of most other initiatives in the region favours tourism as an income-producer. A leaseback inhabited national park would conceivably 'provide a model for Aboriginal-owned national parks throughout the country, within which the Aborigines and conservation conscious Euro-Australians could express and develop their natural alliance for the public benefit'.<sup>7</sup>

Moreover, such initiatives can remove from the wilderness cult its present stigma of opposition to, or silence on, the rights of the prior owners of a land which they have not only inhabited and managed for countless thousands of years, but have virtually created through that management, in a natural balance of human and country; and whose management has left it so beautiful and significant that it is worthy of declaration as national park.

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#### NOTES

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1. Peter Bayne, *The Legal Status of Aborigines*, Faculty of Law, Australian National University, 1986, draft paper, p 1.
2. H.C. Coombs, *Tourists on Black Lands: Opportunity or Threat?*, *The Age*.
3. Stan Stevens, *Inhabited National Parks: Indigenous Peoples in Protected Landscapes*, April 1986, p 27, Working Paper No 10, East Kimberley Impact Assessment Project (EKIAP), a joint project of the Centre for Resource and Environmental Studies, Australian National University; The Australian Institute of Aboriginal Studies; Anthropology Department, University of Western Australia; and Academy of Social Sciences in Australia.
4. *Ibid*, p 7.
5. Dr Deborah Bird Rose, *Preliminary Report: Ethnobotany in the Bungles*, EKIAP Working Paper No 5, p 5. See also N.H. Scarlett, *A Preliminary Account of the Ethnobotany of the Kija People of Bungle Bungle Outcamp*, EKIAP Working Paper No 6.
6. Project Description and Feasibility Study, EKIAP Working Paper No 1, p 3.
7. H.C. Coombs, *op cit*.