The empire of political thought: Perceptions of Indigenous government in Australia

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Abstract

This paper examines the relationship between perceptions of Indigenous government and the development of early-modern European, and especially British political thought. It will be argued that a range of British political thinkers provided a rationale for the 'subjection' of Indigenous peoples by articulating the view that such peoples were in want of effective government and regular conduct due to the absence of property relations among them. The deficiencies of Indigenous people were thus framed by understandings of concepts of 'civility', 'government', and 'society' in European and British political thought. In opposition to the reason and freedom of European civility, government and society, Indigenous peoples in Australia and elsewhere were perceived to live in associations bound by unalterable custom and tradition. The paper will thus identify conceptual connections made between property, polity, civility, and sovereignty in European and British political thought. Understandings of these conceptual relationships will then be traced in colonial literature on the subjection of Indigenous people to British law and sovereignty, and on the existence or non-existence of Indigenous government and nation-hood in Australia. The paper will conclude with some observations on the 1998 Federal Court of Australia decision in the Yorta Yorta case.

aptain Cook's 1768 Additional Instructions, marked 'secret' by the Admiralty, required him, after observing the transit of Venus from Tahiti, to proceed through the South Seas in order to discover, observe, chart and report on the advantages Britain might acquire from the presumed vast southern continent, Terra Australis Incognita. Most importantly, he was required to "observe the Genius, Temper, Disposition and Number of the Natives, if there be any, and endeavour by all proper means to cultivate a Friendship and Alliance with them". This was to be accomplished by presenting 'the natives' with "presents of such Trifles as they may Value", inviting them to "Traffick" and taking care to show them "every kind of Civility and Regard". Finally, the 'secret instructions' authorised Cook, "with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King", or if uninhabited, to "take Possession for His Majesty by setting up Proper Marks and Inscriptions".

There has been much debate on the meaning of the instruction that Cook first obtain the 'consent of the natives' before taking possession in the name of his king.² What is clear however, is that in taking possession of the eastern coast of New Holland in August of 1770, neither Cook nor Banks seem to have thought that the 'natives' could in fact give their consent. In forming this opinion, they seem to have concluded that the Indigenous inhabitants of New Holland possessed no government with which they could negotiate. It has been argued that the British failure to negotiate was a consequence of the doctrine of terra nullius.³ This convenient legal fabrication, it is claimed, allowed the British to deny any genuine recognition of Indigenous peoples because they did not exhibit sufficient signs of economic, social or political advance. In fact the legal doctrine of terra nullius belongs to a later period in Australian history. In this paper I want to explore part of the intellectual context of British responses in Australia and elsewhere by examining the place of Indigenous government in European and British political thought. I will argue that a range of (mainly British) political thinkers provided a rationale for the subjection of Indigenous peoples by portraying Indigenous peoples as being in want of effective, good, or indeed any government at all.

I Locke, Indian chiefs and Lacedaemonian kings

John Locke is often considered the key thinker in the development of the British 'ideology' of empire in providing arguments justifying Indigenous dispossession in America. In his association with the Earl of Shaftesbury's schemes for colonisation in the Carolinas, for which he designed the 'fundamental constitutions', and his later involvement with the Board of Trade, Locke's influence as an ideologist of colonisation is certainly significant. Colonisation here is understood as the effort to transplant 'European' communities of settlers onto the foreign lands, and this project required (and Locke certainly provided) an ideological justification. In his treatment of Indigenous government however, Locke can also be seen as an 'ideologist' of empire, understood as the governmental project of administering 'subject peoples'. His contribution was not to deny the existence of Indigenous government, but to 'recognise' it as 'deficient'.

As Tully and others have noted, by the time Locke came to write on American affairs, he had a rich tradition on which to draw. From the earliest years of American colonisation, the English had justified their colonies on the grounds that the Indians did not make proper use of the land. They began to justify their *imperial* designs however, on claims that the Indians had no laws but 'custome', a defective government (at best), and that subjection to English rule would bring them to 'civilitie'. Such justifications rested on an entrenched sense of European and English civility which had initially been contrasted to Irish and Gaelic 'wildness', but in America was opposed to Indian 'savagery'. In doing so, civility came to represent the qualities of a refined and regulated social life under 'good government'. It was this discourse on which Locke drew in his writings.

Locke's strategy was to demonstrate by means of the hypothetical device of the 'state of nature', how political authority could be legitimately based upon the unforced consent of the members of civil society to renounce their own right of self-defence to an impartial, public authority. These agreements he famously described in his chapter 'Of Property' as emanating from the "common consent" of the more advanced peoples of the Earth to the use of money as the universal means of exchange thus allowing the accumulation of property. Such agreement was double-sided, one set of agreements setting the bounds of each person's property within civil society, the other setting the bounds of territories between the "several States and Kingdoms" of the Earth. The implication that Locke did not hesitate to draw, was that where peoples had not consented to the use of money, no property beyond the immediate possessions necessary for self-preservation could be accumulated, and thus "great Tracts of Ground" in America were unclaimed, and so "Still lie in common."

The thrust of this argument was that in not consenting to the use of money such peoples could have only a very circumscribed and limited property, and that similarly, they could have only a tenuous political identity. The implications of this view were spelled out in the later chapter 'Of the Beginning of Political Societies', in which Locke argued that civil societies had their origin in the union of the family ruled by the patriarch. He supposed that if more than one family united, the members would use "their own natural freedom" and appoint someone who seemed best suited to rule, and "Conformable hereunto" Locke suggested, "we find the People of *America*, who... set up the stoutest and bravest man for their Ruler." This passage is crucial in two senses, first in that is characterises Indian rulership as limited by the 'natural freedom' of all members of the tribe, and second, in raising the possibility that rulership could be based on election or the choice of the members. Locke here develops an ethno-historical account of Indian 'government':

Thus we see, that the *Kings* of the *Indians* in *America*, which is still a Pattern of the first Ages in *Asia* and *Europe*, whilst... want of People and Money gave Men to Temptation to enlarge their Possessions... are little more than *Generals of their Armies*; and though they command absolutely in War, yet at home and in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty, the Resolutions of Peace and War, being ordinarily either in the People, or in a Council...

In making this argument Locke echoed other writers such as James Tyrell, who clearly did recognise a real but qualitatively inferior Indigenous government.¹⁰ This government was described in terms of a familiar trope in seventeenth and eighteenth-century British thought of 'Lacedaemonian kings', or the kings of ancient Sparta. The power of an Indian chief then, was described as analogous to that of a,

...Lacedaemonian King...And so are those Caciques [chiefs] that the *Indians* in the *Caribbee* Islands and *Brasile* chuse to be their Leaders in War, but in Peace have little or no power.¹¹

Tyrell's (and Locke's) source on the 'Caribbees' was probably Charles Cesar de Rochefort, who claimed that although the "poor Barbarian" Caribbees "cannot be imagin'd to study much Policy" they did nonetheless have their own elected "petty Kings and Captains". None of these leaders "hath any command over the whole Nation nor any superiority over other Captains", except in times of war, and "when the expedition is over, he hath no authority...". The election of leaders, he described as contingent upon withstanding "strange and savage" rituals which conferred respect, from which he make the not insignificant deduction that,

...this Worlds Honour, whatever it may be, Virtue excepted, consists only in Opinion and Custom, which differ, and sometimes clash, according to the diversity of Mens humours.

In bowing to the power of custom and opinion, Rochefort was suggesting, as Locke was to suggest in his Essay Concerning Human Understanding, that there were more kinds of government than that which involved holding and exercising the powers of public office.¹⁴ The presence of government could also be indicated by the degree to which a human community regulated its affairs by the operation of social sanctions-the need to show courage and fortitude (or for Locke, rectitude and public credit). Government may also consist in the effective regulation of families, the control of children and women. It was with these latter kinds of government in mind that Tyrell refuted Hobbes' account of the state of nature, and the latter's particular claim that the Indigenous inhabitants of America exemplified it. Tyrell contended that even though there was "no Civill Power to keep them in awe..." and that they had no "Government in time of Peace", Indigenous Americans nonetheless possessed "Concord" by maintaining familial bonds, and "having no riches". 15 In the account of his wanderings among the peoples of the Isthmus of Panama, Lionel Wafer - the sometime privateer and colleague of William Dampier similarly extolled the familial virtue, order and regularity of the Indigenous peoples he observed.¹⁶

The idea that Locke, Tyrell and others employed was that 'civil' (as opposed to familial) government should be understood as a function of different arrangements of property, and correspondingly different kinds of political and social life. Tyrell's reference to the 'absence of riches' signified the view that where a subsistence economy prevailed, there could be few distinctions of wealth and property, thus the desire for private gain would be limited, few crimes were possible, and thus few (if any) laws were needed. 'Civil' government was seen here as a function of a more advanced stage of economic, social, and political development than that exhibited in America. In other words, 'civil' government was premised on an unequal division of property requiring the regulation of conduct by laws, government, and the norms of 'civility'. Indigenous government, like that of the Lacedaemonians was premised on rough equality and the inculcation of a rude, martial virtue.

In late seventeenth-century British thought, Lacedaemonian kingship could mean different things. For an absolutist like Sir Robert Filmer, limited or mixed monarchy was a dangerous concession, and the limited powers of Lacedaemonian kingship represented a defective kind of sovereignty. For British 'republicans' like James Harrington and Walter Moyle however, Lacedaemonian kingship could be invoked approvingly in reference to the equality, tranquility, and martial vigour of the Spartans. The Lacedaemonian system, as Harrington and Moyle understood it, represented a type of government in which a more suitable balance was struck between a limited monarchy, aristocratic privilege and popular delegates. It also represented a system based on

popular involvement with the means of national defence, thus identifying it with a martial virtue they claimed was being extinguished in contemporary England. In describing Indian government as 'Lacedaemoninan' or 'Spartan', European writers were often advancing a claim that those Indians possessed a kind of rude martial virtue, but more frequently, it was used to highlight the absence of any settled system of law and legislation. This was the sense in which Locke may be said to have invoked the imagery of Lacedaemonian kings. As a critic of absolutism (and Filmer's defence of it in particular), Locke was aware of the anti-absolutist implications of the Lacedaemonian system. But Locke's invocation of this imagery was not a recommendation, but a way of highlighting the alternatives that hedged his own recommendation of limited power.

Locke in fact was reticent to speak of sovereignty precisely because the term had absolutist connotations, and he preferred using the term "Supream Power". 19 Locke's favoured style of government, expounded at length in the second *Treatise* was based on the idea that political power derived from the 'consent' of property owners who together formed a civil society. This 'consent' was fully revocable on condition that the government to which they had consented had breached the trust bestowed upon it by those who had given their consent. To a late seventeenth and early eighteenth-century English audience, this would have seemed a dangerous, if not revolutionary doctrine. 20 For this reason, Locke was careful to distinguish his favoured system of government not only from Filmer's absolutism, but from the more dangerously anarchic systems of government he seemed close to recommending. Hence Locke's repeated claim that his delegated 'supream power' was completely different from the simple assumption of power by undisciplined groups such as bands of "Robbers and Pyrates". 21

Such distinctions reinforced Locke's view that these dangerously unregulated associations were based on the uninhibited (and dangerous) 'natural' freedom of their members. His favoured system of government however, rested on the freedom of those in civil society and was thus regulated not only by laws, but by a refined 'law of opinion' quite different to that which dominated the savage mind. Locke was thus insistent that his system was qualitatively superior to the superficially similar power of Indian chiefs. Although the description of the power of Indian chiefs in *The Two Treatises* made it sound democratic and even delegated, it consisted solely in command in war, and as Locke also put it, "in time of Peace" those chiefs exercised "very little Dominion...". ²² In phrasing his description in this way, Locke was advancing the claim that, firstly, those chiefs possessed no power (or dominion) in times of peace as of right, and hence did not constitute a government based on the right to legislate. The second claim was that Indian chiefs did not possess or own (as their dominion) the lands upon which they and their tribes resided,

and thus could legitimately be dispossessed by Europeans who alone were capable of establishing a 'dominion'.

The idea that Indigenous peoples in America lived under the rule of chiefs whose powers could be described as roughly analogous to that of 'Lacedaemonian kings' was invoked by a variety of eighteenth-century 'authorities' such as Father Joseph Lafitau and Cadwalader Colden.²³ The superintendant of northern Indian affairs in the thirteen colonies in the 1750's, Sir William Johnson, also spoke of the "chief magistrate, or Sachem" of the Indians as possessing some limited authority over the "nation", but that his "authority is scarcely discernible..." and rested on the "tacit consent" of the tribe.²⁴ Indeed, the "political maxim" of the Indians, Johnson claimed, was "Spartan-like", commending the pursuit of war and martial virtues, to which they had tailored their 'government' and its "small degree" of "sovereign" authority.²⁵ The consequence of this 'small degree of sovereignty' was that subjecting them to British rule was a similarly minor moral concern.

II Savagery and the Scottish Enlightenment

In recognising a limited, even temporary Indigenous form of government, British political thinkers and administrators constructed the problem of imperial administration around an ordering of government. The task of imperial administration thus required the subjection of Indigenous peoples who possessed their own forms of government. This could be accomplished through the conquest of Indigenous peoples, but in most cases the problems of waging a war of conquest on the frontiers, not to mention polite scruples at home about conquest abroad, prevented this option.²⁶ The alternative was to engage in forms of negotiation, often by treaty, in which the British could attempt to subject and control Indigenous peoples through their own 'government'. The 'consent' of chiefs and sachems were thus taken as pledges 'on behalf' of their 'tribes', tying them by bonds of submission in return for limited recognition of rights and the payment of gifts or presents. In doing so, the recognition given to Indigenous peoples was framed within an ethno-historical scheme which tied the limited recognition of Indigenous government to a similarly limited recognition of Indigenous property (the ubiquitous 'hunting and fishing grounds' mentioned in many treaties).²⁷

During the eighteenth-century, this ethno-historical scheme was given powerful expression by Montesquieu, who insisted on a distinction between 'savage' and 'barbarian' peoples. Savages, he claimed, existed in "small scattered nations", whereas

'barbarians' formed "small nations that can unite together". Savages he described as "hunting peoples", barbarians as "pastoral people", and significantly he claimed that because they wander about the forests, savages form no permanent social bonds and have loose if any family structures. Barbaric pastoralists by contrast were described as being tied to certain regions by their herds, as living in communities with settled laws and strict familial relations. Montesquieu said little about any further progression, but he did accord the use of money an importance which implied that its invention constituted a pivotal stage in human social *and political* evolution. "If you are alone", Montesquieu wrote, and happen to come upon an "unknown people and if you see a coin, reckon that you have arrived in a nation with police." Here, 'police' referred to government understood as the activities by which society was shaped by pervasive mechanisms of surveillance and regulation. The use of money thus implied a much more settled form of social existence, probably based on an agricultural economy, in which private property was mediated by a means of exchange, protected by laws and government.

As Richard Sher among others has argued, the Scottish Enlightenment thinkers had read and appreciated Montesquieu's work, but between Adam Smith and Adam Ferguson, there was a divergence in the interpretation of 'savagery' and 'barbarism'.²⁹ Building on earlier foundations, the Scottish Enlightenment thinkers articulated a variety of 'historical' explanations of the motor forces and effects of social advance.³⁰ According to the stadial theory, often ascribed to Smith, peoples pass through four distinct stages related to the sophistication of their means of subsistence or economy, passing from primitive savagery (hunting and gathering), to barbarism (pastoralism), agriculture (as in feudal Europe), and finally civilised commerce and foreign trade.³¹ Although beneficial, Ferguson also thought commerce a source of moral enervation, weakening the dedication to virtue. As Pocock has suggested, Ferguson's fear on this score was not a warning of any present or "immediate peril", but a 'moralistic' exposition of "the dangers inherent in a certain type of society".³² Ferguson spelled out those dangers by focussing on the distinction between 'savages' and 'barbarians' in order to argue that the great benefits of civilisation were won at considerable moral and political costs.³³

For Adam Ferguson the image of 'the savage' embodied all the exotic, untutored qualities that the forces of civil society strove so hard to control. For him, the savage was "inured to fatigue", possessed a "robust... unalterable constitution", was the subject of passions that rendered him (or her) indolent when unmotivated, but "bold, impetuous, artful and rapacious" when driven by the hunt or conquest.³⁴ The rigours of life in the forests meant that the savage was agile, tenacious, and formidable, aware of only the simplest of animal passions (food, shelter, warmth, sex), and whose senses were unrefined and gross. He used this image of the savage both to highlight and to criticise what he thought to be the

peculiar advantages of and special dangers of civilisation. Civilisation brought great refinement and accomplishment in arts, sciences, and manners, but it also softened and weakened the spirit which required the vigorous exercise of martial virtues. This is what set Ferguson's criticism of civilisation apart from that of Rousseau even though both employed the image of the savage to establish their criticisms of civil life.

The savage envisaged by Jean-Jacques Rousseau was a rather bloodless and pathetic creature more inclined to flight than fight. Ferguson's savage however, showed a robust appreciation for the boundless possibilities the savage life afforded for exercising a warrior's virtues.³⁵ But importantly for both, 'the savage' was a stranger to anything resembling a 'society', having "neither houses, nor huts, nor any kind of property whatever", they were only brought together by passing need or sudden inclination, and separated as easily "with the same indifference".³⁶ Ferguson's savages were strangers to society because 'society' was an artefact of a process of civilisation, and 'society' was an accomplishment only of more civilised peoples, in which he included 'barbarians'.³⁷ A similar sentiment was expressed by Robertson who claimed that Indigenous Americans occupied "the rudest" state of collective life, far inferior to the Germanic tribes described by Tacitus, in which "[w]e behold communities just beginning to unite..." and where "in the infany of social life" human beings "feel but imperfectly the force of its [society's] ties...". ³⁸

The distinction between Ferguson's 'savages' and 'barbarians' was in part based, as was Smith's on their means of subsistence, but Ferguson drew from this material distinction more subtle intellectual differences. Having "possessed themselves of herds", barbarians knew what it was "to be poor and rich"; in other words, they had put an end to the rough equality of the savage hunters, and had established the basis for social distinction resulting in "a material difference of character".³⁹

The image of savage life Ferguson painted he claimed to draw from the accounts of First Nations people in North America, citing European authorities such as Charlevoix, Wafer, Colden and Lafitau. From such sources, Ferguson outlined what he took to be the social and political condition of savagery. Among the Indigenous North-Americans, Ferguson claimed, each individual "is independent", but,

...he is engaged by his affections and his habits in the cares of a family. Families, like so many separate tribes, are subject to no inspection or government from abroad... They are, in the mean time, parts of a canton... Many such cantons assemble to constitute a national council... They appeared to understand the objects of the confederacy [the Six Nations of the Iroquois], as well as those of the separate nations; they studied a balance of power...

They had their alliances and their treaties, which, like the nations of Europe, they maintained, or they broke, upon reasons of state...⁴¹

In speaking of these savage 'nations' and the 'order' they maintained, Ferguson also drew on classical sources, notably Tacitus, whose *Germania* had previously been employed by humanists in Germany and France to defend and revive their ancient "national" liberties.⁴²

Echoing Tacitus, Ferguson described the 'order' of the savage condition as resting not on laws, government or the manners of civil life, but 'instinct' and communal attachment. Without a "settled form of government, or any bond of union", these savages nonetheless managed to concert their activities, without recourse to "police or compulsory laws", which meant that their "domestic society" had a "better security than any public establishment for the suppression of crimes." The reference here to 'society' is ambiguous, notable for the rarity with which Ferguson and his contemporaries applied it to their accounts of the savage condition. Its use here may not denote the active sense of society as an institution, and refer to no more than passive 'association' or 'combination'.

It is only when divisions of property among pastoral peoples gives rise to "distinction of ranks" that the terms "jurisdiction and government" become known and despotic "monarchies" succeed "rude nations". Among savages, the chief is not "sufficiently distinguished from his tribe" and is still regarded with "veneration" rather than "envy", as the "common bond" of their union, "not as their common master". Ferguson cited the "frequent practice of war" as the motor force in 'strengthening' the "bands of society" and "mutual attachment", but also in establishing the "despotism" and "political slavery" of the barbaric "sovereign". For Ferguson then, the condition of savage virtue was contrasted to that of barbaric corruption; barbarians (among whom he gave prominence to the Tartars) become entrapped by their own polities, which were driven to conquer lest they be subdued by internal faction.

The 'civilised' person by contrast was an autonomous agent, capable of resisting the whims of passion through the "study of justice ... and good order" in civil society, entailing the inculcation of habits of civility, "industry, sobriety, and frugality" enabling one to act "with a view to futurity". Such inestimable skills could only exist in a society in which private property provided the necessary foundation for "relations of patron and client, of servant and master", and for the legal and political arrangements that protected them. As Ferguson saw it, the development of property ownership provided "the ground" upon which "a permanent and palpable subordination is laid" and thereby the development of civil society was associated with the simultaneous development of

political institutions, in particular, government and the state. By 'government' he meant the careful management and regulation of 'society' to ensure the flourishing of commerce, the increase of wealth, and the extension of the disciplines of labour throughout society. Ferguson's legacy is thus ambiguous, encompassing not only the denigration of savagery as a descriptive category, but the appreciation of what savagery could teach the civilised about combining their 'civility' with 'martial virtue'. Most importantly however, Ferguson helped to develop a conceptual discourse in which concepts of 'society' and 'government' became measures of civilisation that could be used as a rationale for subjecting the 'uncivilised'.

III Perceptions of Indigenous government in Australia

Many early observers and administrators in Australia employed elements of this discourse in their efforts to comprehend the Indigenous peoples, whom they felt were subjects of a particular kind of savage order within and between their tribes. ⁴⁵ As Governor Phillip observed in his dispatch to Lord Sydney in 1790, the nature of that order seemed completely 'savage',

There is every reason to believe that the women are treated as inferiors by the men, who employ them constantly fishing in the canoes. The men seldom fish with the line... their chief employment is the chase.⁴⁶

The observation on the 'inferiority' of women is a constant theme in early European accounts, and was regarded as one index of civilisation. The other important criterion was the reference to living by 'the chase', which indicated an entirely 'savage' economic, social and political condition. The Judge Advocate of the colony, David Collins, gave some insight into British thinking on the nature of this Indigenous condition in recounting a conversation with Captain Matthew Flinders. According to Collins, Flinders reflected on the possible implications of the use among some Aborigines of large fishing nets and traps,

Mr. Flinders was of opinion, that this mode of procuring their food would cause a characteristic difference between the manners, and perhaps the dispositions, or these people, and of those who mostly depend upon the spear or fiz-gig for a supply. In the one case, there must necessarily be the co-operation of two or more individuals; who therefore, from mutual necessity, would associate together. It is fair to suppose, that this association would, in the course of a few generations, if not much sooner, produce a favourable change in the manners and dispositions even of a savage. In the other case, the native who

depends upon his fiz-gig of his spear for his support depends upon his single arm, and, requiring not the aid of society, is indifferent about it, but prowls along, a gloomy, unsettled, and unsocial being.⁴⁷

Throughout the nineteenth-century, European observers continued to represent the Indigenous peoples of Australia as 'primitive', lacking their own government, or identity as 'nations'. Where recognition was made of Indigenous 'nations' it was heavily tinged with Biblical reading of the term which implied an evangelical consideration of the different peoples under God's care. 48 The application of a more political concept of the nation as a self-governing community, a concept of the nation invoked by Chief Justice Marshall in the United States, was not applied in Australia.⁴⁹ In 1841, Justice J. W. Willis had argued in the *Bonjon* case that this kind of recognition be extended to the Indigenous peoples, but his view was sternly opposed by the authorities in Sydney. ⁵⁰ The *Bonjon* case did however, suggest grave difficulties over the legal status of the Indigenous peoples that were further exposed in the administrative reaction to Captain George Grey's 'Report on the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia'. Grey argued that all Indigenous laws were merely "barbarous customs" and that Australia's Indigenous peoples should be made totally "amenable to the British Laws...". 51 In Westminster, Lord Russell reacted favourably to the proposals, but Governor Gipps in NSW diplomatically rejected them as unworkable, while Governor Hutt in WA argued that it was unwise if not "impossible" to regard Indigenous peoples "at all times and under all circumstances... amenable to our laws". 52

One major reason why it was thought 'impossible' was that Indigenous 'customs' and 'tribes' were thought dangerously anarchic, lacking any form of Indigenous 'government' that could be used by Australian authorities as a mechanism to effect their subjection. As Howitt and Fison, the pioneers of Australian ethnology saw it, the 'inferior' Indigenous people did not yet possess sufficiently evolved institutions (such as chieftainship) which could be used by 'superior' European administrators in the task of governing them. Lacking any firm institutional structure within the tribes, Indigenous peoples were thought to lack any kind of 'national' identity beyond their tribes. This view was most clearly expressed by J.W. Bleakley in his 1928 report entitled 'Aborigines of Central and Northern Australia'. Bleakley poured scorn on the idea that Indigenous people be entrusted with their own 'native state', arguing that it would impose upon Indigenous people a "social machine they cannot understand",

They have no conception of democracy... Their native laws and customs... utterly fail to conceive any idea of combination or federation of tribes for mutual government or protection. Each tribe is a separate and distinct group, with its own language, customs,

and laws environing its peculiar totem, and has interest in nothing outside of those associations.⁵⁴

As recently as 1979, Justice Gibbs of the High Court argued in *Coe v Commonwealth* that the Indigenous peoples of Australia possessed "no legislative, executive or judicial organs by which sovereignty might be exercised." This notion of Indigenous tribes as lacking 'government' and bound by immemorial custom and lacking government continues to be invoked.

Most recently, Justice Olney in the Federal Court of Australia employed this view in finding against 'Members of the Yorta Yorta Aboriginal Community' in their application for lands under the Native Title Act. In making this determination, Olney J argued that the crucial issue was that the current inhabitants did not maintain the 'traditional' observances and customs that the original inhabitants had at the time that British sovereignty was asserted over them in 1788. The case thus turned on determining the difference between 'modern' as opposed to 'traditional' Indigenous observances and customs. In determining the content of these 'traditional' customs, the Court relied heavily on the writings of E. M. Curr. In making a case for the credibility of Curr's 'evidence', Justice Olney claimed that it should be accorded more weight than the oral testimony of Indigenous people because it represented a record (rather than a memory) of existing Indigenous practices and traditions. This was maintained despite the fact that Curr had a vested interest in representing Indigenous peoples as 'primitive', as lacking any sound claim to their land or their own political existence.

Among Curr's many observations of the customs and traditions of the Indigenous people, Olney J placed particular emphasis on those which represented the nature Indigenous 'society' as bound by unalterable custom, as lacking government, or strong union among and between tribes. The Indigenous people, Curr claimed, had "no government" but had strong observances that may "be called laws"; they practiced little discipline of children, women were subject to the tyranny of men, and they regularly practiced infanticide without any possible justification of scarcity of resources. His observations on the absence of government were accorded considerable prominence by the Court, for the simple reason that they were taken as proof of the centrality of customary and traditional observances. As Curr put it,

Among the Bangerang there was not, as far as could be observed, anything resembling government; nor was any authority, outside of the family circle, existent. Within the family the father was absolute. ... The adult male of Bangerang recognised no authority in anyone, under any circumstances, though he was thoroughly submissive to custom.⁵⁹

In his later *The Australian Race*, Curr wrote expressly to correct (quite emphatically) what he took to be the errors of other European authorities on the Indigenous people. Here he provided more detail to the image of Indigenous life wrapped in the obscurity of immemorial custom in contrast to the freedom of European life,

The Englishman, noting in the savage the absence of the manacles which civilisation imposes, fancies that none other exist, and that the savage is a free man. Persons who have looked below the surface, however, are aware that the Australian savage, though absolutely untrammeled in some respects, is nevertheless, on the whole, much less free... than the Englishman or Frenchman.⁶⁰

There was, in his view, no such thing as a 'national life' among Indigenous Australians, "...failing even to reach the earlier stage of clan life... [they] existed to the end in tribes... destitute of any formal governing principle."61 The tribes of the Aboriginal people he claimed, held "together in a way quite distinct from European society" by being maintained not through the rational deliberations of government, but the "impersonal", "hidden" and "constraining" power of "education" in the rigid customs and traditions of the tribe, to which the individual tribal member totally submitted. 62 Sentiments such as these have played a prominent part in the European, colonial discourse on Aboriginal people supposedly demonstrating an 'absence' of Indigenous government, and a general lack of legislative capacity. Portrayed as caught within the 'customs' and 'traditions' of their own 'tribes', Indigenous Australians were considered 'subjects' not only of superior Western knowledge, but 'subjects' of superior Western government. This image of Indigenous life bound by custom and tradition is one of the most salient features of the imperial attitude to Indigenous people. 63 It is an image that imperial and post-imperial authorities have helped to foster, but it is also an image that has a prominent place in British and Western political thought.

Endnotes

- ¹ Additional Instructions, in The Journals of Captain James Cook on his Voyage of Discovery, Volume I, edited by J.C. Beaglehole, Hakluyt Society, Cambridge, 1955, p. cclxxxiii. (Following quotations also taken from the same page)
- ² For example, see Wallace-Bruce, N.L., "Two Hundred Years on: A Reexamination of the Acquisition of Australia", *Georgia Journal of International and Comparative Law*, 19 (1), 1989, p. 102 [87-116]; and Reynolds, H., *The Law of the Land*, Penguin, Harmondsworth, 1992, pp. 51-54.
- ³ See for instance, Davidson, A., *From Subject to Citizen*, Cambridge University Press, Cambridge, 1997, p. 189.
- ⁴ Armitage, D., *The Ideological Origins of the British Empire*, Cambridge University Press, Cambridge, 2000, pp. 97-8; and Tully, J., *An Approach to Political Philosophy: Locke in Contexts*, Cambridge University Press, Cambridge, 1993, pp. 137-176.
- ⁵ Arneil, B., *John Locke and America*, Clarendon Press, Oxford, 1996, pp. 115-117.
- For the arguments of the pamphleteers, see, "Pamphlet for the Virginia Enterprise by Richard Hakluyt" [1585], in *The Original Writings and Correspondence of the Two Richard Hakluyts*, Hakluyt Society, London, 1935, pp. 328-338; Purchas, S., *Hakluytus Posthumus or Purchas His Pilgrimes* [1625], Volume XIX, James MacLehose, Glasgow, 1906, pp. 224-238. Captain John Smith in Virginia expressed these arguments in, *A Map of Virginia* [1612], in *The Jamestown Voyages Under the First Charter* 1606-1609, Volume II, edited by P.L. Barbour, Hakluyt Society, Cambridge, 1969, pp.369-74, 438. The Governor of Massachusetts, John Winthrop, also employed these arguments in his "Reasons to be Considered..." [1623-1630], in *The Winthrop Papers*, Volume II 1623-1630, Massachusetts Historical Society, 1931, pp. 138-145.
- ⁷ See for instance J.H. Ohlmeyer, "'Civilizinge of those rude partes': Colonisation Within Britain and Ireland, 1580's-1640's"; and Canny, N. "England's New World and the Old, 1480's-1630's", both in N. Canny (ed), *The Oxford History of the British Empire: Volume I, The Origins of Empire*, Oxford University Press, Oxford, 1998, pp. 124-169.
- ⁸ Locke, *Two Treatises of Government* [1690], edited by P. Laslett, Cambridge University Press, Cambridge, 1988, p. 299. All following information in this paragraph is drawn from this page.
- ⁹ The following quotations are taken from, Locke, *Two Treatises*, pp., 336-340.
- ¹⁰ Sir James Tyrell, Patriarcha Non Monarcha: The Patriarch Unmonarch'd: Being Observations on a Late Treatise and Divers Other Miscellanies, Published Under the Name of Sir Robert Filmer Baronet, London, 1681, p. 76.
- ¹¹ Tyrell, Patriarcha Non Monarcha, p. 92.
- 12 Charles Cesar de Rochefort, *The History of the Caribby-Islands... In Two Books*, London, 1666, Book I, p. 116. In his *A Brief Disquisition of the Law of Nature*, London, 1701, Tyrell referred to "the *French* Author of the Natural History of the *Caribe* Islands, Part. 2d. Chap. 11 and §19." (p. 330).
- This and following quotation from Rochefort, *The History...*, Book II, pp. 314, 316.
- Locke, J., *An Essay Concerning Human Understanding* [1690], edited by J. Yolton, J.M. Dent and Sons, London, 1970, p. 175. Here Locke referred to the "law of opinion" as a means of regulating conduct. Also, Locke, J., "Credit, Disgrace" in D. Wootton (ed.), *Political Writings of John Locke*, Mentor, New York, 1993, pg. 236-237.
- ¹⁵ Tyrell, A Brief Disquisition, pp. 328-329.
- Wafer, L., A New Voyage and Description of the Isthmus of America [1699], edited by L. E. Elliott Joyce, Hakluyt Society, Oxford, 1934, pp. 93-97.
- Filmer, R., *The Anarchy of a Limited or Mixed Monarchy* [1648], in *Patriarcha and Other Writings*, edited by J. P. Sommerville, Cambridge University Press, Cambridge, 1991, p. 157-158.
- Harrington, J., *The Commonwealth of Oceana* [1656], in *The Political Works of James Harrington*, edited by J. G. A. Pocock, Cambridge University Press, Cambridge, 1977, p. 273; and Moyle, W., 'An Essay on the Lacedaemonian Government' [1698], in *The Whole Works of Walter Moyle, Esq; that were published by himself*, London, 1727, pp. 51-52, 59-60. (University Microfilms, Ann Arbor). Moyle referred approvingly to Locke's

Treatises, which, echoing an un-named friend, he proclaimed "the A. B. C. of *Politicks.*" (p. 58). Pocock, J.G.A., *The Machiavellian Moment; Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press, Princeton, 1975, pp. 415-417.

- Locke, *Two Treatises*, p. 238. I am obliged to James Tully for making this point forcefully to me in private correspondence.
- Tully, J., "Placing the *Two Treatises*", in N. Phillipson and Q. Skinner (eds.), *Political Discourse in Early-Modern Britain*, Cambridge University Press, Cambridge, 1993, pp. 253-280; Ashcraft, R., *Revolutionary Politics and Locke's Two Treatises of Government*, Princeton University Press, Princeton, 1986, p. 305.
- ²¹ Locke, Two Treatises, p. 385.
- ²² Locke, Two Treatises, p. 340.
- See for instance, Father Joseph Francois Lafitau, *Customs of the American Indians Compared With the Customs of Primitive Times* [1726], Volume I, edited and translated by W.N. Fenton and E. L. Moore, The Champlain Society, Toronto, 1974, p. 283; and Cadwallader Colden, *The History of the Five Indian Nations of Canada*, London, 1747, facsimile edition, Coles Publishing, Toronto, 1972, p. 13.
- ²⁴ Sir William Johnson, "Extracts of Some Letters, From Sir William Johnson Bart., to Arthur Lee, M. D. F. R. S. on the Customs, Manners, and Language of the Northern Indians of America", *Philosophical Transactions of the Royal Society*, 63, Dec. 1773, pp. 144-145. (at: http://www.bodley.ox.ac.uk/cgi-bin/ilej.)
- ²⁵ Johnson, "Extracts", pp. 147, 145.
- ²⁶ Pagden, A., Lords of All the World, Yale University Press, New Haven, 1995, pp. 84-5. On 'conquest' in Australia see Buchan, B., "Subjecting the Natives: Aborigines, Property and Possession Under Early Colonial Rule", Social Analysis, 45 (2), 2001, pp. 143-162.
- See for example the *Treaty of 1693 With Tribes of Massachusetts Bay and Rivers Area*, and the 1714 and 1717 *Maritimes Treaties*, http://www.kstrom.net/isk/maps/maritimes1693.html
- ²⁸ This and following quotations taken from, Baron C. L. Secondat de Montesquieu, *The Spirit of the Laws* [1748], translated and edited by A. M. Cohler, B. C. Miller and H. S. Stone, Cambridge University Press, Cambridge, 1989, p. 290-292.
- Sher, R.B., ">From Troglodytes to Americans: Montesquieu and the Scottish Enlightenment on Liberty, Virtue, and Commerce" in D. Wootton (ed.), *Republicanism, Liberty and Commercial Society, 1649-1776*, Stanford University Press, Stanford, 1994, pp. 368-401.
- The Scottish Enlightenment thinkers were not 'economic determinists', in the sense that politics and manners were 'determined' by economics. Rather, the 'autonomy of politics' was a feature of the more advanced stages of economic production, and hence of social and intellectual advance. Hopfl, H.M., ">From Savage to Scotsman: Conjectural History in the Scottish Enlightenment", *Journal of British Studies*, 17 (2), 1978, p. 36. See also, Hont, I., "The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the 'Four-Stages Theory'", in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge, Cambridge University Press, 1987, pp. 253-256 [253-276]; Harpham, E.J., "Liberalism, Civic Humanism, and the Case of Adam Smith", *The American Political Science Review*, 78 (), 1983, p. 769 [764-774]
- As Robertson observed in his *Historical Disquisition*, this process involved the uniting of families in "independent tribes and communities", followed by the uniting of those tribes in alliances for mutual defence, and only later on to develop an economy to "provide for the wants" of each and finally to "conduct the affairs of a numerous society". Robertson, W., *An Historical Disquisition Concerning the Knowledge which the Ancients had of India*, London, 1791, p. 263.
- ³² Pocock, J.G.A., *Barbarism and Religion*, Volume II, *Narratives of Civil Government*, Cambridge University Press, Cambridge, 1999, p. 350.
- Forbes, D., "Introduction" to Ferguson, A., *An Essay on* the *History of Civil Society* [1767], edited by D. Forbes, Edinburgh University Press, Edinburgh, 1966, pp. xx, xxii.
- ³⁴ Ferguson, *An Essay on the History of Civil Society* [1767], edited by F. Oz Salzberger, Cambridge University Press, Cambridge, 1997, p. 107.

- ³⁵ Ferguson, *An Essay*, p. 58, 73.
- ³⁶ Rousseau, J.-J., 'A Discourse on the Origin of Inequality' [1755], in *The Social Contract and Discourses*, translated by G.D.H. Cole, J.M.Dent, London, 1973, p. 65.
- On the concept of society in eighteenth-century French thought see, Baker, K.M., "Enlightenment and the Institution of Society: Notes for a Conceptual History", in W. Melching and W. Velema (eds.), *Main Trends in Cultural History, Ten Essays*, Rodopi, Amsterdam, 1994, pp. 94-120. On the link between 'society', 'civilisation' and 'police', see, Lucien Febvre's essay "Civilisation: Evolution of a Word and a Group of Ideas" [1930], in J. Rundell and S. Mennell (eds.), *Classical Readings in Culture and Civilsation*, Routledge, London, 1998, pp. 160-190; Dampierre, E. de, "Note sur "Culture" et "Civilisation", *Comparative Studies in Society and History*, 3, 1960, pp. 328-340; and Pagden, A., "The 'Defence of Civilisation' in Eighteenth-Century Social Theory", *History of the Human Sciences*, 1 (1), 1988, pp. 33-45.
- Robertson, *History of America*, Cadell and Davies, London, 1812, 12th edition, Volume II, p. 51.
- ³⁹ Ferguson, An Essay, p. 81.
- As Peter McCarthy pointed out to me, Ferguson made the claim in a footnote to the 1768 edition, that his account of "most points of importance" relating to the "Rude Nations", and specifically the "original North Americans" was also based "...on the concurring representations of living witnesses, who, in the course of trade, of war, and of treaties, have had ample occasion to observe the manners of that people." Ferguson, *An Essay*, p. 82.
- ⁴¹ Ferguson, An Essay, p. 85
- Thom, M., *Republics, Nations and Tribes*, Verso, London, 1995, p. 124-5, 230-31. In the *Germania* Tacitus spoke of the various nations of the *Germani* as "indigenous" and unmixed with other peoples "resembling only themselves", and obeying either "kings" (*rex*) "which they choose for their birth" (*nobilitas*) and have strictly limited powers, and "generals" (*dux*) which "lead more by example" (*virtus*) "than command". Tacitus, *Germania* [98-99AD?], Translated with Commentary by J. B. Rives, Clarendon Press, Oxford, 1999, 2.1, 4.1, 7.1, pp. 77-78, and 80.
- ⁴³ Ferguson, *An Essay*, p. 85
- ⁴⁴ All following quotations from Ferguson are drawn from, Ferguson, *An Essay*, pp. 81-101.
- Thus, Collins could observe that the Aborigines did not appear to live singly (as in Rousseau's state of nature) but in family groups in which, "the distinguishing appellation of (Be-anna) or Father" did not conform to European understandings because "we observed it frequently applied by children to men who we knew had not any children of their own." *Ibid.*, pp. 544-5
- ⁴⁶ *HRA*, volume I, p. 160.
- ⁴⁷ Collins, Volume II, pp. 253-4.
- Blackburn, K., "Imagining Aboriginal Nations: Early Nineteenth Century Evangelicals on the Australian Frontier and the "Nation" Concept", *Australian Journal of Politics and History*, 48 (2), 2002, pp. 174-92.
- See Buchan, B., "Aboriginal Welfare and the Denial of Indigenous Sovereignty in Australia", *Arena Journal*, 2002 (forthcoming). In the United States, Chief Justice Marshall argued in the 'Cherokee cases' (notably in *Worcester v Georgia*) in the 1830's, that the Cherokees constituted a 'self governing community' that the Federal Government ought to deal with on a nation-to-nation basis, entitled to recognition by treaty of their 'domestic dependent nation' status. Norgren, J., *The Cherokee Cases*, McGraw-Hill, New York, 1996.
- ⁵⁰ BPP, Colonies Australia, 8, Shannon, IUP, 1969, pp. 151-155.
- ⁵¹ *HRA*, vol XXI, pp. 34-5.
- ⁵² *BPP, Colonies, Australia, 8,* Shannon, IUP, 1969, p. 99-100, Hutt to Russell, 10 July 1841, p. 392; and *HRA*, vol XXI, pp. 312-315, quote from p. 312. Dispatch dated Jan 24, 1842.
- Later Howitt did in fact speak of "tribal government" to denote the existence of "some authority and restraint" and even "executive power" within tribes. But he went to some pains to differentiate 'Aboriginal' government from that of other Indigenous peoples, choosing "the term Headman as being less likely to be misunderstood than that of Chief, which has associations not applicable to the Australian savage." The power of Aboriginal 'headmen' was described as "limited" by the power of other elders, and of the whole

body of adult males in the tribe, indicating once again the view that the Indigenous people had not progressed beyond the stage of primitive 'equality'. A.W. Howitt, *The Native Tribes of South-East Australia* [1904], Canberra, Aboriginal Studies Press, 1996, pp. 295, 297, 320.

- J.W. Bleakley, *The Aboriginals and Half-Castes of Central Australia and North Australia 1928*, Government Printer, 1929, p. 30. K. Blackburn, 'White Agitation for an Aboriginal State in Australia (1925-1929)', *Australian Journal of Politics and History*, 45 (2), 1999, 168-179.
- ⁵⁵ *Coe v Commonwealth* (1979) 53 ALJR 403. The anthropological debate over Indigenous 'government' is covered in Hiatt, L., *Arguments About Aborigines*, Cambridge, 1996, pp. 78-99.
- The Members of the Yorta Yorta Aboriginal Community v The State of Victoria &Ors [1998], 1606 FCA (18 December 1998), pp. 1-50. Source: http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1606.html References to quotations from this text will be made to particular numbered paragraphs indicated by the symbol §.
- ⁵⁷ Olney J, § 111-116
- ⁵⁸ Curr, E.M., *Recollections of Squatting in Victoria*... *From 1841 to 1851*, George Robertson, Melbourne, 1883, facsimile, Libraries Board of SA, Adelaide, 1968, pp. 245, 252, 263.
- ⁵⁹ Curr, *Recollections*, p. 244. This claim is largely repeated in Curr, E.M., *The Australian Race*, Volume I, p. 52.
- ⁶⁰ Curr, E.M., The Australian Race: Its Origin, Languages, Customs, Place of Landing In Australia, and the Routes by Which it Spread Itself Over that Continent, Volume I, Government Printer, Melbourne, 1886, p. 51.
- ⁶¹ Curr, Australian Race, Volume I, p. 192.
- ⁶² Curr, *Australian Race*, Volume I, pp. 241, 52, 54.
- Mamdani, M., "Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism", *Comparative Studies in Society and History*, 2001, pp. 651-664.