THE INTERSECTION OF ABORIGINAL LAW AND ABORIGINAL RIGHTS IN
THE COMMON LAW FRAMEWORKS OF CANADA AND AUSTRALIA

by

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ABSTRACT

This thesis is concerned with how Aboriginal law is accommodated within the common law frameworks of Canada and Australia (and thereby producing “Aboriginal rights” within those frameworks).

Chapter one is a brief introduction to the topic and the methodology employed. The methodology justifies the approach and methods of this thesis that include the use of Michel Foucault’s work, cultural studies and critical human geography.

Chapter two is a summary of liberal rationales and arguments for Aboriginal rights. It is also a critique of liberal practice as it pertains to the discipline of law. It is argued that it is not enough to accommodate the substance of Aboriginal law in liberal forms of law, but rather it is necessary to accommodate the substance and form of Aboriginal law.

Chapter three is a summary and critique of legal pluralism. It is argued that legal pluralism as traditionally conceived is not capable of providing a suitable model. However, this is not due to the concept of legal pluralism, but because of how law has been conceived in the states of Canada and Australia.

Chapter 4 provides an historical account for the issues posed in chapter 3. It is argued that the merger, or assumed merger, of four spaces (sovereign space, national space, economic space and juridical space) has made it very difficult to argue for the
notion of legal pluralism within Canada and Australia. However, this is not to say that the hegemony of dominant discourse has been complete. Indeed, there have been marked changes since the Second World War. It is suggested that the spatial dimensions of this change have been ignored.

Chapter 5 provides an analysis of why the spatial dimensions to Aboriginal law and Aboriginal rights are important. It is argued that making of an Aboriginal juridical space is underway and that a more post-modern conception of law utilizing a re-configured notion of legal pluralism may provide further insights into processes involved the settlement of land claims (in Canada) and Aboriginal land rights (in Australia), and also the notion of Aboriginal self-government in Canada.
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INTRODUCTION

The issues surrounding indigenous peoples have become very topical in Canada and Australia. This thesis is concerned with Aboriginal and non-Aboriginal issues in the domestic law of Canada and Australia.

My central argument is a not a happy one, namely, that the belief that the common law can accommodate Aboriginal legal norms is largely misconception. I do not state this to be "against indigenous peoples", but rather to suggest alternative avenues for exploration.

The secondary literature, and certainly primary sources of law, have yet to address whether the common law tradition is capable of finding some space for indigenous legal norms. Indeed, it seems extraordinary that Australian and Canadian legal systems have recently created legal norms which are said to be based on indigenous traditions without inquiring into the capacities of the common law regime. It is fair to say that this increasingly important area of the law lacks any consistent theoretical underpinning. If there happens to be a theory, historically, it was usually fatal to Aboriginal interests (e.g. terra nullius, settled country doctrine).

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1 I use the expression "common law" as a label for the legal system originally derived from the English common law. This includes statutes and constitutional documents, together with "common law" legal methods. I do not intend to use the expression "common law" to contradistinguish doctrines against the body of law known as "equity" or "statutory law". I have done this as Canada (Quebec excepted) and Australia are common law countries and it is their legal systems which are being examined in this thesis.
I will focus on land rights as this is a central issue in Aboriginal and non-Aboriginal relations. Given the significance land plays in Aboriginal cultures, this is not surprising. The present regulatory framework (particularly in Canada with its federal structure, constitutional recognition of Aboriginal rights, the *Royal Proclamation of 1763*, a variety of treaties, statutes, and common law doctrines), is centrally concerned with the question of "land rights" and the issue of self-government.

In this process of determining indigenous interests in land, the ascertainment of indigenous customs and traditions is crucial. This accommodation of Aboriginal norms within the state’s law can be described as “weak legal pluralism.” Griffiths explains:

> 'In this ('weak') sense a legal system is 'pluralistic' when the sovereign (implicitly) commands (or the *grundnorm* validates, and so on) different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds. Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state legal system, result from 'recognition' by the state of the supposedly pre-existing 'customary law' of the groups concerned.'

The Canadian materials I intend to draw on in an assessment of legal pluralism and Aboriginal peoples are: *Delgamuukw et. al v. The Queen in Right of British Columbia et. al.*; and Canada, House of Commons, *Indian Self-Government in Canada: Report of the Special Committee*, 1983. The Australian materials I will draw on are *Mabo v State of Queensland [No. 2]* and the Commonwealth’s response - the *Native Title Act 1993* (Cth). Some other judicial decisions will also be examined.

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2 John Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism* 1 at 5. Footnotes omitted. The emphasis is in the original text.
4 Henceforth I shall refer to this document as the “Penner Committee Report.”
5 (1992) 175 CLR 1 (HC of A). Hereafter *Mabo [No. 2]*.
METHODS

Two points are important with respect to the methodology adopted here.

First, the primary focus of my research is not doctrinal. Although the essay will of necessity refer to doctrinal material, law is treated as an object of inquiry. For too long legal scholarship has been dominated by what courts and legislature have done, do, or will do and the legitimacy of these acts given the institutional constraints of ‘liberal’ polities. Rather this essay’s ‘project is one which takes ‘law’ as its object of inquiry but which pursues it by means of the exploration of the interaction between legal relations and other forms of social relations rather than treating law as an autonomous field of inquiry linked only by external relations to the rest of society.”

In writing and researching this thesis I have found useful to think in terms of a tripartite division: (i) multi-disciplinary studies (studies which use the methods of another discipline without any intention of integrating the methods utilized); (ii) inter-disciplinary studies (studies which shares methods in two or more disciplines); and, (iii) trans-disciplinary or “un-disciplinary” studies (studies which transcends disciplinary frameworks or do not “think in” disciplinary frameworks). This thesis is an attempt at trans-disciplinary analysis of important contemporary issues. To this end I have drawn inspiration from a

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6 For now, I use the word ‘liberalism” in its very broadest sense. The essay will have to focus on various “authors of liberalism” for it have any cogency.
number of disciplines and sub-disciplines: political theory, philosophy, human geography, history, jurisprudence, and cultural studies. I have also utilized techniques associated with the enigmatic and portmanteau word “post-modernism.”

A number of matters are raised by the preceding paragraph. Firstly, the danger of “methodological syncretism” as Hans Kelsen called it.8 Secondly, the very use of the word “post-modernism.” Thirdly, the use of cultural studies. Fourthly, the use of human geography, in particular, notions of space as a sovereign, national, economic and juridical phenomenon. The second point is closely related to my use of Foucault’s work, which in turn is also related to the third and fourth points. I shall deal with each in turn.

(i) Methodological Syncretism

The first point relates to my conception of law and its study. Treating law as an object of inquiry, I nonetheless insist “on taking doctrine seriously.”9 Law, doctrinally and as an object of inquiry constitutes social relations and is constituted by social relations. The method is unashamedly theoretical. This “has the simple but important advantage over common sense in that it specifies its concepts and their connections and thereby brings to surface the assumptions around which the theory is constructed, and thus it makes their interrogation possible.”10 If the consequence of taking this approach is being given the

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Methodological syncretism holds that to mix law with other matters is to debate about matters which are not strictly speaking within the province of law.

9 Hunt, *op. cit.*, n.7 at 12. Original emphasis.

badge of "methodological syncretism" then that badge is worn with pride. This having been said, I do not seek to excuse uncritical acceptance of materials outside what has traditionally been considered the field of law.

(ii) Post-modernism

Before I commence on post-modernism, I should briefly explain what I mean by modernism, and what this means to law. Following Harvey, I have concluded that though the word "modern" has had a long history, the "project of modernity came into focus during the eighteenth century."[11] This was a project "by Enlightenment thinkers to develop objective science, universal morality and law, and autonomous art according to their inner logic." The object of this exercise was to accumulate "knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life." The development of science "promised freedom from scarcity, want, and the arbitrariness of natural calamity" and the development "of rational modes of social organization and rational modes of thought promised irrationalities of myth, religion, superstition, release from the arbitrary use of power as well as from the dark side of our own human natures." It was only through this project that "the universal, eternal, and the immutable qualities of all humanity" could "be revealed".

The Enlightenment, according to Harvey, "embraced the idea of progress, and actively sought that break with history and tradition which modernity" espoused. It was "a secular movement that sought the demystification and desacralization of knowledge and social organization in order to liberate human beings from their chains." Modernity sought to address the claim that "Man is born free, yet everywhere he is in chains." And it was because of this that "Enlightenment thinkers welcomed the maelstrom of change and saw the transitoriness, the fleeting, and the fragmentary as a necessary condition through which the modernizing project could be achieved." As Harvey notes, it was a very optimistic period in which "[d]octrines of equality, liberty, faith in human intelligence (once allowed the benefits of education), and universal abounded. 'A good law must be good for everyone' pronounced Condorcet in the throes of the French Revolution, 'in exactly the same way that a proposition is true for all.'"

It was within these "metanarratives" that the law operated. The law, so far as modernity was concerned, "would be guided by a set of standardized, rational, and predictable rules." It was "[s]tandardization, uniformity, certainty, and above all rationality" which "became the basis of law's authority." Modern law was seen an institution for emancipation, and not just regulation.

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12 id. at 13.
13 ibid.
15 ibid.
16 ibid.
17 See Boaventura de Sousa Santos, Toward a New Common Sense (New York: Routledge, 1995).
Whether this has materialized in law is still a hotly contested issue - especially in common law jurisdictions. Certainly, many enactments by Parliament have certainty and predictability as an express goal. This was definitely the case with the Native Title Act 1993 (Cth). So far as court decisions are concerned, the doctrine of stare decisis operates to provide the same goal.

Post-modernism on the other hand, highlights an incredulity "toward metanarratives." The legitimation of knowledge which "once lay within the domains of the grand narratives of reason or emancipation, or of theory, or grandest of all, philosophy"\(^{18}\) no longer guarantees an advance. Post-modernism acknowledges that "the truth" is not lurking somewhere to be discovered by the careful researcher - to quote Said:

"... the real issue is whether indeed there can be true representation of anything, or whether any and all representations, because they are representations, are embedded first in the language and then in the culture, institutions, and political ambience of the representer. If the latter alternative is the correct one (as I believe it is) then we must be prepared to accept the fact that a representation is *eo ipso* implicated, intertwined, embedded, interwoven with a great many other things besides the "truth," which is itself a representation."\(^{19}\)

My reliance on postmodern modes of analysis is aimed at highlighting, exploring and explaining the basis of the current situation. It is not aimed at imposing yet another metanarrative - "modernism with make-up"\(^{20}\) as one commentator has described it. Rather, it is my contention that a critical and postmodern approach is one which is not about "the erecting of foundations: on the contrary, it disturbs what was previously considered


\(^{20}\) Gary Wickham, "Theorising Sociology in the Face of Postmodernism" (1991) 27(3) *Australian and New Zealand Journal of Sociology* 351 at 357.
immobile; it fragments what was thought unified; it shows heterogeneity of what was imagined consistent with itself.”

The increasing incredulity “toward metanarratives” does not however mean that “truth” is the enemy. Moreover, post-modernism does not necessarily end in irrationalism or neo-conservatism. Foucault notes, for example, that social Darwinism was a racism that was formulated in the nineteenth century. It has had enduring effects this century. It was “of course, an irrationality, but an irrationality that was at the same time, after all, a certain form of rationality ...” Thus, “if critical thought itself has a function, ... it is precisely to accept this sort of spiral, this sort of revolving door of rationality that refers us to its rationality that refers us to its necessity, to its indispensability, and at the same time, to its intrinsic dangers.”

A related point to what I have just described, is the fear of nihilism. One can simultaneously adopt a critical position vis-à-vis the metanarratives of modernity and reject philosophical nihilism. As Hunt argues:

“The possibility of sustaining the judgment that some situation, circumstance, idea, policy, etc., is an ‘advance’/’better’ or is a ‘retreat’/’worse’ can and should be retained. Such judgments are not to be measured against some absolute standard of Truth or Knowledge, but seen as a choice between alternatives in which the options are determinant and in which the ethical or other values employed are made explicit.”

23 ibid.
24 Hunt, op. cit., n.10, at 537-538.
Foucault’s work does not, in my view, detract from this cogent point argued by Hunt. Indeed, Foucault, with some irony has said ‘there is no way you say there is no truth.”

The fact that legitimation through grand metanarratives is no longer convincing does not detract from the notion that there can be human judgment. If anything, post-modernism underscores the difficulties associated with human judgment and human institutions such as law. The evocation of nihilism is therefore premature. As Hunt persuasively argues, the:

“Big Fear’ is a reaction which adopts a catastrophic scenario in which any concession to contingency or any retreat from the objectivity of knowledge-claims necessarily leads, via the associated imagery of the ‘slippery slope,” unwittingly, but unavoidable towards the abyss of relativism, and its even more dangerous associate, nihilism.”

The fear and hostility generated by post-modernism has been remarkable. Whilst it is certainly true that post-modernism and post-moderns have showed little respect, if not playful abandon, to conventional modes of scholarship, style alone does not account for the hostility. Perhaps Douzinas, Goodrich and Hachamovitch are correct when they state:

‘Melancholia, mourning or dread are inevitably associated with periods of transition. A sense of nostalgia, of depression or of loss has always tended to accompany the birth or renewal of social forms and is expressed both in pessimism and in radicalism, in the return to tradition and the escape from the present associated with epochs and literatures as diverse as renaissance humanism, naturalism or surrealism. The fear of ‘unreason’, of irrationality, heresy or simple nihilism is the stagnated historical expression of an extant tradition, loss of confidence in orthodoxy, whether theological, jurisprudential or political. The attribution of darkness, melancholy, fragmentation, waste and irrationality are common themes in the early doctrinal tradition in common law, and the institution was constantly attacked for its arbitrary judgments, its sudden and inexplicable injustices, its harsh wastages of youth and promise as well as its fundamental philosophical irrationality and political inequity.”


26 Hunt, op. cit., n.10, at 524.

Perhaps the reason for the fear is the awareness of the difficulties created by such modes of thought. As Connolly argues:

"For to challenge fixed conceptions of will, identity, responsibility, normality and punishment is to be cruel to people (and aspects of oneself) attached to established moral codes; it is to open up new uncertainties within established terms of judgment; and, sometimes it is to incite punitive reactions among those whose sense of moral self-assurance has been jeopardized."\(^{28}\)

But whatever the reasons for the "big fear", the time has come for a thorough critique of the modernist underpinnings of Canadian and Australian law of indigenous peoples. Notwithstanding the prominence of indigenous issues in the mass media of both countries, the increasing use of law by various actors (indigenous peoples, governments, industry, etc.), the ever expanding academic literature (most of which is doctrinal), the jargon of diversity, pluralism, and multi-culturalism, there has been no challenge to the fundamental elements of the debate: identity, difference, cultural groups and its relationship between legal discourse and other practices.

The debate, to utilize the words of Connolly, as its stands now sets "its fundamental presumptions [which] fix its possibilities, distribute explanatory elements, generate parameters within which an ethic is elaborated, and center (or decenter) assessments of identity, legitimacy, and responsibility."\(^{29}\) But the:

"... reality of the limit or limit-text of culture is rarely theorized outside of well-intentioned moralist polemics against prejudice and stereotype, or the blanket assertion of individual or institutional racism - that describe the effect rather than the structure of the problem. The need to think the limit of culture as a problem of the enunciation of cultural difference is disavowed."\(^{30}\)

\(^{28}\) William E. Connolly, "Beyond Good and Evil: The Ethical Sensibility of Michel Foucault" (1993) 21(3) Political Theory 365 at 365.


\(^{30}\) Homi K. Bhabha, The Location of Culture, (London: Routledge, 1994) at 4.
It is to the exploration of these "fundamentals" - a word which includes presumptions and assessments of identity, difference, and culture - that I seek to enlist post-modern approaches in analyzing the legal material I have selected.

(iii) Cultural Studies

I seek to enlist cultural studies because:

"... if the interest in postmodernism is limited to a celebration of the fragmentation of the 'grand narratives' of postenlightenment rationalism then, for all its intellectual excitement, it remains a profoundly parochial enterprise."31

Approaches from cultural studies aid in understanding the relationship between identity and difference (i.e. the concepts of Aboriginality and non-Aboriginality) and how these constructions affect legal concepts. It is important to realize that "identity, in some modality or other, is an indispensable feature of human life."32 Identities are "established in relation to a series of differences that have become socially recognized. These differences are essential to its being. If they did not coexist as differences, it would not exist in distinctiveness and solidity."33 "Entrenched" in this mode of thought however is the tendency to form fixed categories "as if their structure expressed the true order of things."34 And when the pressures of this process of entrenching prevail "the maintenance of one identity (or field of identities) involves the conversion of some differences into otherness, into evil, or one of its numerous surrogates."35 Thus "identity requires

31 *id.*, 34.
33 *id.*, at 64.
34 *ibid.*
35 *ibid.*
difference in order to be, and it converts difference into otherness in order to secure its
own self-certainty.”

The nature of relationship between identity and difference, especially in the
Aboriginal and non-Aboriginal arena, is a complex one that is not entirely reliant on
tradition. As Homi Bhabha puts it:

“The social articulation of difference, from the minority perspective, is a complex, on­
going negotiation that seeks to authorize cultural hybridities that emerge in moments of
historical transformation. The ‘right’ to signify from the periphery of authorized power
and privilege does not depend on the persistence of tradition to be reinscribed through
conditions of contingency and contradictoriness that attend upon the lives of those who
are ‘in the minority’. The recognition that tradition bestows is a partial form of
identification. In restaging the past it introduces, other incommensurable cultural
temporalities into the invention of tradition. This process estranges any immediate
access to an originary identity or a ‘received’ tradition.”

Secondly, in arguing that I am dealing with “constructions” or things “established”
I encounter the difficulty that if such ‘constructions are ‘artificial’ they lack ‘reality’ or do
not ‘exist’.” I mention this as such “reasoning, however faulty, can lead to the conviction
that the social construction perspective lacks internal consistency because it appears to
deny the existence of the very categories that form the basis of its own analysis.” It
therefore becomes necessary to discern the difference between the “their acceptance of the
assertion that people operate as if categories ‘exist’” and the “rejection that this existence
is grounded in ‘reality’ as an immutable, unalterable truth.” It follows, that all

36 ibid.
37 Bhabha, op. cit., n.30 at 2. Additionally, I heed Spivak’s warning, that a “nostalgia for lost origins can
be detrimental to the exploration of social realities within the critique of imperialism.” See Gayatri
Chakravorty Spivak, “Can Subaltern Speak?” in C. Nelson and L. Grossberg eds., Marxism and the
Interpretation of Culture (Basingstoke: Macmillian Education, 1988) cited in Patrick Williams and Laura
Chrisman, Colonial and Post-colonial Theory: A Reader (New York: Columbia University Press, 1994) at
85.
"constructions of 'reality' must be seen as a product of the human capacity for thought and, consequently, are subject to change and variability."\(^{38}\)

**(iv) Foucault and Law**

Though Foucault’s influence is in the background of what I have argued, his “fit” with legal studies is problematic and requires justification.

For Foucault, the advent of modernity, more particularly its notion of power, is signaled by the rise of various disciplines utilized by the state in order to govern. Societies are not governed by direct force, by the threat of some form of violence, or by some manner of rules; rather they are governed by “power.” For Foucault power:

> “is a group of institutions and mechanisms that ensure the subservience of the citizens of a given state. By power, I do not mean, either, a mode of subjugation which, in contrast to violence, has the form of a rule. Finally, I do have in mind a general system of domination exerted by one group over another, a system whose effects, through successive derivations, pervade the entire social body. The analysis, made in terms of power, must not assume the sovereignty of the state, the form of the law, or the over-all unity of domination are given at the outset; rather, these are only the terminal form power takes.”\(^{39}\)

Instead, Foucault’s injunction is not to seek “the headquarters that presides over its [i.e power’s] rationality; neither the caste which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions ...”\(^{40}\)

Rather, power “is everywhere; not because it embraces everything, but because it comes

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\(^{38}\) All quotations in this paragraph are from Peter Jackson and Jan Penrose, “Introduction: placing ‘race’ and nation” in Peter Jackson and Jan Penrose eds., *Construction of race, place and nation*, (London: UCL Press, 1993) at 3.


\(^{40}\) *id.*, at 95.
from everywhere. And ‘power’ in so far as it is permanent, repetitious, inert, an self-reproducing, is simply the over-all effect that emerges from all these mobilities ...”  

Moreover “it is in discourse that power and knowledge are joined together.”  

Thus, for Foucault it is:

"... a question of orienting ourselves to a conception of power that replaces the privilege of the law with the viewpoint of the objective, the privilege of the prohibition with the viewpoint of the tactical efficacy, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced. The strategical model rather than the model based on law.”

Modernity for Foucault is characterized by the emanation of ‘the art of government’ - or “governmentality” (to use his neologism). That is, modernity is concerned with conduct in which ‘the finality of government resides in the things it manages and in the pursuit of the perfection and intensification of the processes which it directs; and the instruments of government, instead of being laws, now come to be a range of multiform tactics. Within the perspective of government, law is not what is important...

The conjunction of power and knowledge permits governmentality. As a result, Foucault sees ‘things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society

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41 id., at 93.
42 id., at 100.
of government; in reality one has a triangle, sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatuses of security."

Confronted by the rise of the disciplines (psychiatry, economics, statistics, anthropology etc.) law’s response is to refashion itself and attempt to control the disciplines in “the form of law.”

But this leaves a number of issues unexplored. First, how does one examine or concentrate on localized power in the form of the various disciplines administered on subjects without ignoring the significance of state power? Secondly, is Foucault’s view of law accurate? Given that Western law has historically existed in a variety of forms and sites (royal power, popular self-control, guilds, various religious institutions, etc.), and given the very recent origins of the idea that formal state law is the only law (coincident with modernity, in fact), how is Foucault able to launch into a critique of the monolithic conception of power relations and the modern state associated with more traditional analyses? Thirdly, how does Foucault account for imperialism?

The failure to account for the enduring presence of the state and law, is definitely one of Foucault’s weak points. This appears inevitable in his theory. He does this in order to distinguish himself from various Marxist traditions which he considers to be reductionist. But this failure to take further notice of the law and the state arguably leads him to underestimate their roles. Consequently, Foucault fails to realize that state

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45 id., at 102.
46 Foucault, op. cit., n.39 at 109. See also at 144.
monopolization of legitimate violence underlies the exercise of disciplinary and ideological tools "and when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear." Historically and currently, this is an undeniable proposition in Aboriginal and non-Aboriginal relations in both Canada and Australia.

Furthermore, law grants tangible rights to dominated groups or classes, although they are expressed in the dominant language (liberal conceptions of rights). These rights extend far beyond nineteenth century notions of constitutional rights (free speech, property rights, and so on). Thus law, and the state, are conditioned by the active opposition, counter-strategies and openness to co-optation of various groups in a state. Alternatively put, the dominant language, in spite of its hegemony, is porous enough to leave some space for different forms of critical knowledge which condition the exercise of power within the state.

Nowhere is this more apparent than in the field of Aboriginal and non-Aboriginal relations in Australia and Canada. This of course, leads me to the next point, viz., the failure of Foucault to take imperialism into account. This omission is absolutely fundamental. His concept of power must be modified if it is to have any relevance for this thesis.

However this does not marginalize Foucault’s insights. The important point, as Hunt argues, ‘is whether it is possible to retain Foucault’s emphasis on the productivity of

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power without lapsing into the neglect of the state and of the condensation of power relations that occurs around it without repeating his expulsion of law.”

Thus what is required for any adequate understanding is an “account of what we may loosely describe as ‘big power’ and ‘little power’” together with “their mutual articulation and interaction.”

Foucault himself comes tantalizingly close to providing insights which could provide a platform for such an argument. In an essay entitled “The Subject and Power” Foucault said:

“[W]hat makes the domination of a group, a caste, or a class ... a central phenomenon in the history of societies is that they manifest in a massive and universalizing form, at the level of the whole social body, the locking together of power relations with relations of strategy and the results proceeding from their interaction.”

The seemingly incompatible notion of law and the conception of power exercised within the modern state withers once we acknowledge the persisting plurality in the forms of law that exist in any given society. The corollary of this proposition is that this incompatibility only arises from Foucault’s insistence on the solid link between law (the juridical) and sovereignty and the command model of law that such a link generates. The “connection between law and new disciplines is much less troubling and involves no necessary tension or contradiction the moment we abandon his unitary model of monarchical law.”

Thus the question we need to ask, is how are different forms of law to operate with the various disciplines? Or, more appropriately (for this thesis), how does

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49 ibid.


51 Hunt, op. cit., n.48, at 17.
the subjugation and denial, or recognition, of different forms of law operate with the various disciplines? And how does the state handle this?

**(v) Space**

In seeking to answer the above questions, I have utilized in chapter 4 of this thesis ideas and writings on "space." The experience of space is fundamental to human existence. It is "naturalized" through the assignment of common-sense everyday meanings. It can have objective qualities - namely direction, shape, pattern. It can be measured (length, breadth, depth, volume). We are also cognizant of the fact that our subjective experience can take us into realms of perception, imagination, fiction, and fantasy, which produce mental spaces and maps as so many mirages of the supposedly 'real' thing.

I want to call into question the idea of a single objective space in recognition of the fact that different conceptions of space have existed historically. Thus, if space in some way determines what may be thought to be possible, then different conceptions of space may also determine what may be thought to be possible. In the context of this thesis, I use Aboriginal land rights and notions of self-government as example of spatial practices latent within law.

If space is fundamental to any exercise of power, as Foucault argues, then different conceptions of space will condition the exercise of power. This is important because different methods of conceiving space will render differing conceptions of law.

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52 Harvey, *op. cit.*, n.11 at 203.
53 *ibid*.
54 Michel Foucault, "Space, Knowledge, Power", *op. cit.*, n.22 at 252.
For example, if in early British Columbia the state could not enforce its law among remote miners, then, by default, plural "legal" regimes must have existed. Hence, to extend this line of argument further, it is possible to claim (as Harvey has) that "[s]patial and temporal practices are never neutral in social affairs. They always express some kind of class or other social content, and are more often than not the focus of intense social struggle."\(^{55}\)

But to leave matters here is somewhat inadequate. In the above paragraph, I used the expression "different conceptions of space". This expression leads us to another question. What produces these different conceptions?

More generally, is it possible to "produce space"? But to "speak of 'producing space'" sounds bizarre, so great is the sway held by the idea that empty space is prior to whatever ends up filling it."\(^{56}\) And as Lefebvre continues in the very next sentence, "[q]uestions immediately arise here: what spaces? and what does it mean to speak of 'producing space'?" By whom is it produced? Who occupies that space? And if "space embodies social relationships, how and why does it do so? And what relationships are they?"\(^{57}\)

It is important to realize, if we are discussing the production of space (i.e. a productive process), that we are then in some way dealing with history.\(^{58}\) But history itself

\(^{55}\) Harvey, op. cit., n.11, at 239.
\(^{57}\) id., at 27.
\(^{58}\) id., at 46.
occurs in a space. As Paul Carter argues in *The Road to Botany Bay*, history must not be seen as a collection of facts organized chronologically. As:

"[t]his kind of history, which reduces space to a stage, that pays attention to events unfolding in time alone, might be called imperial history. The governor erects a tent here rather than there; the soldier blazes a trail in that direction rather than this: but, rather than focus on the *intentional* world of historical individuals, the world of active, spatial choices, empirical history of this kind has as its focus facts which, in a sense, come after the event. The primary object is not to understand or to interpret: it is to legitimate. This is why history is associated with imperialism - for who are more liable to charges of unlawful usurpation and constitutional illegitimacy than the founders of colonies? Hence, imperial history's *defensive* appeal to the logic of cause and effect: by its nature, such a logic demonstrates the emergence of order from chaos."

I highlight this aspect of the issues I am dealing with, because in some way or another, they are all spatial issues. Any "struggle to reconstitute power relations is a struggle to reorganize their spatial bases." Furthermore, for any "social transformation, to be truly revolutionary in character, it must manifest a creative capacity in its effects on daily life, on language and on space - though its impact need not occur at the same rate, or with equal force, in each of those areas." 

To conclude on this point, it is *essential* to examine how space has been produced if we are to understand how Aboriginal issues have been dealt with or to suggest future pathways for research and analysis.

**THE DATA**

60 Harvey, *op. cit.*, n.11 at 238.
61 Lefebvre, *op. cit.*, n.56 at 54.
Bearing these methodological points in mind, I have divided the materials I will be analyzing into three categories. The first category is the case law with respect to Aboriginal title. The second category is the *Native Title Act* 1993 (Cth). And third category is the Penner Committee Report.

In *Mabo [No. 2]* Aboriginal title was described as thus by Mason CJ and McHugh J:

"In the result, six members of the Court ... are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title ."\(^62\)

Brennan J described it in the following manner:

"The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. ... Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do)."\(^63\)

And Deane and Gaudron JJ described Aboriginal title as follows:

"Since the title preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to the traditional law or custom."\(^64\)

This approach has subsequently been affirmed by the High Court.\(^65\)

\(^{62}\) At 15.
\(^{63}\) At 60.
\(^{64}\) At 110.
\(^{65}\) "The content of native title is ascertained by reference to the laws and customs of the people who possess that title ...". See *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 452, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
A similar approach now exists in Canada. The British Columbian Court of Appeal in had this to say about Aboriginal title:

"The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Rights of occupancy are usually exclusive. Other rights, like hunting or fishing, may be shared. What is an aboriginal use may vary from case to case. Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society. The nature and content of the right, and the area within which the right was exercised are questions of fact."\(^66\)

Consequently, for Macfarlane JA (and Taggart JA) "... native title does not have a single, generic form encompassing all activities."\(^67\)

Wallace JA had this to say about Aboriginal title:

"[t]he aboriginal right of occupation and use will vary according to the circumstances of the traditional occupation and use prevailing in the aboriginal society prior to sovereignty. The aboriginal rights may nearly constitute a title resembling a proprietary title like those in western property law; or, they may be restricted to certain uses of the land in common with others. Whatever form the traditional aboriginal occupation and use of land took, if the form was distinctive and integral to the native culture and traditional way of life prior to sovereignty, it was recognized by the common law as an aboriginal right deserving of protection."\(^68\)

Thus it appears that the current approach to Aboriginal title in Australia and Canada is based on the idea that Aboriginal norms are facts to be incorporated into the law of the state. Historically it is at this stage that most claims for Aboriginal title have faltered. Indigenous peoples are said to have lived without any laws or government, or they have been said to be uncertain and thus incapable of proof.

\(^{66}\) Delgamuukw et. al. v The Queen in Right of British Columbia et. al. (1993) 104 DLR (4th) 470 at 496-497, Macfarlane JA (Taggart JA concurring).

\(^{67}\) id., at 497.

\(^{68}\) id., at 579.
Thus for example, in the Australian case of *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 it was held, *inter alia*\(^6^9\), that the plaintiff had failed to establish any pre-existing interest in relation to the land which satisfied the requirement considered to be "rights of property."\(^7^0\) Whilst this requirement has been formally jettisoned in *Mabo [No. 2]*, this requirement presents us with a similar methodological issues in comprehending Aboriginal normative structures (which created 'rights of property' in the first place) still remain.

Another example\(^7^1\) of this - and this example follows a long history - was the trial decision with respect to the self-government issue in *Delgamuukw v British Columbia* (1991) 70 DLR (4th) 185 (BCSC). In that MacEachern CJ held at 419 that:

"Gitksan and Wet'suwet'en laws and customs are not sufficiently certain to permit a finding that they or their ancestors governed their territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so."

Thus, the failure to recognize or acknowledge Aboriginal title to land (or for that matter, other Aboriginal rights such as self-government in *Delgamuukw*) can be seen as a cognitive error on the part of courts.

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\(^6^9\) In this case the plaintiffs had failed to prove: (i) that they had had the same links as their predecessors (at 198); (ii) that there was a doctrine in Australian common law known as "communal native tide" (at 244-245, 262). They had however, established a system of law (at 267).

\(^7^0\) *Id.*, at 272-273, 273-274.

\(^7^1\) It will be noted that I am treating self-government as an example of an Aboriginal right. This approach seems warranted in this light of *Howard Pamajewon v R.* (22 August 1996), No.24596 (SCC). In that case at para. 24 Lamer CJ, La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ said:

"... claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard."
Another, different, reason offered for this failure to recognize Aboriginal norms is that there is no theoretical basis within liberalism for the recognition of norms which are alien to liberalism. It is said that liberalism - a philosophy which has deeply influenced the shape of the law in both Australia and Canada - is premised on individualism and as such does not respect community rights. In this thesis I will address how liberalism can deal with Aboriginal rights, together with pitfalls as I see them.

Turning now to legislation, the *Native Title Act 1993* (Cth) is important. This Act was the Commonwealth of Australia’s “response” to the High Court of Australia’s decision in *Mabo [No. 2]*. Broadly speaking the act:

- recognizes and protects Aboriginal title in accordance with the Act (ss. 10, 11(1));
- provides a framework which can deal with past actions which have affected native title and provides a framework for compensation for past actions which have affected native title in certain circumstances;
- establishes a National Native Title Tribunal (NNTT) (an administrative tribunal for the purposes for handling claims);
- and provides a right to negotiate for certain future acts with respect to an onshore place.

Once a claim for the determination of native title is accepted, procedures commence whereby the Registrar of the NNTT notifies the relevant State or Territory
government, the general public, persons holding proprietary interests. Those to whom notice is given and other persons whose interests may be affected by any determination of native title may become a party to the application.

If an application for determination of native title is unopposed, the NNTT may make a determination which is in accordance with the claim provide that the NNTT is satisfied that the applicant has made a *prima facie* case and that the NNTT considers just and equitable in all the circumstances.

If the parties to the application agree on the terms of a determination, and if the terms agreed to are consistent with the powers of the NNTT and the NNTT considers would be appropriate in the circumstances, the NNTT must make an order according to the terms of that agreement. In the event that the parties fail to reach an agreement, the claim must go to mediation. If there is an agreement after the mediation, then the NNTT must make a determination in accordance with that agreement. If there is no agreement after mediation, the matter is then referred to the Federal Court of Australia for a judicial determination.

In attempting to claim native title, two matters will be decisive. First, “the continuity of the connection of the claimants and ancestors with the land in which native title is claimed”. Secondly, the “tenure history” of that land so far as it appears from Crown grant, Crown licence or Crown use.”72 The first matter is concerned with

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72 *Re North Ganaland Corporation; Ex parte Queensland* (1996) 70 ALJR 344 at 352 (H.C. of A).
establishing the continuation of Aboriginal normative structures and the latter is concerned with whether the juridical space of the common law has allowed or restrained itself in such a manner as to assist in the continuation of Aboriginal normative structures.

I shall now turn to the Penner Committee Report. This is an important document, for it, for the very first time established the language of "self-government" in Canada. Its political import cannot be under-estimated. So far as self-government is concerned, it recommended the following:

"1. The Committee recommends that the federal government establish a new relationship with Indian First Nations and that an essential element of this relationship be recognition of Indian self-government.

2. The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada. The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government is by means of a constitutional amendment. Indian First Nations governments would form a distinct order of government in Canada, with their jurisdiction defined.

3. While the Committee has concluded that the surest way to lasting change is through constitutional amendments, it encourages both the federal government and Indian First Nations to pursue all processes leading to the implementation of self-government, including the bilateral process.

4. The Committee rejects the Department’s band government proposal. Although there have been years of consultation, there was no general agreement of Indian representatives, and the proposal finally emerged from a unilateral government decision.

5. The Committee does not support amending the Indian Act as a route to self-government. The antiquated policy basis and structure of the Indian Act make it completely unacceptable as a blueprint for the future.

6. The Committee is convinced that any legislation that could apply generally must offer a framework flexible enough to accommodate the full range of governmental arrangements that are being sought by Indian First Nations.

7. The Committee recommends that the federal government commit itself to constitutional entrenchment of self-government as soon as possible. In the meantime, as a demonstration of its commitment, the federal government should introduce legislation that would lead to the maximum possible degree of self-government immediately. Such legislation should be developed jointly."

73 The Penner Committee Report, chapter 4.
As such, the Penner Committee Report can be seen as an attempt to accommodate Aboriginal peoples within the state. However, it is different from the case-law and legislation in that the recognition of self-government is purely from non-Aboriginal sources. It is also a little more explicit about re-negotiating the spatial premises of the Canadian state. Thus the questions which need to asked about the Penner Committee’s recommendations are: how does this relate to legal pluralism?; what are its spatial premises?; how does this relate to the recognition of self-government in the formal law of the state?

OUTLINE OF THESIS

With these comments having been said about the methodology and object of inquiry in this thesis I wish to provide a brief outline of the chapter in this thesis.

In chapter 2, I provide an analysis of liberal conceptions of accommodating Aboriginal peoples in Canada and Australia pointing to the limitations of the liberal project.

Chapter 3 is analysis of how the discipline of law attempts to grapple with Aboriginal communities. I have utilized the literature on legal pluralism. In this chapter I suggest the pitfalls of this approach or method. It is at this stage that a différend appears.74

In chapter 4, I provide a view as to the development of this *différend*. It is the chapter where I introduce the notion of space, utilize Foucault’s work and provide an interpretation of the law-space nexus as it pertains to the issues I am considering here.

Chapter 5 is my concluding chapter. In this chapter I have provided suggestions for future work. It suggests a more post-modern conception of law may assist in the creation and maintenance of a space within Canada and Australia in spite of the hegemony of the dominant discourse.
CHAPTER 2: LIBERALISM AND THE IRONY OF ABORIGINAL RIGHTS

In his paper entitled "Pre-Existing Rights: The Aboriginal Peoples of Canada" Professor Sanders concludes:

"There has been a major shift in attitudes to indigenous peoples and that shift is reflected in government policy and in the rulings of the courts. This evolution has occurred not simply in Canada but in other parts of the Americas and the world. In general, the Canadian legal system in 1945 recognized no rights of Indians, Inuit or Métis which were not granted by constitutional or legislative provisions. Treaties had no definable status. Now, with the judicial and constitutional changes, treaty and aboriginal rights have a legal basis in the Canadian Constitution, but their essential validity derives from the pre-contact aboriginal legal order." ¹

Sanders also notes that it would be unwise to claim that "the biases and prejudices of another era" have disappeared. The trial decision in Delgamuukw et al. v The Queen in Right of British Columbia ² is offered as proof.

Sanders rightly highlights two points. First, the existence and development of a rights (both collective and individual) based jurisprudence. These "rights" claims have flourished in the post-Second World War Canadian legal system. This is all the more remarkable given that the twentieth century liberalism has been characterized as 'individualistic', 'atomistic' and generally insensitive 'to the virtues and importance of our membership in a community and culture." ³

² (1991) 70 DLR (4th) 185 (BCSC).
Indeed the standard account of liberalism holds that only individuals are the measure of value and that the maximisation of individual welfare is the only legitimate social interest. Because one individual cannot measure another's utility, it is difficult to ascertain public good. Individuals should therefore be free to maximize their utility and free from interference by others in their pursuit of utility. The only legitimate limitation to this is government interference which is designed to prevent interference from other persons who are indulging in their passion for freedom. Critics of liberalism claim that this is a central contradiction in the liberal project. Hutchinson offers the standard criticism:

"The central contradiction and paradox is that the more freedom that is allowed to pursue such ends, the less security is available against the intrusion of others. In short, individual freedom seems possible only through its collective limitation and negation: one person's freedom can only be obtained by curbing another's freedom and vice versa. Consequently, the acute challenge for contemporary liberal theorists has been to identify those regulative principles that can provide the necessary degree of social order and, at the same time, ensure that it comes 'as close as a society can to being voluntary scheme'."

Whilst this supposed contradiction is said bedevil contemporary liberalism, it is nowhere near an adequate critique of liberalism.

Charles Taylor provides another criticism of liberalism; namely, that 'since the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a whole. He cannot, following the libertarian model that Nozick has sketched, be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in

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Similar statements about what defines liberalism are made by Tina Loo, *Making Law, Order, and Authority in British Columbia*, (Toronto: University of Toronto Press, 1994) at 8-9.
which such choices can be open or closed, rich or meagre. It is important to him that certain activities and institutions flourish in society.”

Thus the emphasis on the individual in liberalism is misplaced.

Nevertheless, rights which are designed to maintain, support or enhance the position of a “group” in society are to said to anomalous or enigmatic.

In the context of Aboriginal legal rights Weaver has said:

‘Because liberalism disregards the social system as the basis of society, the liberal concept of individual choice is frequently a fallacy. It fails to detect that choices are possible under certain conditions.”

In the context of Aboriginal peoples it is said that the words ‘Aboriginal’ and ‘right’ is said to led us to an oxymoronic state of affairs. Loo has said:

'However, in calling for recognition of ‘aboriginal rights,’ native peoples are actually doing something quite radical and subversive of liberalism as they are exploiting the rhetorical power of ‘rights,’ which, in a liberal universe, accrue to all individuals in the name of a particular collectivity. In a sense, ‘aboriginal rights’ should be an oxymoron: for not only does it shift the focus of rights from the individual to the collectivity, but it also makes status matter in their allocation. In essence, a claim for aboriginal rights is an attempt to entrench difference (in this case ‘aboriginal’) with a tool that has historically denied its importance (in this case ‘rights’), and in doing so makes it intelligible and palatable within existing political discourse provided by liberalism.”

A few commentators have described Aboriginal rights as a form of apartheid (it should be noted that idea is more prevalent in Australia and Canada). Mel Smith has said:

'How is it that we as a nation can proudly point to our efforts in opposition to apartheid in South Africa when we are well on the way to establishing that system through native
self-governments based on the ill-found concept of the inherent right? Racism anywhere and everywhere and under all circumstances is wrong. It is an anathema to all democratic principles that we as a nation hold dear."

Given the rhetorical power of linking Aboriginal group claims to the apartheid in South Africa, it appears that the fixation on individual rights is the largest hurdle in addressing Aboriginal rights. Moreover a number of scholars have sought to defend Aboriginal rights "against liberalism"; some have argued that Aboriginal rights are justified because the forebears of the current holders of rights were here first; some have argued that indigenous peoples in Canada have a right to self-determination in international law; some have argued that Aboriginal peoples simply have a different value structure which has to be recognized; some have argued that Aboriginal groups should have certain rights as these groups have legitimate moral claims. Some have argued that Aboriginal rights in Canada can be justified on the grounds that they protect Aboriginal communities and thereby expand the range of choices available to all Canadians (in the sense that all Canadians can choose to learn from various Aboriginal cultures; though it is Aboriginal Canadians who get the choice to exercise their particular cultural framework). Given that there is not and has not been a generally accepted liberal theory

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9 Melvin H. Smith, Our Home or Native Land?: What governments' aboriginal policy is doing to Canada (Victoria, BC: Crown Western, 1995) at 250.
10 id., at 55-56; Kymlicka, op. cit., n.3, at 144; Michael Asch, Home and Native Land: Aboriginal Rights and the Constitution, (Toronto: Methuen, 1984) at 75-88.
11 It should be noted that these arguments against liberalism were formulated at a time when the assimilationist tendencies within liberalism were at their twilight. Even if one were to accept the terms of assimilation, it must now be accepted that this project failed as a matter of fact. In other words, it was a failure on its own terms. For example, removing Aboriginal children from their parents and educating them in non-Aboriginal methods did not equip those children for life in the non-Aboriginal world. Nonetheless, it must also be accepted that the criticisms against liberalism have informed the difficulties of proponents of group rights working within the parameters of liberalism.
12 Kymlicka, op. cit., n.3 at 153.
13 id., at 173.
of group rights, it is not surprising that courts have had difficulty justifying Aboriginal rights.

However, this conflict between individual rights and community rights in liberal legal system is a misconception. Will Kymlicka's work has made a helpful contribution to this conflict.

My second point of agreement with Sanders is his warning that 'the biases and prejudices of another era” have not gone away. These thoughts of a past era were intricately associated with the Enlightenment’s imperial project. But recent statements to the contrary have not rendered imperialism “as something marginal, exceptional and evanescent”.14 It is a mistake to suggest that imperialism did not inform liberal theory and practice - either in the past or the present.

Within the context of liberal political theory, merely stating that one is concerned with “modern liberalism, not seventeenth-century liberalism”15 and dismissing the history of liberalism as “ethnocentric”16 does not provide an adequate account of how modern liberalism can address community rights, particularly to communities that have been marginalized by state policies informed by liberalism. Moreover, I think this omission is

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15 Kymlicka, op. cit., n.3 at 10.
recognized by Kymlicka in *Liberalism, Community, and Culture*. At the start of this book Kymlicka states rather cryptically:

‘My concern is with this modern liberalism, not seventeenth century liberalism, and I want to leave it entirely open what the relationship is between the two. It might be that the developments initiated by the ‘new liberals’ are really an abandonment of what was definitive of classical liberalism.”

I shall now commence to examine a liberal defence of Aboriginal rights, and then examine what I have termed the “irony of liberalism.”

**CONTEMPORARY LIBERALISM**

The criticisms which have been leveled against liberalism generally fail to take account of the more subtle and nuanced arguments put forward by liberal authors. Indeed, it turns out that criticisms I have outlined above attack only a certain strain of liberalism, namely, libertarian liberalism. Such criticisms in my view does not withstand the response developed by other liberals from a different tradition. Kymlicka is the main liberal author I have in mind.

According to Kymlicka, liberals argue that ‘[o]ur essential interest is in leading a good life, in having those things that a good life contains.”

17 Kymlicka, op. cit., n.3 at 10.

18 *ibid.*

19 *ibid.* Moreover, it is a claim that does not distinguish liberals from Marxists: see Don Lenihan, ‘Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka” (1991) 4(2) *Canadian Journal of Law and Jurisprudence* 401 at 402.
that we may be mistaken about the worth or value of what we are currently doing.\textsuperscript{20}

Given this, Kymlicka argues that the:

"... defining feature of liberalism is it that ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives. It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life."\textsuperscript{21}

But paradoxically, it is the fact that individuals can get it wrong is also an argument for liberal freedoms according to Kymlicka. As no one wants to be living a life ‘based on false beliefs ... it is of fundamental importance that we able to rationally assess’ our lives in the light of new and different experiences and information.\textsuperscript{22}

To ignore this aspect of liberalism is to ignore ‘much of what is distinctive to a liberal state concerns the forming and revising of people’s conceptions of the good, rather than the pursuit of those conceptions once chosen.’\textsuperscript{23}

Hence the liberal concern for ‘rights’. Kymlicka gives the example of religion.\textsuperscript{24} In a liberal state one is \textit{not only} permitted to practice one’s faith. One is \textit{also} permitted to seek new adherents, one is \textit{also} permitted to question received religious doctrines, one is \textit{also} permitted to convert to another religion, and one is \textit{also} permitted to become an atheist. One can have the freedom to pursue one’s faith without any of these other rights.

In summary, a liberal society:

\textsuperscript{20} \textit{ibid.} Original emphasis.
\textsuperscript{21} Kymlicka, 1995, \textit{op. cit.}, n.16 at 80.
\textsuperscript{22} \textit{id.}, at 81.
\textsuperscript{23} \textit{id.}, at 81-82.
\textsuperscript{24} \textit{id.}, at 82.
"... not only allows people to pursue their current way of life, but also gives them access to information about other ways of life (through freedom of expression), and indeed requires children to learn about other ways of life (through mandatory education), and makes it possible for people to engage in radical revision of their ends (including apostasy) without legal penalty. These aspects of liberal society only make sense on the assumption that revising one's end is possible, and sometimes desirable, because one's current ends are not always worthy of allegiance. A liberal society does not compel such questioning and revision, but it does make it a genuine possibility."  

**SOCIAL CULTURES**

However, what gives us options from which to choose? According to Kymlicka societal cultures give us the context within which choices are made. Societal cultures provide their "members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."  

A societal culture is not only a set of "shared memories or values, but also common institutions and practices."  

The ability to make choices involves the "making of choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us."  

People in a liberal society make choices about their lives and practices within their lives based on the beliefs they have, which in turn are based on societal cultures. These beliefs are always subject to revision, and societal cultures make this possible.

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25 ibid.  
26 id., at 76.  
27 ibid.  
28 id., at 83.
BUT WHY HAVE LEGAL MEASURES?

But why should national minorities have their own cultures protected by certain legal measures guaranteed by the state? Kymlicka offers two main reasons. One is that:

"... we should treat access to one’s culture as something that people can be expected to want, whatever their more particular conception of the good. Leaving one’s culture, while possible, is best seen as renouncing something to which one is reasonably entitled. This is a claim, not about the limits of human possibility, but about reasonable expectations."

It is a reasonable expectation precisely because it is extremely difficult to leave the bonds of one’s own culture - even if one were to do so voluntarily.

The second reason is that people, for whatever reason “value their cultural membership.” It defines one’s identity. Why people value their cultural membership is complex. The:

"... causes of this attachment lie deep in the human condition, tied up with the way humans as cultural creatures need to make sense of their world, and that a full

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29 Kymlicka (1995) distinguishes between multi-nation states and poly-ethnic states. The former is one in which one state has more than one historical community with more or less institutionally complete societal structures (e.g. language, history, religion) occupying a distinct homeland. The latter is where a state permits large numbers of immigrants from other cultures and permits them to retain certain aspects of their ethnic particularity. Most states have both multi-nation and poly-ethnic sources of pluralism.

A national minority is a numerically smaller culture in a multi-nation state. In the Canadian context there are two national minorities (broadly speaking): (i) the various Aboriginal communities, and (ii) French-Canadian. English-Canadians are a national community, but are not a minority. See Kymlicka, op. cit., n.16 at 11-26.

The rights carried by national minorities are to be distinguished from the rights of poly-ethnic minorities. National cultures are treated separately as they are the founding cultures of a state. English and French Canadians qualify as national cultures, as distinct from poly-ethnic cultures as these cultures "resulted from a deliberate policy aimed at the systematic re-creation of an entire society in a new land ...": id., at 95.

Whilst poly-ethnic minorities broaden the horizon of options available to their fellow inhabitants, they no do not have a right to have their cultures protected. The reason why they are minorities is that they chose to move to another state: ibid.

30 Kymlicka, id., at 86. Emphasis added.

31 id., at 88.
explanation would involve aspects of psychology, sociology, linguistics, the philosophy of mind, and even neurology."32

In conclusion, Kymlicka states that "the unavoidable, and indeed desirable, fact of cultural interchange does not undermine the claim that there are distinct societal cultures."33 Thus, it is possible to argue that one’s cultural structure is a ‘primary good’34 and as such is entitled to be protected by legal measures.

IS THIS BRAND OF LIBERALISM AHISTORICAL?

Given that the prevailing doxa holds that a recognition of minority group rights is illiberal, it would seem that Kymlicka’s view is ahistorical. Indeed it would seem that his central thesis could be accurately described as “revisionist”.

Kymlicka argues however that the prevailing view of liberal “individualism” or “atomism” arose after the Second World War35, asserting:

"If we look at the writings of earlier liberals, especially Mill, Green, Hobhouse, and Dewey, a different picture emerges. They emphasized the importance of cultural membership for individual autonomy, and so had a different view about the salience of cultural membership."36

Kymlicka then states:

‘Hobhouse said that ‘true freedom’ was possible only in such ‘high communities’ ... and Dewey said that ‘fraternity, liberty, equality’ were ‘hopeless abstractions’ outside of such communities .... Likewise Mill saw no conflict between his belief that individuals should be not only free but encouraged to experiment with unfamiliar lifestyles, and his belief that communities should be united by a feeling of nationality based on common sentiment. Mill was so concerned with the freedom of individuals to express their individuality in unusual and unexpected ways that Dewey thought Mill equated individuality with quirky eccentricity ... yet Mill also believed that such free

32 id., at 90.
33 id., at 105.
34 Rawls, op. cit., n.4 at 62.
35 Kymlicka, op. cit., n.3 at 207; Kymlicka, 1995, op. cit., n.16 at 49-60.
36 Kymlicka, ibid.
individuality was ‘next to impossible’ in a country without commonality of language and heritage .... For Mill, as for others, commonality of cultural membership wasn’t in conflict with individual freedom, but rather was its precondition. Mill, Green, Hobhouse, and Dewey were concerned with community, but were not thereby communitarians, .... They were as much concerned with individual liberty as anyone before or since. Yet they recognized the importance of our cultural membership to the proper functioning of a well-ordered and just society, and hence they had a different view of the legitimacy of special measures for cultural minorities.”

The focus on community or group rights arose because administrators in the British Empire faced a diverse range of cultures from various parts of Africa to the Antipodes, from India to Canada, from the Carribean to the Middle East. The administration of the colonies provided the acid test for English liberals as they:

“... were constantly confronted with the fact that liberal institutions which worked in England did not work in multination states. It quickly became clear that many English liberal institutions were as much English as liberal - that is, they were only appropriate for a (relatively) ethnically and racially homogenous society such as England.”

Consequently, “liberals who went to administer or study British colonies found that the liberalism they learned in England simply did not address some of the issues of cultural diversity they faced.”

Indeed one example of imposing English liberalism in the colonies was Lord Durham’s prescription of ‘benign neglect” after the Rebellion of 1837 in English and French Canada. This policy is now seen as an abysmal failure. Thus:

‘Most subsequent liberals, therefore, proposed accommodating national divisions in the colonies. Indeed, many liberals believed that developing a theory of national rights was the greatest challenge facing English liberalism if its appeal was to move beyond the boundaries of its (culturally homogenous) homeland ...’

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37 id., at 208-209.
38 Kymlicka, 1995, op. cit., n.16 at 54.
39 ibid.
40 id., at 55.
The liberal tradition took a different turn (away from the recognition of group rights) after the Second World War for a number of reasons. The first is simply the decline in interest. This decline was due to decolonization. There was, crudely put, simply no need to address issues of cultural diversity in the British Empire when it was falling apart.\(^{41}\)

The second reason why liberals after the Second World War have failed to address community or group rights related to failure of the League of Nations minority protection scheme. Under this scheme, German speaking minorities were given international recognition in Czechoslovakia and Poland. The Nazi Government in Germany encouraged them to lodge complaints against their governments and when those governments were unwilling or unable to deal with those complaints the Nazis used this as a pretext for aggression. Consequently, politicians and scholars of the day were not pre-disposed to community or group rights in the light of this experience.\(^ {42}\) As a further point related to the Second World War, is that the nationalism involved in the war effort against Germany and its allies were not conducive to pro-minority views.

The third reason offered by Kymlicka as to why community or group rights have received little attention from liberals has been the predominance of American scholars and

\(^{41}\) *ibid.*  
\(^{42}\) *id.*, at 57-58.
writings in this area since the Second World War. The United States has been preoccupied
with racial desegregation in this period and this has had a profound effect on scholarship
concerning liberalism. The issues in the United States have few parallels elsewhere, and
precisely why the United States should be the theoretical anchor for contemporary
liberalism needs to be questioned. According to Kymlicka, the problem in the United
States has been the forced exclusion of African-Americans from mainstream American
institutions; whereas the problem for Aboriginals in Canada has been the forced inclusion
of Aboriginals in Canadian society. As a consequence, Kymlicka argues American
writings have been aimed at assimilation/integration into the majority society. The writings
have not emphasized difference or autonomy.

A fourth reason has been attributable to demographic and economic factors.
Namely, the post-war economic boom drew a number of isolated communities into the
economy, thus fostering increased population movements and thereby undermining the
isolation of ethnic minorities.

Whilst Kymlicka is on sound ground when it comes to describing why post-War
liberals have ignored community or group rights, the inclusion/exclusion dichotomy with
respect to the comparison of Aboriginal groups in Canada and African-Americans needs to
re-considered. It is true that African-Americans have been excluded from mainstream
American institutions. But the experience of Aboriginal communities in Canada and

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43 *id.*, at 58-60. The example offered is Hall J’s concurring judgment which cites and approves of the
Australia has been different. They have been forcibly included in mainstream society by the undercutting of their societies and institutions and forcibly excluded from mainstream society and institutions. For example, the denial of the voting rights to Indians cannot be seen as forced inclusion; nor can the former prohibition against raising funds and retaining lawyers for the pursuit of land claims be seen as forced inclusion. Kymlicka fails to recognize the implications of the fact that inequalities can result either from emphasizing cultural difference or from not emphasizing cultural difference.

CAN GROUP DIFFERENTIATED RIGHTS BE JUSTIFIED?

He is however substantially correct in arguing that liberalism can accommodate group rights.

Critics charge that national cultures can be maintained by choices made by members of a particular national culture in a free state which maintains a strict separation between ethnicity and the state. In other words, critics argue that matters concerning culture or ethnicity are private matters which should not be dealt with by the state. The critics argue that “benign neglect” is the best policy.

However proponents of “benign neglect” are not cognizant of the fact that national minorities are at a disadvantage when the dominant society has the power to undermine national minorities in crucial political and economic decisions. Once this is recognized it

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44 See the Indian Act, RSC, 1927, s.141.
can be clearly seen that group differentiated rights are designed to alleviate the disadvantages, not contribute to them. These rights can take the form of obligations on the dominant national culture (e.g. the Crown’s fiduciary duties to Aboriginal peoples); they can take the form of a priority in the use of certain resources (e.g. hunting and fishing rights); they can take the form of measures which make it more difficult for non-Aboriginals to move into territories which are controlled by Aboriginal peoples, or taking the form of a direct grant of an interest or declaration of an interest (e.g. Aboriginal title).

**LIBERALISM AND TOLERANCE**

But what are we to do with illiberal national minorities? Can liberalism accommodate all forms of cultural diversity?

According to Kymlicka there are two fundamental limitations. First, a liberal ideal of national minority rights will not justify, except under extreme circumstances, any ‘internal restrictions’ which limit the basic civil or political rights each member of the national minority has. Secondly, liberal justice cannot accept any right which enables one group to oppress or exploit another group. External protection can only be justified if, and only if, external protections enhance equality between various national minorities.\(^{45}\) Kymlicka argues that “a liberal view requires *freedom within* the minority group, and *equality between* the minority and majority groups.”\(^{46}\)

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\(^{46}\) *ibid.*
But what if a national minority seeks autonomy in order to restrict its members so that its cultural structure will not disintegrate? For example, how should liberals respond if a national minority were to impose compulsory religious observance on its members? It is important to realize precisely what this question asks, and not to conflate this with other issues. This question is not about whether or not national minority group rights should be granted to national minorities. It raises, rather, the issue of whether liberals from the dominant group or groups should impose their views on national minorities "which do not accept some or all liberal principles?"47

Drawing on the analogy between states in international law and national minorities, Kymlicka argues that:

"... there is relatively little scope for legitimate coercive interference. Relations between majority and minority nations in a multination state should be determined by peaceful negotiation, not force (as with international relations). This means searching for some basis of agreement. The most secure basis would be agreement on fundamental principles. But if the two national groups do not share basic principles, and cannot be persuaded to adopt the other's principles, they will have to rely on some other basis for accommodation, such as a modus vivendi. ... Liberals in the majority group have to learn to live with this, just as they must live with illiberal laws in other countries."48

This does not mean liberals are to do nothing as national minorities act illiberally. On the contrary, liberal reformers inside the national minority should seek to make their views known and liberals outside the national culture should support such liberal reformers within particular national minorities.49 Some liberals view this as unfortunate. However, if one were to accept liberal parameters, I think this pragmatic compromise or

47 id., at 164.
48 id., at 167-168.
49 id., at 168.
the acceptance of such a statement, is needed. In the context of relations between Aboriginal and non-Aboriginal peoples the probability of a statement is high, given the number of Aboriginal groupings in Canada and Australia.

**CRITIQUE**

Though Kymlicka’s theory of liberalism and its defence of group differentiated rights is an important recent contribution to liberal political theory, it is flawed in several respects.

First, Kymlicka misrepresents important historical sources. He explicitly states that acknowledged liberal authorities such as Mill, Dewey, Green and Hobhouse support his argument. The quotations in chapter 10 of *Liberalism, Community and Culture* is from J.S. Mill’s *Utilitarianism, Liberty & Representative Government*. Mill states:

“Among a people without fellow feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in the different sections of the country. An altogether different set of leaders have the confidence of one part of the country and of another. The same books, newspapers, pamphlets, speeches, do not reach them.”

Mill goes on to say:

“For the preceding reasons, it is in general a necessary condition of free institutions that the boundaries of governments should coincide with the main with those of nationalities.”

Still later on Mill says:

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51 *id.*, at 294.
'Experience proves that it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Bretton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilised and cultivated people - to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity of French power - than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman or the Scottish Highlander as members of the British nation.\textsuperscript{52}

We now approach J.S. Mill's conclusion:

'When the nationality which succeeds in overpowering the other is both the most numerous and the most improved; and especially if the subdued nationality is small, and has no hope of reasserting its independence; then, if its is governed with any tolerable justice, and if the members of the more powerful nationality are not made odious by being invested with exclusive privileges, the smaller nationality is reconciled to its position, and becomes amalgamated with the larger.'\textsuperscript{53}

So much for liberal concerns for minority. But it does not stop here. As for T.H. Green, he argues that a citizen's patriotism:

"... will hardly be the passion which it needs to be, unless his judgement of what he owes to the state is quickened by a feeling of which the patria, the fatherland, the seat of one's home, is the natural object and of which the state becomes the object only so far as it is an organisation of a people to whom the individual feels himself bound by ties analogous to those which bind him to his family - ties derived from a common dwelling-place with its associations, from common memories, traditions and customs, and from common ways of feeling and thinking with a common language and still more a common literature embodies. Such an organisation of an homogenous people the modern state in most cases is (the two Austrian states being the most conspicuous exceptions), and such the Roman state emphatically was not."\textsuperscript{54}

Such passages seem to contradict Kymlicka's argument. Indeed, elsewhere Green says: '[i]n some states, from the want of homogeneity of facilities of communication, a representative legislature is scarcely possible."\textsuperscript{55}

\textsuperscript{52} id., at 294-295.
\textsuperscript{53} id., at 296.
\textsuperscript{55} id., at 94, §119.
John Dewey's writing is ambiguous and it could, but not necessarily, support Kymlicka's argument. Of the four liberals cited, it is only Hobhouse who unequivocally supports Kymlicka's position.

In *Multicultural Citizenship* the citation of Barker in support of the argument propounded is unconvincing, the citation of Humboldt and Mazzini is not to the point, and the citation of Hoernlé is simply misleading. As well as stating that "autonomy 'offers a realization of the ideal of an 'area of liberty', or in other words, of a free society for free men'" Hoernlé also advocated "total separation" of racial groups in South Africa.

Kymlicka is in fact aware that "biases and prejudices of another era" pervade liberal writings. He notes, for example, that liberal practice has been historically "gender-coded, race-coded, and class-coded". One of the arguments he makes is that these situations are not cases of defective liberalism, but cases where there has not been enough liberalism, cryptically concluding that '[m]oving closer to liberal principles might well ... involve moving away from some traditional liberal institutions.'

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60 Kymlicka, 1995, *op. cit.*, n.16, at 50.
62 *op. cit.*, n.3 at 86.
63 *id.*, at 96.
Indeed this very point is demonstrated in Kymlicka's work. In a revealing passage about liberalism, he states that:

"[f]or better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand. Aboriginal people have their own understanding of self-government, drawn from their experience, and that is important. But it is also important, politically, to know how non-aboriginal Canadians - Supreme Court Justices, for example - will understand aboriginal rights and relate them to their own experiences and traditions. And as we've seen, on the standard interpretation of liberalism, aboriginal rights are viewed as a matter of discrimination and/or privilege, not of equality. They will always, therefore, be viewed with the kind of suspicion that led liberals like Trudeau to advocate their abolition. Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice."

This revealing passage highlights the central problem with liberalism, viz., its lack of pluralism, and ironically therefore, its illiberalism. In other words, Aboriginal rights under liberalism cannot be drawn or advanced from an Aboriginal perspective, but only within a liberal paradigm. This is the "epistemic violence" of liberalism.

This problem, which results from the liberal legal structure is one which liberalism has not faced. Indeed, the assumption is that a 'right' (the enigmatic and curious progeny of liberal legalism) is neutral. I am not discussing the content of a right, or the meaning of a right, or the 'correct' interpretation of a particular right is. We all know that text "always produces a little more or a little less than the original, theoretical input." 

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64 id., at 154. Emphasis added.
What I am discussing is the limitations of liberalism and liberal “rights” within a liberal legal structure. Under a liberal structure the assumption is that differences in cultural formations can be accommodated in similar forms. Thinking about differences in the form in which human life is experienced is disavowed and thus Aboriginal norms in common law legal systems must replicate the norms of non-Aboriginal society in order to be successful.
CHAPTER 3: LEGAL PLURALISM IN AUSTRALIA AND CANADA OR SELF-LEGITIMATORY RUSE

Legal pluralism is an emerging paradigm that attempts to explain and understand the interaction between state law and various "normative regimes". It also attempts to explain interaction within various "normative regimes."

As a broad generalization, the literature on legal pluralism has had three periods or phases. In the first phase, legal pluralism was used as an analytical tool to describe the interaction of various normative orders (including the law of the state) in colonial and post-colonial contexts. In the second phase, legal pluralism was used to explain normative heterogeneity in various states of advanced/late capitalism.1 Both the first and the second phase have examined relationship and interaction of infrastate and state legal orders. The third phase, in which legal pluralism has been used as a tool for analysis, has been described as "the period of postmodern legal plurality." This era refers to the co-existence of infrastate, state, and international legal orders within the territorial containers of the state.2

In this chapter I will examine a special category that straddles the first two phases of the legal pluralism debate, viz., the interaction and conflict of Aboriginal and non-Aboriginal legal orders in Canada and Australia. It is submitted that perspectives drawn from legal pluralism are helpful because state legal systems attempt to accommodate, or

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1 Sally Engle Merry, "Legal Pluralism" (1988) 22(5) Law & Society Review 869 at 872-874.
"recognize" - and I use that word cautiously - normative orders which are distinct to various Aboriginal communities. That is, the formal legal system of the state is composed from distinct sources which do not share any commonality.

**WHAT IS LEGAL PLURALISM?**

At one level, legal pluralism "refers to the situation in which two or more laws interact." However, this is not what most legal pluralists have in mind when they use the term legal pluralism.

H.W. Arthurs, has noted the objection that "the very idea of legal pluralism is a contradiction in terms." How can there be law which does not emanate from the state? As Arthurs argues, this question makes "what-ever rules found elsewhere ... [to] be given some other name - customs, conventions or understandings, for example - to avoid confusion with real 'law'." Thus, the very concept of legal pluralism is attacked with a stipulative definition.

But the problem with accepting this stipulative definition is that the vast majority of civil and criminal disputes are not resolved with the "official law" of the state. This, as

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5 *ibid.*
Marc Galanter suggests places "limits on the desirability of conforming to outcomes of authoritative rules." His chief contention is that just as:

"... health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forms sponsored by the state but the primarily institutional locations of their activity -- home, neighborhood, workplace, business deal and so on ... "

Galanter contends that law exists "in a variety of institutional settings - in universities, sports leagues, housing developments, hospitals, etc." Such laws are "concrete patterns of social ordering." He takes particular trouble in contrasting this to legal centralism (the notion or "ideology" that law emanates from the state alone). His argument is that the "legal centralist disdain of these lesser orderings is matched by the view that they have been so attenuated by the growth of the state and/or the development of capitalism that their presence is vestigial or confined to backwaters." Further, he argues that legal scholarship has abetted "the pretensions" of legal centralism's hierarchic control over other normative orderings and that whilst "indigenous law" (law which emanates in sources other than the state) may not reflect "harmonious egalitarianism" the study of "indigenous law" in the "various institutional" settings has a vital role to play in understanding how the official legal system works. But what makes "concrete patterns of social ordering" legal?

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6 Marc Galanter, "Justice in Many Rooms: Courts Private Ordering and Indigenous Laws" (1981) 19 Journal of Legal Pluralism and Unofficial Law 1. at 4. It should be noted that this article informs Arthurs' conception of legal pluralism.
7 id., at 17.
8 id., at 17-18.
9 id., at 21.
10 id., at 20.
11 id., at 25.
In her influential work on the New York garment industry and the Chagga of Tanzania has Sally Falk Moore argued for an appreciation of "semi-autonomous social fields". Such fields designate "a social locale to which anthropological techniques of inquiry and observation can be applied in urban as well as rural setting."\(^{12}\) The "semi-autonomous social field is defined and its boundaries identified not by its organization (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance with them."\(^{13}\)

What Moore focuses on in her analysis is the extent to which formal strictures of a contract or state law are not followed. Indeed, what she highlights is a situation of illegality or hybridity of normative orders which control human behaviour. In Griffiths' view, Moore's weakness is that she approaches "legal pluralism primarily from the perspective of state law".\(^ {14}\) Thus "the concept of the semi-autonomous social field provides us, for the first time, with an adequate descriptive tool for locating legal pluralism in social structure, but if it is to constitute an adequate basis for a descriptive theory of legal pluralism it will have to complemented with a conception of 'legal' ..."\(^ {15}\)

Leopold Pospisil has also examined what he terms 'legal levels and the multiplicity of legal systems". He argues that traditionally "law has been conceived as the property of

\(^{13}\) *ibid.*  
\(^{15}\) *id.*, at 37.
society as a whole."\textsuperscript{16} Consequently, "a given society was thought to have only one legal system that controlled the behavior of all its member."\textsuperscript{17} Thus it is claimed that societies that did not have an overall political structure did not have law. Secondly, in societies that did have an overall political structure, it was thought that the formal legal apparatus of the state was the exclusive source of normativity. Pospisil argues against this by asserting "the existence of legal systems in any organized group and their subgroups within the state."\textsuperscript{18}

In his view "every functioning subgroup of a society has its own legal system which is necessarily different in some respects from those of other groups".\textsuperscript{19}

"This multiplicity of legal systems, whose legal provisions necessarily differ from one another, sometimes even to the point of contradiction, reflects precisely the pattern of the subgroups of the society -- what I have terms "societal structures"... Thus, according to the inclusiveness and types of the pertinent groups, legal systems can be viewed as belonging to different legal levels that are superimposed one upon the other, the system of a more inclusive group being applied to members of all its constituent subgroups. As a consequence an individual is usually exposed to several legal systems simultaneously -- to be exact, to as many systems as there are subgroups of which he [sic] is a member."\textsuperscript{20}

Griffiths argues that Pospisil is "implicitly dominated by the whole-society perspective."\textsuperscript{21} Whilst the legal order is characterized as strong by Griffiths, the problem with Pospilil's theory is that "it is simply that the conception is far too limited and idealized to do justice to social reality."\textsuperscript{22} The other criticism leveled at Pospisil is that the

\textsuperscript{17} ibid.
\textsuperscript{18} id., at 112.
\textsuperscript{19} id., at 107. Citing his earlier work \textit{Kapauku Papuans and Their Law} (New Haven: Yale University Department of Anthropology, 1958) at 272.
\textsuperscript{20} id., at 125.
\textsuperscript{21} Griffiths, \textit{op. cit.}, n.14 at 17.
\textsuperscript{22} ibid.
notion of ‘legal levels’ is far too inaccurate a tool for including groups - especially those groups or subgroups which are not part of the “overall hierarchical arrangement”.  

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John Griffiths has suggested that two forms of legal pluralism are to be found in scholarly writings: weak legal pluralism and strong legal pluralism. With weak legal pluralism being a legal system which:

“... is ‘pluralistic’ when the sovereign (implicitly) commands (or the grundnorm validates, and so on) different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds.”

This version of legal pluralism has a long history and Griffiths is at pains to contrast weak legal pluralism (which is ‘but one of the forms in which the ideology of legal centralism can manifest itself’25) with strong legal pluralism. The latter is “a descriptive theory of legal pluralism” which:

“... deals with the fact that within any given field, law of various provenance may be operative. ...

Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. ‘Legal pluralism’ refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping ‘semi-autonomous social fields’, which, it may be added, is in practice a dynamic condition.

A situation of legal pluralism - the omnipresent, normal situation in human society - is one in which law and legal institutions are not all subsumable within ‘one’ system but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.”26

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23 id., at 17-18.
24 id. at 5.
As can be seen from this brief survey of some the major legal pluralist literature, there is no agreed understanding of legal pluralism. All, however, are agreed that:

(i) legal pluralists postulate that there are numerous legal orders operating in every society;
(ii) each of these orders interact in complex ways with the state legal order;
(iii) that there is a constant interaction between these orders;
(iv) and to understand how state law operates a knowledge of these other orders is important.

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A number issues are raised by the preceding discussion of legal pluralism. First, as a matter of description, how are Aboriginal norms accommodated within the common law normative order? Is it a case of weak or strong legal pluralism?

Secondly, how can legal pluralism, given that it is descriptive, be helpful in providing prescriptive measures? In order to answer this question though, we must first be sure that legal pluralism can provide a coherent description. The very coherence of the legal pluralist project must first be defended. Once this defence has been made, it possible to advocate prescriptive measures. But it should be noted that this leap from description to prescription is a political act. I say this, as it is important to acknowledge the full implications raised by the question I have posed.

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LEGAL PLURALISM AND ABORIGINAL NORMS

At one level cases like *Mabo [No. 2]* and *Delgamuukw*, legislation like the *Native Title Act* 1993 (Cth); and policy documents which argue for the implementation for self-government like the Penner Committee Report manifest a certain degree of pluralism. They are attempts by the state or its agencies to accommodate Aboriginal norms in some way. But all can be considered to be “weak” legal pluralism. To quote Thomas Hobbes:

> ‘If a Soveraign of one Common-wealth, subdue a People that have lived under other written Lawes, and afterwards govern them by the same Lawes, by which they were governed before; yet those Lawes are the Civill Lawes of the Victor, and not of the Vanquished Common-wealth. For the Legislator is he, not by whose authority the Lawes were first made, but whose authority they now continue to be Lawes. ...’

All four objects of this study fit within this Hobbesian dictum. In the instance of self-government, the conventional and dominant view in Canada prior to the commencement of s.35(1) of the *Constitution Act, 1982* was either that it has been extinguished or that it is delegated from some relevant “higher” authority in Canada (i.e. the Crown in right of a province or the Crown in right of Canada). This position on self-government in Canada has changed through intense political activity and these changes are interpreted in chapters 4 and 5. The changes have significant implications for legal pluralism in the Canadian and possibly the Australian space.

In the instance of Aboriginal land title in Australia and Canada, it is a case of “the Victor” authorizing such rights - as is the *Native Title Act* 1993 (Cth). It should be

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remembered that this recognition is and was always subject to the process of colonial construction.

Given this situation, Klug's rather bleak assessment that either "indigenous land rights have been completely denied by formal legal systems or their content has been mystified by a process of colonial construction" appears accurate. But notwithstanding the process of colonial construction, is a strong legal pluralism possible? And if so, is it possible to provide prescriptive measures?

It my submission that a strong legal pluralism is not possible. But the reasons for this claim lie in the way in which the legal pluralism debate is structured.

A DEFENCE OF LEGAL PLURALISM

The arguments, assertions, claims, and submissions of legal pluralists have not gone unchallenged (even by those who are sympathetic to the legal pluralist project). Tamanaha has made a powerful critique of legal pluralism as a scholarly genre. His first criticism is that the persistent claim made by legal pluralists that law exists in non-state legal orders runs the danger of creating a "generous view of what law is" thereby sliding to the conclusion that all forms of social control are law." Even if we grant the fact that

normative orderings play a significant role in the behaviour of social groups, "normative ordering is, well, normative ordering; social control is social control."  

Tamanaha contends that to describe legal centralism as "ideology" is "rhetorical stone-throwing" and more importantly claims to factualness have to be placed under careful scrutiny given the current epistemological uncertainties. The legal centralist definition of law is a shared convention which scholars are free to discard if a suitable alternative is found. Law is, after all, a social construct.  

Moreover, the fact some social science researchers of law have adopted a legal centralist conception does not mean they are held under its tyrannical sway. Rather they seek to utilize a shared convention that provides adequate results for the questions posed.

These arguments put forward by Tamanaha take the form of a stipulative definition. Stipulative definitions "have long masqueraded as incontrovertible description in the age-old quest of competing paradigms to externalize the burden of the qualifying adjective." This form of argument is consistent with accommodation and denial of inconvenient data. It merely underscores the importance of definitions in legal scholarship. As such the criticisms put forward by Tamanaha do not provide a sustained criticism of the legal pluralist project.

31 id., at 199.
32 id., at 195.
33 Roderick A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" (Faculty of Law, McGill University, 1995) [unpublished] at 1, 5-6.
The other criticisms of legal pluralism are related. First, it is claimed that the terms of legal pluralism replicate legal centralism. And secondly, where the terms of legal centralism are not replicated, the problem of what law is bedevils the legal pluralist project.

According to Tamanaha the replication of legal centralist notions is apparent as legal pluralists locate "the criteria for law by extracting or emulating those elements which appear to be essential to state law" minus all the "trappings of the state." 34 Commonly this is done by analyzing norms of a particular semi-autonomous social field(s) (i.e. the institutional aspect of norm generation and maintenance) and examining human behaviour in the context of these norms. Hence, "the state law model inescapably provides the kernel of the concept of non-state 'law'" 35

The other side to this criticism is that if state law does not provide the kernel for comparison then legal pluralists are stuck with the problem of how to delimit law. Nowhere is this more apparent than in legal discourse dealing with Aboriginal rights. On closer inspection however, this is not a critique against legal pluralism - but a critique against a particular conception of legal pluralism. 36 This criticism "confuses the postulation of a genus with the assumption of a uniform phenomenon within the genus." 37 It assumes

34 Tamanaha, op. cit., n.30 at 201. Original Emphasis.
35 ibid.
36 Macdonald, op. cit., n.33 at 6.
37 ibid.
that state law or non-state law must provide the fundaments by which understanding can be acquired.\textsuperscript{38}

A third criticism leveled at legal pluralism is that it fails to deal with complexity and inter-connectedness of reality. As Fitzpatrick has put it:

"So, to take one of Galanter’s titles, the search is for ‘justice in many rooms’ ... in many mansions (John xiv, 2). But in Noddy terms, we have to ask where is the house? What the rooms are, what they do must be affected by the total structure and operation of the house in which they are located."\textsuperscript{39}

Thus whilst legal pluralism provides a description of various fields, it fails to provide the tools required for “some overarching explanation.”\textsuperscript{40}

This criticism of legal pluralism is only valid to the extent that its underlying assumption convey the requirement for a totality and the inter-connectedness of normative ordering. Whilst it is useful for legal pluralism to provide mechanisms (note the plural) of coupling normative heterogeneity, it need not and should not be required to provide a mechanism of coupling or inter-connecting normative heterogeneity.\textsuperscript{41} Pluralism will take many forms, and because of this it may be difficult to see due to the multiplicity of specific arrangements.

\textsuperscript{38} \textit{ibid.}
\textsuperscript{39} Peter Fitzpatrick, “Marxism and Legal Pluralism” (1983) 1(2) \textit{Australian Journal of Law & Society} 45 at 47.
\textsuperscript{40} \textit{id.}, at 49.
\textsuperscript{41} Macdonald, \textit{op. cit.}, n.33 at 6-7.
LEGAL PLURALISM IN THIS THESIS

Having made this defence of legal pluralism, it should note that I believe it is possible to construct a legal pluralism which is descriptive. I also believe it is possible to re-configure legal pluralism to provide prescriptive measures. But I leave this for chapter 5. This, as I have already noted, is a political argument.

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Thus it appears that social scientific legal pluralism provides us with a différend - a situation when “the ‘regulation’ of the conflict that opposes is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.”\(^{42}\)

I say this because in liberal ideology we have Aboriginal norms having to be expressed in non-Aboriginal forms. Under social scientific legal pluralism, it seems that only “weak” legal pluralism is only possible (if one were to accept Tamanaha’s arguments). How did this situation come about? In the next chapter I propose an examination of the concept of space and its implications on the law relating to Aboriginal peoples.

CHAPTER 4: THE MERGER OF SOVEREIGN, NATIONAL, ECONOMIC AND JURIDICAL SPACES AND ITS IMPLICATIONS FOR ABORIGINAL INTERESTS

In *The Condition of Postmodernity*\(^1\) David Harvey convincingly argues that there have been different ways in which space and time have been experienced. Taking a cue from this, it should be noted that the creation and merger of sovereign, national, juridical and economic space\(^2\) within the territorial containers of what is now Canada and Australia was crucial to the advent of 'modern' law (with its lack of plurality). It was especially important to the common law with respect to Aboriginal interests (Aboriginal title and self-government) as the merger of these spaces proved disastrous to the indigenous peoples who 'occupied' their particular territories.

**SPACE**

Space is normally assumed to be inert and pliable, something for human beings to annihilate through time. It 'gets treated as a fact of nature, ‘naturalized’ through the assignment of common-sense everyday meanings ... it has direction, area, shape, pattern and volume as key attributes, as well as distance - we typically treat of it as an objective attribute of things which can be measured and thus pinned down.'\(^3\) This, however is a mistake. Space is intricately tied with human agency. In the words of Lefebvre:

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2. The concepts of sovereign, economic, and juridical space are extracted from W. Wesley Pue, 'Revolution by Legal Means' [1994] *Contemporary Law* 1. The notion of a national space arose from a coversation with Professor Pue. I am indebted to Professor Pue for that conversation.
3. *id.*, at 203.
‘Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space has an air of neutrality and indifference with regard to its contents and thus seems to be ‘purely’ formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past processes. ... Space has been shaped and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.”

If we accept that space is thoroughly ‘political’ - in short, if space is a social construct - then nowhere will conflict be more apparent than in the interaction between Aboriginal and non-Aboriginal peoples. Given the different world views these various societies had, it is not difficult to understand that different conceptions of space were held by Aboriginal and non-Aboriginal peoples in Canada and Australia. This conflict has manifested itself in many facets of social life in Canada and Australia, including legal discourse and legal doctrine. A “spatial legal history” is useful in understanding social and legal processes in both countries. To quote Lefebvre again,

‘[A]ny ‘social existence’ aspiring or claiming to be ‘real’, but failing to produce its own space, would be a strange entity, a very peculiar kind of abstraction unable to escape from the ideological or even the ‘cultural’ realm. It would fall to the level of folklore and sooner or later disappear altogether, thereby immediately losing its identity, its denomination and its feeble degree of reality.”

I shall now turn to different notions of space which animate this chapter.

(i) Sovereign Space

The term sovereign space in this chapter encompasses two notions. Firstly it describes ‘the demand for nominal fealty of residents” to a particular sovereign. In Australia and Canada this European sovereign was the Imperial Crown.

4 Henri Lefebvre, “Reflections on the politics of space” (1979) 8(2) Antipode 30 at 31.
6 Pue, op. cit., n.2 at 13.
Secondly, sovereign space includes acts done in the name of the Crown which turn "space into place ...".7 Government (imperial or otherwise) is only possible in space which is known to the government. This "known space" in which events could unfold had to be manufactured and was primarily achieved by the acts of exploration and naming. Thus in Australia,

"In the seventy years or so after the First Fleet's arrival, the Australian coastline was mapped - even discovered, since it was not until Flinders circumnavigated Australia in 1801-2 that it was established as a discrete and single land mass; the Australian interior was explored, its map-made emptiness written over, criss-crossed with explorer's tracks, gradually inhabited with a network of names; the Australian coastal strip, especially between the Great Divide and the sea, was progressively furrowed and blazed with boundaries, its estuaries and riverine flats pegged out for towns. The discoverers, explorers and settlers - and they were often one and the same person - were making spatial history. They were choosing directions, applying names, imagining goals, inhabiting the country."8

But this did not only apply in Australia - it was a common phenomenon across the colonies. For example, Ireland changed dramatically through a variety of settling practices and its incorporation by the Act of Union. Thereafter the Ordnance Survey of 1824 was ordered. Its goals were to anglicize the names or select Irish names suitable to English ears, and redraw land boundaries so as to permit property valuations. The naming process is important as "the relationship between the original culture and the soil is textually unpicked and a new ownership asserted."9 In Egypt "the French expedition was accompanied by a whole team of scientists whose job it was to survey Egypt as it had never been surveyed before - the result was the gigantic Description [de l'Egypte] ...".10

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8 id., at xx-xxi.
9 Mary Hamer, "Putting Ireland on the Map" (1989) 3(2) Textual Practice 184 at 185.
Canada is no stranger to this. George Mercer Dawson’s report on western Canada serves an example. It details, among other things, the climatic and physical features, the potential of lands for agriculture, whether or not certain areas are bearing coal, and a list of collected plants.

This was usually done as a first step in transforming otherwise "empty" sovereign space into an economic space. Dawson’s report was undertaken “for the purpose of determining to what extent it offered advantages for the passage of the lines of the Canadian Pacific Railway.”

Eleven years later the Canadian Pacific Railway in one of its publications stated at the very first page:

"Concerning the Province of British Columbia, which the Canadian Pacific Railway so suddenly transformed into an easily accessible and profitable field for commercial enterprise. The majority of people have only very indistinct ideas. The object of this pamphlet is to impart reliable information of the country, its present conditions and capabilities, and the important position it now holds and in the future will occupy, in its relations with the other provinces of the Dominion, the trade of the Pacific Coast, and the commerce of the world."

What is clearly evident is the very conscious attempt to bring British Columbia into awareness so that events could occur within this sovereign space. In this case the events which were desired were of a commercial nature.

(ii) National Space


12 British Columbia - The Pacific Province of the Dominion of Canada, Its Position, Resources and Climate - A New Field for Farming, Ranching and Mining along the Canadian Pacific Railway (Montreal: Canadian Pacific Railway, 1892) at 1. Emphasis added.
By ‘national space’ I mean the space created which equates the nation with the state. We are accustomed to think of the ‘nation’ as ‘natural’ and ‘normal’ and this is reflected in current usage of the word. *The Concise Oxford English Dictionary* gives a standard definition of ‘nation’:

> "1. large number of people of mainly common descent, language, history, etc., usually inhabiting a territory bounded by defined limits forming a society under one government.”

The fact to be noted in the above definition is its spatial configuration. This idea of the nation is a recent phenomenon in historical terms. As Hobsbawm has compellingly argued that “[w]e may thus, without entering further into the matter, accept that in its modern and basically political sense the concept *nation* is historically very young.” Indeed, it would appear that the popular and misleading notion of the nation is a nineteenth century invention created in the age of “nation-making”. In contrast, prior to this age, the word nation meant “a people” and did not necessarily link a people to a particular space (territory) or state.

The state actively sought to render the nation coterminous with itself. To quote Colonel Piludski’s words: “It is the state which makes the nation and not the nation the state.” These comments were by no means isolated. To quote J.S. Mill again,

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16 Hobsbawm, *op. cit.*, n.14 at 15-17.

17 Massimo d’Azeglio has made a similar statement with respect to Italy - “We have made Italy, now we have to make Italians.” Hobsbawm, *op. cit.*, n.14 at 44-45.
Nobody can suppose that it is not more beneficial for a Breton or a Basque of French Navarre to be ... a member of the French nationality, admitted on equal terms to all the privileges of French citizenship ... than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same applies to the Welshman or the Scottish highlander as members of the British nation.”

The state ruled (as the ultimate authority) over a particular territorial container which had a ‘people’. Its ever more frequent interventions manifested in the form of state agencies and institutions as the postal system, the railway system (where it was state owned), the military, the census, the compulsory education system, the registrar of births, deaths and marriages, the police, the courts, the taxman. These developments ensured that “government and subject or citizen were inevitably linked by daily bonds, as never before.” Furthermore, ‘the nineteenth-century revolutions in transport and communications typified by the railway and the telegraph tightened and routinized the links between central authority and its remotest outposts.”

In summation, ‘territory is national; space is re-formed as a series of territories, it is cut up into segments of different sizes and parcelled out internally as property according not to an economic but a political logic. Territory not only is, in the sense of belonging to the national, it constitutes it.”

(iii) Economic Space

19 id., at 80-81.
20 ibid.
Within this geo-political space an economic space is also constructed. That is, the
"state creates a space within which a base for production, exchange, and distribution is
established, from which external trading and investment activities can be launched. Thus
the nation becomes the internal market in which citizens and corporations exchange
commodities as free and equal individuals, politically subject to the same state." 22

But to say this is not enough. It is important to emphasize the functionality of the
state to capitalism because it is within this space that:

"... the modern nation appears as a product of the State, since its constitutive elements
(economic unity, territory, tradition) are modified through the State's direct activity in
the material organization of space and time. The modern nation further tends to
coincide with the State, since it is actually incorporated by the State and acquires flesh
and blood in the state apparatuses: it becomes the anchorage of state power in society
and maps out its contours. The capitalist State is functional to the nation." 23

Nowhere was this more apparent than in the colonies after the publication of
Edward Gibbon Wakefield's *The Art of Colonization*. 24 Garret has stated that prior to the
publication of *The Art of Colonization,*

'[c]olonial questions, involving serious problems in statesmanship and political
economy, had hitherto been treated in the roughest fashion. For most people the
Colonial question was the Convict question, or at most a contribution to the more urgent
problem of how to rid the mother country of idle and useless incumbrances." 25

Garret summarized Wakefield principles. They were:

'I. That a payment in money of _ per acre be required for all future grants of land, with
exception.
II. That all land now granted, and to be granted, throughout the colony, be declared
liable to a tax of _ per cent upon the actual rent.
III. That the proceeds of the tax upon rent, and of sales, form an *Emigration Fund,* to be
employed in the conveyance of British labourers to the Colony free of cost.

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22 id., at 272.
24 This is described as 'influential' by Tina Loo. See Tina Loo, *Making Law, Order, and Authority in
British Columbia,* (Toronto: University of Toronto Press, 1994) at 38-40.
25 Richard Garrett, *Edward Gibbon Wakefield: the Colonization of South Australia and New Zealand*
(London: T. Fisher Unwin, 1898) at 70.
IV. That those to whom the administration of the fund shall be entrusted be empowered to raise money on that security of parish and county rates in England.

V. That the supply of labourers be as nearly as possible proportioned to the demand for labour at each settlement; so that the capitalists shall never suffer from an urgent want of labourers, and that the labourers shall never want well-paid employment.

VI. That in the selection of emigrants an absolute preference be given to young persons; and that no excess of males be conveyed to the Colony free of cost.

VII. That colonists providing a passage for emigrant labourers, being young persons and equal number of both sexes, be entitled for a payment in money from the Emigration Fund equal to the actual contract price of a passage for so many labouring persons.

VIII. That grants be absolute in fee, without any condition whatsoever, and obtainable by deputy.

IX. That any surplus of the proceeds of the tax upon rent and of sales, over what is required for emigration, be employed in relief of other taxes, and for the general purposes of colonial government."

26

What is interesting here is the very conscious attempt to create a new society in a new space. Its very spatiality underscores its somewhat utopian character.

After a sovereign space has been created (in the sense I have used in this paper) one has to create a national space (which is composed of emigrants and colonists of both sexes from the mother country) and economic space (the transplantation of the capitalist mode of production with its accompanying class relations). This is all to governed in a juridical space, preferably a single juridical space, which assists in constituting these other spaces.

(iv) Juridical Space

It is at this point that the role of law and space interact. As Johnston says:

"as space is segmented into territories with insides separated and protected from outsiders, there remains the problem of how to unify or homogenize the interior, especially given that territorial boundaries may have become fixed and largely irreversible, except by extraordinary resort to violence (including war), and thus include diverse national elements. This the state does through national law and sovereignty including the organization and location of state apparatuses, for example the expansion

26 id., at 62-63.
of the capital city, the distribution of powers to localities, and the individuation of subjects."

But this law was a very specific type of law, namely, the law of the state or its positively created regions, provinces, localities or component units. This was an active project which had origins with Sir Edward Coke in the early seventeenth century. In Coke's day "the common law was only one among several rival sources of legal knowledge." Coke is important because he precedes such notable figures as Dicey and Blackstone - both of whom made extensive claims about the nature of law. Coke not only opposed external threats to the common law (i.e. civil law) but also internal threats (i.e. the 'chaos' of custom) which had provided the basis for the common law. Customs, for Coke, could only become law upon recognition by the judges of England and not by the acceptance of a particular community.

In the nineteenth century Coke's claims would resonate strongly with analytical positivism of the day. Law was the law of state or those customs as evidenced by judgments of English judges. This positivism has as its underpinning that notion of 'knowledge-as-regulation'. Its very nature seeks the triumph of order over chaos with order being "regularity, logically or empirically established through systematic knowledge." Thus, by virtue of a stipulative definition, other normative orders are said to be something else - customs, conventions, understandings - as H.W. Arthurs has put it.

27 Johnston, op. cit., n.21, at 276.
29 id., at 75-76.
Consequently, 'law properly so called ... is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.'\(^{31}\) Moreover, law properly so called is something which only the Occident has experienced in the nineteenth and twentieth centuries.\(^{32}\)

This development of a single juridical space is extremely important as it gives the capacity to the state to determine the abnormal and normal activities. As Santos as put it ‘[t]hese striking capabilities converted the state into the natural unit - homogenous spatiality and homogenous temporality - of social change and social intelligibility. This naturalization of the state entailed the naturalization of modern law as state law.’\(^{33}\)

**NEED THE FOUR SPACES COINCIDE?**

It should be stressed that the four spaces I am outlining are inter-related and not isomorphic. They can be constructed and conceived simultaneously. On the other hand, they may not be. For example, the Hudson's Bay Company commanded sovereign space and economic space without the national or juridical space in vast parts of Canada.

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\(^{31}\) John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (London: John Murray, 1885) at 220.


\(^{33}\) Santos, *op. cit.*, n.30, at 95.
The modern state however, is characterized by the act of creating and the merging of the four spaces.\(^{34}\) I also argue that the merger of the sovereign, national, economic and juridical spaces is responsible for Aboriginal dispossession. But what of precedent to the contrary - law which recognizes Aboriginal title to land?

Aboriginal land title in the common law world originates in colonial practice in New England. This was later to find expression in the *Royal Proclamation of 1763* and still later in 'the Marshall trilogy.' These three decisions are: *Johnson v M'Intosh* (1823) 8 Wheat 543, *The Cherokee Nation v The State of Georgia* (1831) 5 Peters 1, and *Worcester v Georgia* (1831) 6 Peters 515.

Just as these treaties reflect particular spatial arrangements, the Marshall decisions reflect the particular spatial arrangements of the time. I do not suggest that they were a product of space or were 'caused by' space\(^{35}\), but merely that the spatial configuration which existed at the time these judgments were rendered did not exist towards the end of the nineteenth century and onward. It was this modification that proved disastrous to Aboriginal interests.

In *Johnson v M'Intosh* the plaintiffs, Thomas Johnson and others had purchased land from the Piankeshaw Indians in 1775. The land in question was part of the territory under the *Royal Proclamation of 1763*. The Piankeshaw Indians then surrendered their

\(^{34}\text{Johnston, op. cit., n.21, at 272; Lefebvre, op. cit., n.5, at 280; Hobsbawm, op. cit., n.14 at 80.}\)

land and in 1818 M'Intosh purchased some of the same land from the government which Johnson had purchased from the Piankeshaw Indians. When the claimants under Johnson tried to have M'Intosh removed from the land in question they failed. The United States Supreme Court held that the interest of the Indians could only be transferred to the crown (or its successor, the United States government). Given the terms of the *Royal Proclamation of 1763* this is not surprising. But Marshall CJ went much further. He not only held that the doctrine of discovery gave the European States formal sovereignty over the land *vis-à-vis* other European states. He also held that what survived the claim to sovereignty was the traditional Indian right of occupancy which was based on traditional Indian occupation. This right was only alienable to the crown (or its successors).

This conclusion rests on social understandings of elite Americans including their conceptions of space. This can be seen from the text of the judgment itself. At 588 sovereign space is discussed by Marshall CJ:

"The British Government, which was then our government, and whose rights have passed to the United States, asserted a title to all lands occupied by Indians within the chartered limits of the British colonies. It asserted a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave them."

But though the Indians were in the same sovereign space, they were not part of the national space\(^{36}\) (as they were ‘fierce and uncivilized savages’) or economic space\(^{37}\) (their mode of subsistence differed). At 590 Marshall CJ said:

\(^{36}\) In *The Cherokee Nation v The State of Georgia* (1831) 5 Peters 1 at 17 Marshall CJ described Aboriginal peoples as “domestic dependent nations” though “Indian territory is admitted to compose part of the United States.” In *Worcester v Georgia* (1831) 6 Peters 515 at 539 Marshall CJ said: “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power ...”
"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness, to govern them as a distinct people was impossible, because they were as brave and high spirited as they were fierce and were ready to repel by arms every attempt on their independence."

The Indians were also not part of the same juridical space - that is, they had different laws derived from different normative structures. At 592-593 Marshall CJ stated (emphasis added):

"Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or in other words, might purchase it, still he could only acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still is part of their territory, and is held under, by a title dependent on their laws. ... The person who purchases lands from Indians, within their territory, incorporates himself within them, ...

Clearly, what we have here are four distinct notions of space which animate the normative structure of the law with respect to Aboriginal, Indian or native title; sovereignty; and self-government.

DENIAL

But how was it that the development of the national, juridical and economic space on top of the pre-existing sovereign space was fatal to Aboriginal title? In order to answer this question it is necessary to examine by whom these spaces were constituted. Once this

37 Interestingly, section 8 of Article 3 of the United States Constitution empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." That is, "the objects to which the power of regulating commerce might be directed, are divided into three distinct classes, foreign nations, the several States, and Indian tribes." See The Cherokee Nation v The State of Georgia at 18. In other words, Congress, at the time of its founding was given the power to regulate different economic activity between three different economic spaces - "foreign nations, the several State, and Indian tribes."
is done it becomes possible to see how law can deny Aboriginal title as the four spaces merge.

If we accept the fact that the modern state was a creation of the nineteenth century, one question that could be asked is how was this space constituted? If we accept Colonel Piludski’s claim that: “It is the state which makes the nation and not the nation the state”38 then we need to examine how the “national identity” was constructed and the impact this had for legal discourse. I shall now attempt to address this issue in the Canadian and Australian contexts.

In the ‘settler’ societies of Canada and Australia one means of creating identity was through race. Race gave:

“specific identity to the nation in both of the nation’s contradictory dimensions of the universal and the particular and, by ‘itself’ staying one and the same. Race gives content to particular nationalism by creating or, in a certain literal sense, embodying the integrity and purity of the nation. This is done predominantly by constituting the nation’s identity in opposition to a racial identity which it is not.”39

Law plays an important part in this phenomena as the ‘nation’s law is one of the key components of a unifying nationalism.”40 Law in this sense is “emptied of any necessary

38 loc. cit., n.16.
40 This form or style of thought has been described as “orientalism” - which, according to Said ‘is a style of thought based on an ontological and epistemological distinction made between ‘the Orient’ and (most of the time) ‘the Occident.’ Thus a very large mass of writers, among them whom are poets, novelists, philosophers, political theorists, economists, and imperial administrators, have accepted the basic distinction between East and West as the starting point for elaborate theories, epics, novels, social descriptions, and political accounts concerning the Orient, its peoples, customs, ‘mind’, destiny, and so on.” See Edward W. Said, Orientalism, (New York: Pantheon, 1978) at 2-3.
40 Fitzpatrick, id., at 115.
traditional content, was responsive to the imperatives of the nation-state, including those
of its self-construction."  

Closely related to this distinction is the ideal of progress or evolution. In the
nineteenth century this manifested itself in Charles Darwin’s theory of evolution. As
Fitzpatrick points out, the ‘link between progression and the individual is mediated in
terms of race.” Darwin’s theory on the evolution of man ‘passed unconsciously from
individual struggle and selection, to group or racial struggle and selection. ... Human
races, to Darwin, formed discrete mental and moral units based on biological difference ....
Darwin also accepted that the races formed a mental and moral hierarchy, from the least to
the most moral and intelligent.” Thus the hierarchy of one race over another ‘was the
outcome of evolutionary struggle between them.” Victory in this epic struggle was
dependent upon intelligence, organization or instinct - and ‘It was the European race that
had gained the day.”

Whilst this may seem tangential to the field of law, “[t]hese stories of the
progression are intimately tied to and even told in terms of the progression of law.”
Maine’s Ancient Law is the case in point. Maine argued:

“... from one terminus of history, from a condition of society in which all the relations of
Persons are summed up in the relations of Family, we seem to have steadily moved
towards a phase of social order in which all these relations arise from the free agreement

41 id., at 117.
42 id., at 96.
44 Fitzpatrick, ibid.
45 ibid.
46 id., at 101.
of individuals. In Western Europe the progress achieved in this direction has been considerable.  

The relations of the family were characterized by the word “status”. And

‘[a]ll the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.”

This thesis has ‘little to do with … scholarship but everything to do with its encapsulation of the myth of the age. Ancient Law was, as it were, written backwards. In an immediate sense, its implicitly addressed a debate on how India was to be governed …’ The consequence of this is that ‘modern law moves definitively and distinctly beyond prior stages which are different to, yet of it. The history of what modern law is not becomes also a history of what it is. This is the outcome of mythic dynamics that both propel the linear progression of law, and of society, and provide the standards whereby some are judged as having progressed less than others.” But law is not only manufactured by the above dynamics - it is also a tool to ensure the above dynamics.

Nowhere was this more apparent than in the colonies. Notwithstanding many similarities between European law and the law in the colonies - especially English common law and the common law in the colonies - there was a large difference. A legal system with self-determining subjects, as in Europe, is very different from a colonial legal regime which

48 id., at 164-165.
49 Fitzpatrick, op. cit., n.39 at 104.
50 id., at 107.
51 ibid.
did not have self-determining subjects. Law in the colonies did not have ‘the support of the detailed and tentacular non-legal controls that operate[d] in the West and which go to create a self-determining, self-regulating subject.’\textsuperscript{52} Law’s ideal self-determining subject was not a ‘native’ and ‘[b]ecause of their higher position in the scale of progression, the colonists could know and represent the natives better than they could themselves.’\textsuperscript{53}

In the classical period the ‘sovereign subject was a primal being of such complete self-sufficiency that no explicit note had to be taken of it.’\textsuperscript{54} But this was to change. In Foucault’s words:

‘In Classical thought, the personage for whom the representation exists, and who represents himself within it, recognizing himself therein as an image of reflection, he who ties together all the interlacing threads of the ‘representation in the form of a picture table’ - he is never to be found in the picture table himself. Before the end of the eighteenth century, man did not exist - and more than the potency of life, the fecundity of labour, or the historical density of language. He is quite a recent creature, which the demiurge of knowledge fabricated with its own hands less than two hundred years ago; but he has grown so old so quickly that it has been only too easy to imagine that he had been waiting thousands of years in the darkness for that moment of illumination in which he would be finally known.’\textsuperscript{55}

But as Foucault notes this is a significant change. As he puts its:

‘When natural history becomes biology, when the analysis of wealth becomes economics, when, above all, reflection upon language becomes philology, and Classical discourse, in which being and representation found their common locus, is eclipsed, then, in the profound upheaval of such an archeological mutation, man appears in his ambiguous position as an object of knowledge and as a subject that knows: enslaved sovereign, observed spectator,...’\textsuperscript{56}

\textsuperscript{52} id., at 111.
\textsuperscript{53} id., at 110.
\textsuperscript{54} Fitzpatrick, \textit{op. cit.}, n.39 at 118.
\textsuperscript{56} id., at 312. Original emphasis.
Thus man becomes an "empirico-transcendental doublet"\(^57\) "whose role as governing subject of action and inquiry is perpetually chased by the compulsion to clarify opaque elements in its desire, perception, judgment by converting itself into an object of inquiry."\(^58\) Man is now the "foundation of all positivities"\(^59\) in this episteme.

But the content of this knowledge is "exterior to himself, and older than his own birth, anticipate him, overhang him with all their solidity, and traverse as though he were merely an object of nature, a face doomed to be erased in the course of history."\(^60\) Man thus becomes finite. But this 'finitude is heralded in the paradoxical form of the endless; rather than the rigour of a limitation, it indicates the monotony of a journey which, though it has no end, is nevertheless not without hope."\(^61\) In other words, one characteristic of this form of knowledge is that it is without limits. But how can the subject (who is subject to finitude) be reconciled with the object of inquiry (who is not subject to finitude)?\(^62\)

The answer to this question lies in examining how the modern subject is constructed. This is intricately associated with the episteme described in *The Order of Things* and with "power." This power is intricately associated with knowledge - it is 'inscribed in a play of power, but it is also always linked to certain coordinates of knowledge which issue from it but, to an equal degree, condition it. This is what the

\(^{57}\) id., at 318.
\(^{59}\) Foucault, *op. cit.*, n.55 at 344.
\(^{60}\) id., at 313.
\(^{61}\) id., at 314.
\(^{62}\) Fitzpatrick, *op. cit.*, n.39 at 119.
apparatus consists in: strategies of relations of forces supporting, and supported by, types of knowledge."\(^{63}\) In other words, "the *episteme* is a specifically *discursive* apparatus".\(^{64}\)

Power in this scheme of things "is not to be taken to be a phenomenon of one individual consolidated and homogenous domination over others, or that of one group or class over others."\(^{65}\) In contrast power must be analyzed as "something which circulates, or rather which functions in the form of a chain."\(^{66}\) The individual does not exist "an elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike as ...".\(^{67}\) On the contrary the individual "is one of the prime effects of power ... and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation."\(^{68}\)

But given that individuals, or for that matter groups or collectivities of individuals are subject to a whole of host of powers (and thus a potential multiplicity of effects) how could there be uniformity? As Foucault puts it:

"It is here that the question of liberalism comes up. It seems to me that at that very moment it became apparent that if one governed too much, one did not govern at all - that one provoked results contrary to those one desired. What was discovered at that time - and this was one of the great discoveries of political thought at the end of the eighteenth century - was the idea of *society*. That is to say, that government not only has to deal with territory, with a domain, and with its subjects, but it also has to deal with a complex and independent reality that has its own laws and mechanisms of reaction, its regulations as well as its possibilities of disturbance. This new reality is society. From the moment that one is to manipulate a society, one cannot consider it completely

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\(^{64}\) *id.*, at 197.

\(^{65}\) *id.*, at 98.

\(^{66}\) *ibid.*

\(^{67}\) *ibid.*

\(^{68}\) *ibid.*
penetrable by police. One must take into account what it is. It becomes necessary to reflect upon it, upon its specific characteristics, its constants and its variable. ..."69

Although the state in Australia and Canada claimed to provide liberty through restraints on government - it boldly proclaims a private realm which provides autonomy - the state must be cognizant of events in that very realm of freedom. This process (or "governmentality" to use Foucault’s word) occurs through techniques “which the person initiates an active self-formation. This self-formation has a long and complicated geneology; it takes place through a variety of ‘operations on [people’s] own bodies, on their own souls, on their own thoughts, on their own conduct.’ These operations characteristically entail a process of self-understanding but one which is mediated by an external authority figure, be he a confessor or psychoanalyst."70 Hence the alleged creation of the nightwatchman state. I say alleged, because there was significant state involvement in the creation and maintenance of the Canadian and Australian economic space.

But it is not only surveillance - or panopticism as Foucault puts it - that is deployed. The “power of the Norm appears through the disciplines.”71 This is introduced and “established as a principle of coercion in teaching with the introduction of standardized education and the establishment of the ecoles normales (teachers’ training colleges); it is established in the effort to organize a national medical profession and a

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70 *id.*, at 12.
71 *id.*, at 196.
hospital system capable of operating general norms of health; it is established in the
standardization of industrial processes and products."\textsuperscript{72}

This very important development:

"... marks that once indicated status, privilege, and affiliation were increasingly replaced
- or at least supplemented - by a whole range of degrees of normality indicating
membership of a homogenous social body, but also playing part in classification,
hierarchization, and the distribution of rank. In a sense, the power of normalization
imposes homogeneity; but it individualizes by making it possible to measure gaps, to
determine levels, to fix specialties, and to render the differences by fitting them one to
another. It is easy to understand how the power of the norm functions within a system of
formal equality, since within a homogeneity that is the rule, the norm introduces as a
useful imperative and as a result of measurement, all the shading of individual
differences."\textsuperscript{73}

The norm may exist by way of positive example - but it can exist by of negative
example. Racial identity constituted through negation is the prime example of the latter. It
becomes possible for non-natives to 'be increasingly self-determining, breaking away from
the constraining bonds of a natural community typified by those who have advanced little
or not at all on the scale of progression."\textsuperscript{74}

Space plays a significant role in this affair. From the beginning of modernity space
and time are being experienced differently and it is a type or genus of rationality. To quote
Foucault again:

'There is an entire series of utopias or projects for governing territory that developed on
the premise that a state is like a large city; the capital is like its main square; the roads
are like its streets. A state will be well organised when a system of policing as tight and
efficient as that of the cities extends over the entire territory. At the outset, the notion of
police applied only to the set of regulations that were to assure the tranquillity of a city,
but at that moment the police become the very type of rationality for the government of


\textsuperscript{73} \textit{Foucault, op. cit.}, n.69 at 196-197.

\textsuperscript{74} \textit{Fitzpatrick, op. cit.}, n.38 at 125.
the whole territory. The model of the city became the matrix for the regulations that apply to a whole state.”

These developments had momentous consequences in the construction and merging of the four spaces I have described. The settlers asserted cultural superiority because they had a single, universal, objective law that had the “potential to do anything” (i.e. one juridical space or at least the attempt to have more homogenous juridical spaces which were ‘rationally’ ordered) across a national space (constituted by self-determining subjects in a state) which enabled them pursue progress through the mechanics of capitalism (economic space) within the British Empire (sovereign space). Law provided a means of legitimization, representation and re-presentation. As Fitzpatrick puts it:

"Curzon, the ultimate imperialist, gave exalted expression to the common view in seeing Britain’s gifts to the colonies as ‘integrity, efficiency and the rule of law’... In the colonial situation, law bound together imperial and resident societies, yet constituted and maintained them as different and strange. This entailed massive violence. Among the perceptive, Kipling saw that the violence of the colonist was an essential basis of evolution and colonial progress ... Not without atrocious deviations, especially in the early stages of colonisation, the application of such violence was justified, contained and calibrated in the rule of law. Such legal violence in the constitution of native society necessarily operated in myriad dimensions. The ‘subsistence’ community was created to provide labour or peasant labour, at less than its reproduction cost to capitalism. The tribe and chiefs were created to secure colonial government and to secure ethnic division in the classic strategy of divide and rule. To create these entities the colonist made reserves and other enforced settlements; restricted mobility beyond tribal areas; required a continuing attachment to that area in indenture, vagrancy and pass laws; confined people to the amount of land deemed adequate for agricultural subsistence or deemed less; prohibited wide ranging hunting and gathering; appropriated so-called waste and vacant land; and, in varying forms, erected systems of indirect rule. Yet this creation of native society was to be but a recognition. Such society was now known properly and fully, both in itself and in its place in the certain order of the World and History.""

It should also be noted, in addition to Fitzpatrick’s observations, that dispossession of Aboriginal peoples was often justified in recognizing cultivated or settled land only.

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75 Foucault, op. cit., n.68 at 241.
77 id., at 100-101. Emphasis added.
In any event, the non-European other is constructed in space "there" not 'here'" with a knowledge which consisted in enframing and envisioning ...". In this representation and re-presentation of native society there could no proprietary rights as there was 'no law.'

One consequence of this argument, was that only occupied tracts of land would be recognized. Another consequence of "not having" a single, universal, objective law, was that there could be no property - no mine or thine (to adopt Hobbes' terminology). Thus it became possible for the Judicial Committee of the Privy Council to conclude that Indian possession "could be ascribed to the general provisions made by the royal proclamation" which showed "that tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign." 79

The changes (from prior North American practice and court decisions) in how national, juridical and economic spaces are conceived are shown in the text of Chancellor Boyd's trial decision in St. Catherines Milling Co. v. R. 80 After describing Aboriginal peoples as Her Majesty's "red subjects" 81 (i.e. part of the sovereign space), he had this to say:

"The inevitable problem in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial was and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered..."

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79 St. Catherine’s Milling and Lumber Company v The Queen (1889) 14 App. Cas. 46 at 54.
80 (1885) 10 O.R. 196 at 211. (Ch. D.)
81 id., at 211.
from degrees of dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship.\textsuperscript{82}

Hence not only did the Indians not have law (juridical space), settlers had to encouraged (economic space), and Indians had restrained and retrained into the national space.

This shift entailed a significant change in discursive practice. Legal discourse had shifted from what can be broadly described as natural law theory to analytical positivism\textsuperscript{83} and colonial expansion re-defined economic and national space. The role of the state in this re-definition cannot be over-estimated. But the changes witnessed in the nineteenth century can also be explained as “a function of changes in the practices of government” \textsuperscript{84} rather than a change in the essence of the state.

The spatial configuration latent in Chancellor Boyd’s decision is not only an historical fact. It is still operates today. In \textit{Coe v The Commonwealth of Australia}\textsuperscript{85} - a post \textit{Mabo [No. 2]} case - Mason CJ had this to say:

\begin{quote}
“\textit{Mabo [No. 2]} is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal peoples a limited kind of sovereignty embraced in the notion that they are “a domestic dependent nation” entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to \textit{any rights and interests other than those created}
\end{quote}

\textsuperscript{82} \textit{ibid.}
\textsuperscript{85} (1993) 68 ALJR 115 (H.C. of A).
or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.”

It is in the context of this spatial configuration that the *Native Title Act 1993 (Cth)* was passed. Although the *Native Title Act 1993 (Cth)* assumes the sovereign space of the Crown, its other spatial premises are noted in the preamble. In the case of juridical space the preamble states:

“...The High Court has:
(a) ...
(b) held that the common law of Australia recognises a form of native title that reflects the entitlements of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands, ...

Clearly, the assumption is that there is one law which is operative, though it is the product of two different legal orders.

It also assumes that Aboriginal peoples are now part of the national space of Australia, though it recognizes a different history:

The people of Australia intend:
(a) ...
(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the *Australian nation* to which their history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

But control and certainty of economic space was and is the *raison d'etre* of the *Native Title Act 1993 (Cth)*. In the very words of the preamble:

“In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.”

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86 id., at 115. See also *Walker v The State of New South Wales* (1994) 182 CLR 45 at 48-49 per Mason C.J. (H.C. of A).
At first glance (though in my opinion the situation has altered significantly since the Supreme Court of Canada's decision in \textit{R v Sparrow} [1990] 1 SCR 1075), the situation in Canada appears similar. It can be discerned from \textit{Delgamuukw}.\footnote{At 285} MaEachern CJ said:

"Aboriginal persons and commentators often mention the fact that the Indians of this province were never conquered by force of arms, nor have they entered into treaties with the Crown. Unfair as it may seem to Indians or others on philosophical grounds, these are not relevant considerations. The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all the lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or a war could ever be. The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws. In my judgment, the foregoing propositions are absolute."

Thus Aboriginal persons are within the sovereign, national and juridical space of Canada. And according to MacEachern CJ, they are also in the economic space as "[m]any aboriginals are directly engaged in the wage economy, and a few - not enough, but some - participate as entrepreneurs."

The Court of Appeal in British Columbia operated on the same premises with respect to "self-government." Lambert JA (the most favourable from the perspective of indigenous peoples) for example:

"(a) The plaintiffs claimed 'jurisdiction'. They conceded that sovereignty over the whole of British Columbia rested with the Crown. They conceded that the allodial or root title to the land in British Columbia rested also with the Crown, but they said that it was subject to the burden of the aboriginal title. I think that it is a misconception to think of the claim to 'jurisdiction' as being a claim to sovereignty. It is unfortunate, in my view, that such an equivocal word was used to describe this claim. What they are asking for is surely a right to exercise control over their own land and institutions in that community. In other contexts the claim has been called a claim to a right of self-government and, during the course of argument in this appeal, as a right of self-regulation of themselves and their institutions." (At 715)\footnote{(1991) 79 DLR (4th) 185 at 285.}
After citing passages of the trial decision at pages 437, 437-438, and 449, Lambert JA said:

‘In my opinion, this claim is not about governing the land or the territory or the “wilderness” in the sense that such a form of government would apply to all people when they entered the land. The claim is about the right of self-government and self-regulation of a community of people through their own institutions in order to regulate their own conduct towards each other and their conduct towards others, particularly as related to the existence of their aboriginal title and aboriginal sustenance rights, but also in relation to their social organization. I do not think that this claim can properly relate to regulating the conduct of others towards them, which must be regulated by general common law.” (At 716-717).

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The Penner Committee Report also falls into the same spatial configuration. Consequently, the appeal to historical sources (such as the Royal Proclamation of 1763) is mediated by the merger of four spaces I have outlined. Thus the right to self-government, as a current doctrine in formal state law is a right which is portrayed as extinguished or a right which has to be recognized in some binding instrument (e.g. a provision in the Constitution, a statute etc.).

Law is considered by the Penner Committee Report to mean only the formal law of the Canadian state (both federal and provincial). Aboriginal peoples are part of the same national space with separate laws apply to them (i.e. the Indian Act). So far as economic matters are concerned, (chapter 6 of the Report); its recommendations are that special measures be taken to ensure participation in the national economy of what is now Canada.

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88 To be fair, it did mention the possibility that self-government may be a right contained within s.35(1) of the Constitution Act, 1982: see Penner Committee Report at 44.
But what of the changes in the way space has been conceived? In the next chapter I provide a different point of view. I think this argument can be convincingly made in the light of *R. v Sparrow* [1990] 1 SCR 1075.

It is the beginning of an emerging hybridity in spatial practice and a post-modern approach to law, will further this emerging hybridity in legal practice.
CHAPTER 5: CONCLUSIONS

INTRODUCTION

In this thesis I have argued a number of points. In chapter 2, I summarized liberal arguments for various Aboriginal rights. The crux of the argument is that societal cultures provide a context within which individuals can make meaningful choices concerning the pursuit of the good life. In spite of the criticisms one can level at Kymlicka's arguments - the nature of the argument regarding the place of the individual in a society, the historical amnesia, the limits on whom liberal rights are awarded to - one method underpins the liberal approach viz., rights. This method, to employ the terminology of chapter 4, holds that certain cultural entities are entitled to have certain measures for their benefit within the same overall spatial and temporal matrix of the state.

The effects of thinking in this manner are seen in legal discourse, viz. social scientific legal pluralism. Chapter 3 was a summary of the main tenets of legal pluralism. I have utilized the notion of legal pluralism in order to describe the format in which legal discourse responds to the situation of Aboriginal peoples. In particular, I utilized Griffiths' model of legal pluralism. I explained the current model of handling claims by Aboriginal peoples in terms of weak legal pluralism. I then asked whether a strong legal pluralism was possible with the aim of informing prescriptive measures. I concluded that it was not, but then suggested that this had more to do with how law was conceived and defined. Furthermore, I expressly noted that this was political argument.
In chapter 4 I utilized the concepts of sovereign, national, economic and juridical space to explain changes in the nature of Aboriginal rights over the nineteenth and twentieth century. My argument in chapter 4 was that the merger of sovereign, national, economic and juridical space from four very distinct spaces transformed the nature of Aboriginal rights.

**PLURALISM**

The argument for recognizing the existing pluralism in social life is the concomitant of recognizing pluralism in law. And just as the drive for legal pluralism attracts bellicose responses, the drive for pluralization in wider society attracts a series of bellicose responses. Conventional social pluralism "celebrates diversity within settled contexts of conflicts and collective action" and more often than not "diversity is valued because putative grounds of unity (in a god, a rationality, or a nationality) seem too porous and contestable to sustain a cultural consensus."\(^1\)

The current paradigm of social pluralism sets the contexts within which plurality is appreciated, respected and tolerated; but it also creates criteria within which the reasonableness of new claims for diversification are measured. What I am seeking to do in thesis is highlight how 'the contemporary pluralist imagination, proclaimed as the guardian

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\(^1\) William E. Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995) at xiii.
of diversity and generosity in social relations, remains haunted by the ghost it seeks to exorcise.”

What if the current paradigms of social pluralism contain unreasonable expectations within them? The response to this question has generally been to construct allegedly neutral methods that show “human subjects how to represent perspicuously the objects to be known?” It has not addressed how knowledge and power have engaged and constructed different truths at different historical periods and effects this has had on thinking about various issues, including Aboriginal and non-Aboriginal relations. Thus new drives for diversity are seen as threats to current paradigms.

As Connolly argues, the introduction of new identities or items necessary for the sustenance of an identity out of prior injuries and injustices has a paradoxical element that constitutes the drive for pluralization. Connolly puts it in the following way:

“... the drive to recognition precedes consolidation of the identity to be recognized, and the panic it often induces in the self-confidence of established identities tempts them to judge the vulnerable entry through disabling identifications already sedimented in the old code. Such a bind sets up the new entrant to be repudiated even before ‘it’ becomes crystallized in the institutions of [formal state] law, marriage, work, investment, the military, religion, and education. And this repudiation is often expressed in a language of fairness and normality grounded in misrecognition of the binds involved in the enactment of a new identity out of old injuries. ‘Why should They be treated any differently from Us?’”

This normalizing tendency within popular and legal discourse is apparent and at least implicit, to any casual observer in legal discourse concerning this thesis topic. This,

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2 *id.*, at xii.
3 *id.*, at 6.
4 *id.*, at xv.
of course, is more apparent in the failed attempts at assimilation, but is even apparent in recent judgments, such as the trial decision in Delgamuukw.

The relationship between identity and difference is paradoxical one. Any identity is only "established in relation to a series of differences that have become socially recognized." Without these differences an identity would not exist with distinctiveness. But ingrained in this relationship is another set of tendencies "to congeal established identities into fixed forms, thought and lived as if their structure expressed the true order of things." It is when "these pressures prevail, the maintenance of one identity (or field of identities) involves the conversion of some differences into otherness, into evil, or one of its numerous surrogates."

Power plays a very significant role in the establishment of a field of identity and difference. Power (economic, educational, political etc.) enables certain identities to create a range of differences as other. It is necessary for a powerful identity do so in order to "protect itself from the other that would unravel its self-certainty and capacity for collective mobilization if it [i.e., the other] established its legitimacy." Hence the constellation of others is essential to the powerful identity - yet at the same time a threat to it.

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6 *ibid*.
7 *ibid*.
8 *id.*, at 65.
9 *id.*, at 65-66.
The paradoxical nature of this relationship is that:

"... we cannot dispense with personal and collective identities, but the multiple drives to stamp truth upon those identities function to convert differences into otherness and otherness into scapegoats created and maintained to secure the appearance of a true identity. To possess a true identity is to be false to difference, while to be true to difference is to sacrifice the promise of a true identity."\(^{10}\)

Such issues ultimately highlight the relational and contingent character of identity - the hope being that recognition of such an idea will pluralize pluralism.

**SPACE**

In chapter 4 I argued about the spatially specific origins of Aboriginal legal interests. These interests as originally conceived were not only cognizant of differences in content of normative ordering; but are also cognizant of differences in the forms of normative ordering. This argument was predicated on recognizing "spatial history". The crux of this argument, is that history occurs in space and time and that it is not just a collection of facts chronologically ordered on a "natural" stage. The spatial world is a world which is actively manufactured. In a very important sense, facts come after the event.

Indigenous peoples, particularly from the mid-nineteenth century, were "invisible" not because they were physically invisible; but because they were culturally "invisible." \(^{11}\)

\(^{10}\) *id.*, at 67. Emphasis added.

\(^{11}\) Connolly, *op. cit.*, n.1 at xx.
Hence they more were susceptible to ethnographic discourse which claimed they would “disappear” or be assimilated into the European space.

But where is one to start in the process of spatial re-negotiation I am advocating?

To begin with, the spatial dimensions the colonial encounter and aftermath in Canada and Australia need to be examined. For although indigenous peoples and the Europeans shared the same sensory stimuli - the meanings and historical importance of the appearance of these events were different.

It follows from this, the emerging trend in exploring the colonial encounter between Aboriginal and non-Aboriginal peoples\(^\text{12}\) whilst commendable (given the tendency of historians, particularly in Australia, to dismiss Aboriginal perspectives) is strictly speaking, a continuation and the appropriation and suppression of Aboriginal cultures.

To treat Aboriginal histories (usually a variety of oral and written sources) as strictly comparable to non-Aboriginal histories in a culture-specific discourse know as history “has the effect of suppressing the difference of Aboriginal history - a difference not simply of content but of form.”\(^\text{13}\) Thus to treat Aboriginal peoples as an oppressed group within the dominant societies of Canada and Australia assumes that Aboriginal peoples

\(^{12}\) More often than not, this is usually couched in the opposing dynamics of “white colonial expansion” and “spirited Aboriginal resistance.”

move within the same space which has been culturally constituted according to "social, economic, and, above all, intellectual criteria." The failure to acknowledge the differences in spatial experience drains content from Canadian and Australian legal history as an important aspect of relations between Aboriginal and non-Aboriginal peoples.

In contrast, a spatial (legal) history would not necessarily be a history of dispossession, or an account of how indigenous notions of space have fared in legal discourse. It would not seek to translate or convert their experience into empirical data. Nor would it be a matter of examining the content of the respective spatial practices and experience. On the contrary, a spatial (legal) history would provide the discursive apparatus of law with a tool with which it could recognize the historically constitutive role Aboriginal space played in Euro-Canadian or Euro-Australian law with respect to native title and self-government. Such a (legal) history would not necessarily say a word about indigenous peoples in Canada and Australia, but "by recovering the intentional nature of our grasp on the world, it might evoke their historical [and legal] experience without appropriating" it to non-Aboriginal ends.

Such a view is partially reliant on the relationship between identity and difference - for if Aboriginal identity means anything, it lies "in relation to a series of differences that have become socially recognized." Therefore it is a dialectical relationship which needs a site or space for reflection.

14 *id.*, at 325.
15 *id.*, at 350.
16 Connolly, *op. cit.*, n.5, at 64.
OPENING SPACE

This critique should not be seen as effective because it maintains a binary opposition; but rather because it negotiates the binary division and creates a space for translation. The challenge lies in creating this space without attempting to produce unity.  

This critique of common law legal systems does not treat culture as an empirical object. But rather focuses on cultural difference as a ‘process of the *enunciation* of culture as ‘knowledgable’, authoritative, adequate to the construction of systems of cultural identification.”

The opening up of a space that can accept and regulate the differential structure without attempting to produce a unity is slowly starting to become more apparent in the states of Canada and Australia.

In chapter 4 I suggested the way in which space has been conceived in Canada has altered. This has become most noticeable in the doctrines relating to the extinguishment of Aboriginal rights.

In this chapter, after a description of the doctrines relating to extinguishment I will discuss how this provides some hopeful signs for finding some space for Aboriginal

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18 *id.*, at 34. Original emphasis.
normative structures. This has been achieved using the language of the dominant discourse.

The Supreme Court of Canada’s decision in *R. v Sparrow* provides the relevant starting point. This was the first decision to interpret s.35(1) of the *Constitution Act 1982*. That provision states:

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In *Sparrow* the appellant, a member of the Musqueam Band, was charged under s.61(1) of the *Fisheries Act, RSC 1970, c.F-14* for the offence of fishing with a drift net longer than that permitted by the Band’s food fishing licence. The licence did not permit drift nets longer than 25 fathoms in length. The appellant was caught with a drift net of 45 fathoms in length. The appellant admitted the facts which were said to constitute the offence but defended the charge on the basis he was exercising an Aboriginal right to fish protected by s.35(1) of the *Constitution Act 1982*. The appellant argued that the right which was invoked was inconsistent with the conditions of the Band’s food fishing licence.

The appeal to the Supreme Court of Canada (SCC) essentially phrased the constitutional question as to whether the net length restriction contained in the food fishing licence inconsistent with s.35(1).

\[19\] [1990] 1 SCR 1075. Hereafter *Sparrow*. 
The SCC firstly interpreted s.35(1). It held the word “existing” to mean Aboriginal rights that were in existence when the Constitution Act 1982 came into effect. It did not revive extinguished rights - but referred to rights in actuality.20 Furthermore, the Court held that an existing Aboriginal right cannot be held to incorporate the manner in which it was regulated prior to 1982. It also stated, citing Professor Slattery, that existing Aboriginal rights must be interpreted flexibly to permit evolution over time. The Court emphatically rejected a “frozen rights” approach.21

But the most significant point decided by the Court was with respect to the extinguishment of Aboriginal rights. The Crown maintained that progressive restriction and detailed regulation had the effect of extinguishing Aboriginal rights. Such extinguishment need not be express, but may take place when sovereign authority is exercised in a manner which is inconsistent with the continued existence of the Aboriginal rights.

But the Court held that this argument confused “regulation with extinguishment.” The court reasoned that “the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.”22 The Court adopted Hall J’s view in Calder that the intention to extinguish must be “clear and plain.”23 The onus to prove this was on the Sovereign. The Court held that there was nothing in the Fisheries Act or its

20 id., at 1091.
22 op. cit., n.19, at 1097.
23 id., at 1099.
regulations which demonstrated a clear and plain intention to extinguish an Aboriginal right. It also said that the Crown's historical policy was not only incapable of extinguishing a right, but also incapable of delineating the content and scope of the right. All that the Crown could do was regulate the right so long as it was consistent with s.35(1).

So far as the words 'recognized and affirmed' were concerned, the Court held that the 'approach to be taken with respect to interpreting the meaning of s.35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself."24 Thus, liberal interpretation of s.35(1) was endorsed as this would give "meaningful content."

However, legislation which affects the exercise of aboriginal rights 'will none the less be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s.35(1)."25 Although there was no express constitutional provision which stated this, the Court stated given the constitutional powers of the Constitution Act 1867, the rights contained in the Charter were not absolute. Thus 'federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."26 The Court held that the:

"... first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a

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24 id., at 1106.
25 id., at 1111.
26 ibid.
prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.27

If there has been a prima facie interference:

the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.28

In the event a valid legislative object was found, the:

"analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."29

In the analysis of justification, there:

"... are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."30

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27 ibid.
28 id., at 1113.
29 id., at 1114.
30 id., at 1119.
In the final result, the court dismissed the appeal and the cross-appeal. They also ordered “a retrial which would allow findings of fact according to the tests according to the tests set out”. It also affirmed the BBCA’s order to set aside the conviction.

But what of Australia? Before proceeding any further, it should be noted that there are no constitutional provisions in Australia similar to s.35(1) of the Constitution Act 1982. Thus any comments I make are based on common law principles and statute (which in this specific instance receive there contents from the common law - see ss.10 and 12 of the Native Title Act 1993 (Cth)). Hence in Australia at least, all roads lead to the common law.

At first glance, the test for extinguishment in Australia appears to be similar to Canada. According to Brennan J. “the exercise of power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive.”\(^{31}\) Moreover, Brennan J. also said a “clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title.”\(^{32}\) Thus, general lands legislation does not extinguish native title. A law which reserves from sale land for the purpose of permitting Aboriginal peoples and

\(^{31}\) Mabo [No. 2] at 64. Deane and Gaudron JJ. at 111, 114 stated that “clear and unambiguous words” were necessary to extinguish native title and Toohey J at 195 used the same lanugage as Brennan J.

\(^{32}\) ibid. Footnotes omitted. Brennan J cited Sparrow at 1097 to support this proposition.
their descendants to enjoy native title, or the appointment of trustees to control a reserve where no grant has been made does not extinguish native title.\textsuperscript{33}

However, where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the point of inconsistency.\textsuperscript{34} The same principle applies where the Crown has appropriated land to itself and the appropriation is wholly or partially inconsistent with the continued enjoyment of native title.\textsuperscript{35} Thus if the Crown appropriates land and uses it for a purpose (e.g. roads, schools, railways, hospitals, etc.) native title is extinguished. If the Crown has not so appropriated land or used land, or where the appropriation and use is consistent with the continued existence of native title, then native title survives (e.g. a national park).

The joint judgment of Deane and Gaudron JJ., and the judgment of Toohey J., also agreed on a further point: compensation must ordinarily be given where native title rights are extinguished.\textsuperscript{36} This was not the case the majority. It should be noted however, the \textit{Native Title Act 1993} (Cth) provides for compensation in certain circumstances.

Having stated this extinguishment test, what precisely will extinguish an Aboriginal right in Australia (with its extensive pastoral leases) is still uncertain. The Full Court of the

\textsuperscript{33} \textit{id.}, at 64-65, 66-67.
\textsuperscript{34} \textit{id.}, at 69. See also the joint judgment of Deane and Gaudron JJ. at 110.
\textsuperscript{35} \textit{id.}, at 69-70.
\textsuperscript{36} \textit{id.}, at 111-112, and 214-216 respectively.
Federal Court of Australia (FCA) has ruled that grants, including grants in fee simple, under the *Aboriginal Land Right (Northern Territory) Act 1976* (Cth) are not inconsistent with the continued existence of native title. But whether or not a pastoral lease without any qualifications in favour of Aboriginal peoples extinguishes native title is still undecided by the High Court. As things stand currently now, a pastoral lease extinguishes native title on the basis that a pastoral lease confers on the lessee the right to exclusive possession.

**ANALYSIS**

It can be said that *Sparrow* changes the way in which the Canadian space has been represented since the *Constitution Act, 1982*. This has been, as the Supreme Court noted, the culmination of a long political struggle, for Aboriginal peoples to produce their own space.

The practical effect of the decision is that extensive regulation - as in the case of the salmon fishery on the Pacific Coast of Canada - did not extinguish the Aboriginal right.

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37 Pareroultja et. al. v Tickner et. al. (1993) 42 FCR 32 at 41

38 The President of the National Native Title (NNTT) and the Full Court of the FCA have "decided" on this issue but the High Court has ruled that the NNTT erred in a procedural matter thus invalidating the ruling. Furthermore, the High Court has ruled that the appeal to the FCA was not properly constituted. Thus opinion expressed by the majority of the FCA is not binding. See *Re Waanyi People's Native Title Application* (1995) 129 ALR 118 (NNTT), *North Ganalanja v Queensland* (1995) 61 FCR 1, 132 ALR 565 (FC of FCA) and *North Ganalanja v Queensland* (1996) 135 ALR 225, 70 ALJR 344 (HC of A).

39 *The Wik Peoples v State of Queensland* (1996) 134 ALR 637 at 666 per Drummond J. This decision has been appealed to the High Court and its decision is now reserved. In my opinion, it highly debatable proposition to state that pastoral leases confer exclusive possession and thereby extinguish native title. This proposition arises from the peculiarities of pastoral leases: see Lee J's "dissent" in *North Ganalanja v Queensland* (1995) 132 ALR 565 at 583-592.
Thus, the Court essentially held that Aboriginal normative structures continue unless they are clearly and plainly extinguished, *provided there is appropriate evidence of historical connection*.40

Consequently, the dominant legal space has restrained itself, provided evidence of a historical connection can be made. The tentative beginnings of an Aboriginal legal space therefore appear. This is a marked departure to the argument I had outlined in chapter 4. And it is for this reason that Canada differs from Australia in a very significant manner - for Canada has now created an Aboriginal juridical space. In contrast, in Australia, Aboriginal juridical space exists solely by virtue of the judiciary’s and Parliament’s benevolence.41

In Canada at least, the decision may have consequences for a notion of self-government very different from that outlined by the Penner Committee Report. Self-government is not delegated by formal state institutions. This follows because an Aboriginal right can still exist in spite of extremely detailed and stringent regulation. It is only extinguished when it has been done clearly and plainly by formal state law. Furthermore, any infringement on those rights would have to pass a very strict justification test. At any rate such an approach would apply to the notion of self-government for there

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40 It will be remembered that the Court in *Sparrow* accepted the BCCA factual finding of historical connection.

is no legislation in Canada or any of its provinces which clearly and plainly deny self-government.

There are two points which will have to noted here. Firstly, the practical implementation of this notion of self-government will inevitably involve the involvement of formal state law. However this itself is nothing to fear. It is the realization of hybridity in legal spaces. It displays the interlegality (see below) of various legal orders.

The second point to be noted is that Aboriginal rights are still subject to the historical connection test.

HISTORICAL CONNECTION

In order to prove native title under the approach in Mabo [No. 2] (and thus the Native Title Act 1993 (Cth)), and perhaps any Aboriginal right in Australia, it is essential that there must be an identifiable community, that this community prove biological descent, that there be a customary law (with respect to land this criterion would manifest itself with an appropriate relationship to land) and that the customary laws be acknowledged. Customary laws do not have to exist as at the time of the Crown’s claim for sovereignty. In contrast, in Canada, Aboriginal claimants have to prove “historical continuity”. That phrase includes any evidence of customary law.

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43 Mabo [No. 2] at 61, 110.
But notwithstanding this courts in Australia have imported all manner of requirements. First, a physical connection, presence or occupancy on land is not a requirement mandated by *Mabo [No. 2]*.44 Given the history of Aboriginal and non-Aboriginal relations in Australia, it would be manifestly unreasonable for there to be a blanket requirement of physical connection. Moreover, this corresponds with the behaviour of some Aboriginal peoples in that forbidden territories or zones under Aboriginal customary laws are “held” according to those customary laws and hence subject to native title without occupancy.45

Secondly, what is required to be proved is the existence of a system of law - not all the intricacies of the particular system of law. In the context of formal state law, what has to be proved is the existence of native title, not all the incidents of native title. As Toohey J. noted in his judgment, these two matters “dictate different lines of inquiry but they have been blurred in some instances, leading to the confusion in the proof required to establish title.”46 *The intricacies of a particular system of law are only relevant to the extent that they assist in establishing the existence of a system of law* (see below, as I think this distinction in practice is illusory).

44 My specific target in making this point is the former Chief Justice of Australia’s comments in *Coe v The Commonwealth [The Wiradjuri Claim]* (1993) 68 ALJR 110 at 119. Mason CJ cites *Mabo [No. 2]* at 70 in support of this proposition. This is simply incorrect.

45 This is not to say that proof of physical occupation will not assist Aboriginal claimants. Indeed, Deane and Gaudron JJ. stated *obiter* in *Mabo [No. 2]* at 110:

“It is unnecessary, for the purposes of this case, to consider the question whether they [rights under traditional law] will be lost by the abandonment of traditional customs and ways. Our present view is that, at least where the relevant tribe or group continues to occupy or use the land, they will not.”

46 *Mabo [No. 2]* at 184.
Thirdly, given that native title is held by a people or community, what is required is proof of the existence of a people or community. This does not require proof of all the members of that community. Communities change by virtue of births, deaths, marriages, adoptions etc. Exact membership of a people or community is not what is required. This proposition is not explicitly stated in the reasons for judgment of High Court in *Mabo [No. 2]*. But nonetheless it is implicit in the decision that a people, group, clan, community be proved to exist. Furthermore, the formal order of High Court was in favour of “the Meriam people.” It seems reasonable to infer that what is required is proof of a community, people, group or clan.

Proof of the community’s existence has a temporal dimension. It must be proved that the particular community existed prior to the assertion of the Crown’s sovereignty and has survived and continued to maintain customary links. This will certainly involve genealogical evidence, if not anthropological and archaeological evidence. This is an extremely stringent test given the history of Aboriginal and non-Aboriginal history and I submit it is extremely unlikely that Aboriginal claimants will be able to establish this in the areas where sovereignty was asserted by the Crown initially (in New South Wales, this date is 7 February 1788, in contrast to the Murray Islands - 1 August 1879). The presumption of continuance will have to be drawn in order to assist Aboriginal claimants.

As Kirby P noted in *Mason v Tritton*:

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47 *Mason v Tritton* (1994) 34 NSWLR 572.
48 In Australia, this is best expressed by Isaacs J. in *Cloverdell Lumber Company Pty Ltd v Abbott* (1924) 34 CLR 122 at 137-138:

"... The present existence of facts does in some cases operate retrospectively as evidence of a former condition ..."
"In nature of Aboriginal society, their many deprivations and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by recorded details, their precise genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles. If, therefore, in this case the only problem for the appellant had been that of extending the proved use of land by his Aboriginal forebears from the 1880's back to the time before 1788, I would have been willing to draw the inference asked. In more traditional Aboriginal communities the inference will be quite easily drawn. But even in this case it would have been common sense to draw it."\textsuperscript{49}

This having been said, my real contention is how courts deal with evidence regarding systems of law.

It is now established that Aboriginal claimants for native title do not have to prove a system of law \textit{and} something akin to rights of property.\textsuperscript{50} In \textit{Milirrpum v Nabalco Pty Ltd and The Commonwealth}\textsuperscript{51} Blackburn J. had held that the plaintiffs in that case had proved a system of law\textsuperscript{52}; but that the plaintiffs had failed to prove something akin to the notion of proprietary rights akin to "civilized society": those rights being the right to use, enjoy and alienate.\textsuperscript{53} It should also be noted that Blackburn J. held that the plaintiffs had failed to prove that the doctrine of "communal native title" existed in Australian common law\textsuperscript{54} and that the plaintiffs had failed to establish that they had the same links to the same areas of land as their predecessors.\textsuperscript{55} But even if the plaintiffs had overcome these

\textsuperscript{49} op. cit., n.47, at 588-589.  
\textsuperscript{50} See In re Southern Rhodesia [1919] AC 211 at 233-234.  
\textsuperscript{51} (1971) 17 FLR 141.  
\textsuperscript{52} \textit{id.}, at 247, 268.  
\textsuperscript{53} \textit{id.}, at 273-273.  
\textsuperscript{54} \textit{id.}, at 244-245, 262.  
\textsuperscript{55} \textit{id.}, at 198.
additional hurdles, a comparison between Aboriginal and non-Aboriginal orders would have occurred.

In *Mabo [No. 2]* the Court simply realterred what considered property.56 As Toohey J noted, 'It would defeat the purpose of recognition and protection if only those existing rights and duties which were the same as, or which approximated to, those under English law could comprise traditional title; such a criterion is irrelevant for the purpose of protection.’57

But the problem of comprehending Aboriginal normative orders (whether this be with respect to self-government or Aboriginal title) still remains. In the very next sentence however, Toohey J states ‘the problem which arise where, for example, the evidence of the claimed traditional right is so vague that there is doubt that it existed, or exists, is different.’58 This is supposedly ‘an evidentiary problem’ whose criterion for dealing with it is not the claimed right’s similarity to, difference from, or even incomprehensibility at, common law.”59

It is precisely this issue that will prove to be difficult in the ascertainment of Aboriginal rights, including native title. For how does one assess vagueness, incomprehensibility, similarity or difference without a yardstick for that assessment?

56 *Mabo [No. 2]*, at 51-52, 83-86, 184-188.
57 *id.*, at 187.
58 *ibid.*.
59 *ibid.* I have selected Toohey J as an example of this issue. The problem is most stark in his judgment.
Toohey J.'s response would point to the difference between establishing the *incidents* of Aboriginal rights like native title (the substance of the interest) and establishing the *existence* of Aboriginal rights like native title (the threshold question). In his view "the substance of the interests is irrelevant to the threshold question."\(^{60}\)

But to prove a system of rules, one has to prove, in practice, the rules or norms of that system. Perhaps not every rule or norm, but enough rules and norms are definitely required. Hence the substance is relevant to the threshold question and the "evidentiary problem" still remains\(^{61}\) - albeit in different language. Consequently, the problem of cognition remains.

In Canada the test for establishing what I have termed the "historical connection test" has been recently expressed as "the integral to a distinctive culture test."\(^{62}\) It is said that to:

"... satisfy the integral to a distinctive culture test the Aboriginal claimant must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive -- that it was one of the things that truly *made the society what it was*."\(^{63}\)

\(^{60}\) *ibid.*

\(^{61}\) In the context of self-government see the trial decision in *Delgamuukw v The Queen in Right of British Columbia et. al.* (1991) 79 DLR (4th) 185 at 447, 449.

\(^{62}\) *R. v Van der Peet* (unreported, Supreme Court of Canada, 21 August 1996).

\(^{63}\) *id.*, at para.55 Original emphasis.
In order to do this, one must first prove a practice, tradition or custom - in short a norm which can said to the basis of an Aboriginal right that is integral to Aboriginal society. The matter of cognizing an Aboriginal norm still remains.

A more plural approach to normativity is required. One that is more sensitive to the hybridity of norms will ultimately be more cognizable of the hybridity of norms. In making this argument, I shall now attempt to utilize a re-configured notion of legal pluralism.

**LEGAL PLURALISM**

The legal pluralism I am arguing for is not purely descriptive. It is a call to recognize plurality and accept this plurality. It is thus descriptive and prescriptive. It is reliant on the spatiality of socio-legal life. This being “constituted by different legal spaces operating simultaneously on different scales and from different interpretative standpoints.”

This is:

“not the legal pluralism of traditional legal anthropology, in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather, the conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as our actions ...”

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65 *id.*, at 427-473.
This being said, I do not suggest that the formal law of the state is redundant. The "centrality of the state law, though increasingly shaken, is still a decisive political factor." 66 I also do not mean to suggest that traditional legal anthropology is not useful. The point I which to emphasize is that our "legal life is constituted by an intersection of different legal orders, that is, by interlegality." 67 This notion of interlegality is dependent on the scale with which we understand law - an insight which legal anthropology has helped foster.

The notion of how we understand law is a crucial point for legal pluralism. If there is one insight to be gained from legal anthropology, it is that law "here, there, or anywhere, is part of a distinctive manner of imagining the real." 68 Alternatively phrased, law is "a mode of giving particular sense to particular things in particular places." 69 Thus law is noumenal, not phenomenal. Nor should it be seen, applied or interpreted as a reflection of society.

The role of history, more particularly the history of the common law, and its tenacious grasp on normative preunderstandings must be understood. Indeed, this is readily discernible in determination of fact. Geertz's warning with respect to "facts" is two fold. First, the strict demarcation between fact and law in the Western world, particularly in common law world, is only one view of the matter. Secondly, the process of ascertaining fact is plagued with normativity from the start. That is, facts do not exist "but

66 id., at 473.
67 ibid.
69 id., at 232.
there" - they are constructed, and influenced by a variety of factors, including the material world.

Thus when we are interpreting laws of cultures profoundly different from the culture the common law world is accustomed to, it is important to comprehend that "the question of law and fact changes its form from one having to do with how to get them together to one having to do with how to tell them apart".\textsuperscript{70} This is a point which all too easily forgotten in the determination of Aboriginal rights in Canada and Australia.

The consequences of these observations for legal pluralism I am advocating are enormous - for a new legal pluralism:

\begin{quote}
'is not a description of given entities in the world, but ... a heuristic device for analyzing patterns of interaction, for identifying the contingent relationship between particular norms, methods of ordering and modes of symbolizing on the one hand and specific social milieux on the other, for analyzing continuity and change in normative understandings over time and space, for describing the differing intensity of normative interaction among various actors, and modeling mutual adjustment among these orders.'\textsuperscript{71}
\end{quote}

It would not seek to 'prejudge desirable modes of interaction, respect for different ethno-cultural, neighbourhood, religious or economic (and even what have been called 'virtual') groups, or the respective positions of State and non-State law.'\textsuperscript{72} In its place, this legal pluralism would provide a "variety of languages" in which such issues could framed and discussed.

\textsuperscript{70} \textit{id.}, at 174.
\textsuperscript{71} Roderick A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" (Faculty of Law, McGill University, 1995) [unpublished] at 7.
\textsuperscript{72} \textit{ibid.}
It would not attempt to outline claims for systemic priority, but rather expose the contingency of concepts which operate within normative orders. This requires the development of many methods of argumentation that recognize plural sources of norms.

But it should also be remembered that this preoccupation with norms obscures the interpenetration and interaction "at the level of norms, symbols, methodologies, institutions, conceptual tools, ordering processes, and more."\textsuperscript{73} It follows from this that the more appropriate question is what are the appropriate methods for identifying and accommodating inter-legalility.

In spite of the acknowledgment of custom that rules of recognition has made to Aboriginal norms, there has, in practice, been "an identifiable criterion for systemic membership."\textsuperscript{74} It is for this reason that the boundaries of State law and its interaction with non-State legal orders must be re-thought. In other words, the issue of "what governance according to law entails"\textsuperscript{75} needs to be re-considered.

The most important insight to be gained is not to search for an exclusive list of normative orders within a particular space and then to determine the hierarchies between the different normative orders. Rather, the insight this version of legal pluralism provides

\textsuperscript{73} \textit{id.}, at 8.
\textsuperscript{74} \textit{ibid.}
\textsuperscript{75} \textit{ibid.}
is that each normative order is also at the same time a social order within which other normative orders are interwoven, and these in turn are interwoven with larger fields.\textsuperscript{76}

The concentration on State legal orders has sought to delimit conceptions in two main camps. First, the public/private dichotomy, and secondly, the idea of law imposing order on a disordered society. But if one were to adopt the view of legal pluralism I am advocating in this chapter, such conceptions are clearly reliant on sharply drawn distinctions which cannot exist in a constant state of dissonance, flux and pervasive heterogeneity. It signals a notion of law in "dialectic and iterative reconstitution."\textsuperscript{77} But it should also be noted that such a notion of law is aware of the distribution of power and counter-power and the impact this has normative understandings.

\section*{CONCLUSION}

It should obvious from the above that what I advocate entails a significant re-orientation in the study of law and how it deals with Aboriginal normative orderings. It is reliant on pluralizing pluralism which in turn must produce its space - literally and figuratively.

\textsuperscript{76}ibid.
\textsuperscript{77}id., at 10.
This spatial re-negotiation I am advocating has already begun (most noticeably in Canada). But there must also be a more post-modern conception of law. Such a conception of law fragments what was once considered solid and fixed.

This legal pluralism examines how social orders interact with normative orders across time and space. It allows for the hybridity of legal norms operating within various spaces of given social field. Thus, in the case of Aboriginal normative orders, it would not be fixed to what is considered “traditional” or “customary” and in this sense it would be prospective; it would examine the impact of power and counter-power on normative conceptions; and it would analyze human behaviour in the light of this interaction.

With respect to Aboriginal rights such as land title and self-government, it would not examine Aboriginal normative orders as entities that have to be accommodated within the homogenous space and temporality of the state; but would reflect on law as noumena that is contingently drawn from intellectual, material, and social criteria. It would be a recovery of what was originally thought of as self-evident: namely, that law is emancipatory and not just regulatory.
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