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THE LOST DREAMTIME: NOW FOREVER LOST
A CRITIQUE OF THE GOVE LAND RIGHTS DECISION

PREFACE

This paper bears, despite most conscientious technical assistance, many marks of the deadline pressures. The paper focuses on only one or two salient aspects of the Milirrpum decision. Other segments of the paper, specially those concerning the Court's treatment of comparative case materials, are not included in the text owing to the virtual impossibility of duplicating and collating the materials in due time. I draw some comfort from the fact that it will be possible for me to deal with these aspects of the decision in my oral presentation and that Dr. J. Hookey's paper will cover, amply and authoritatively, some of the ground.

I was fortunate to have access to many volumes of the transcript of the Milirrpum decision and to a large quantity of materials submitted to the Court. I owe a heavy debt of gratitude to Mr L.J. Priestley for making most of these materials available to me and for the use of his chambers for their study. Mr. J.D. Westgarth, of Messrs Dudley Westgarth & Co., Solicitors for Nabalco Pty. Ltd. In this case, was kind enough to permit me to study historical and legal materials presented to the Court. I also greatly appreciate the forbearance of Dean J.H. Wootten Q.C. in letting me have for a considerable period of time the first ten volumes of transcript in his possession.

I must also record my appreciation for the Commonwealth Attorney General Department's permission to refer to, and quote from, the transcript of the proceedings.

UPENDRA BAXI

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By

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1. INTRODUCTION

For almost two centuries after its settlement, Australia has maintained a unique, but rather unworthy, distinction, of being the only major common law country whose judicial system had no role to play in the determination of the community policies towards the "land rights" of its indigenous peoples.

To be sure, this fact can be sought to be explained in a benign, hostile or "neutral" manner. The benign manner of explanation might stress the distinctive nature of the complex aboriginal social organization, of a type perhaps nowhere encountered by British colonizers and governors in the early period of settlement. Such an approach might stress (even if to modern ears quite feebly) the policies of enlightened paternalism and official benevolence to which judicial imprimatur would have added but little.

The hostile manner of explanation might detect a steady emergence of a genocidal design in the heritage of governmental policies towards aborigines since the Australian settlement, under the legitimating banners of "assimilation" and "integration". Such an explanation might well indict the legal profession as a whole (academic and professional lawyers as well as judges) for abdication of the social responsibilities towards the most conspicuously underprivileged minority group in Australia for nearly two centuries. And such indictment may well have a solid foundation in fact. The legal system and courts have been used to impose liabilities on aboriginals (through the application mainly of the "western" criminal law) rather than to confer rights. For vindication of this sort of proposition one does not have to go even as far back in history as 1836, which witnessed the decision in R. v. Jack Congo Murell;[1] one needs only to recall the disgraceful trial of Mrs. Nancy Young in 1970.[2]

The neutral or a "balanced" manner of explanation might stress the limitations of the legal technique in shaping inter-civilizational relationship, even while making an inventory of political and professional biases which cumulatively led to a situation of the lack of legal

recourse. Such an approach may well point to a multitude of problems and frustrations inherent for both sides in a haphazard contact situation. These include, notably the slow growth of social and cultural anthropology; the difficulties of effective governmental decision-making and implementational control both as affecting colonial decision-makers in England and Australia; the uneven penetration of technology and the corresponding variable range of economic development; the demographical variations in the overall size of the aboriginal population (and the crudity of such measurements and estimates); and finally, the genuinely held values of colonial and deeply eurocentric ethic. All these factors, and many more, could be harnessed under this approach without its becoming an apology for the destruction of aboriginal society, the default of the legal profession and the disuse of courts for securing the just entitlements of the indigenous peoples.

The bare truth remains, amidst all this, that the Australian judiciary at no stage became involved as a co-ordinate branch of the Government in policy-making concerning the justice of dispossession and of the land entitlements of the aborigines. And that truth together with its overall significance for Australian legal and social history, is still, after two centuries, in search of an adequate socio-historical explanation.

It is indeed deeply ironical that the very first attempt on behalf of the aboriginals to vindicate through judicial process their subjectively felt just entitlements to land, should have to be recorded by history as their very last attempt as well. For, the thirteen plaintiff aboriginal clans failed in Milirrpum v. Nabalco Pty. Ltd.[3] to establish that the common law recognized their communal native title in 1788, and that this title was not so far extinguished either with their consent or through explicit legislative termination as required on their version of the common law position.[4] In a 153-page closely reasoned judgment, characterized by exemplary conscientiousness, Mr. Justice Blackburn of the Northern Territory Supreme Court ruled against almost every major legal contention of the plaintiff. While the liberalism, thoroughness, and the grand style of judicial craftsmanship ensures this judgment a pre-eminent place in the Australian and common law history, the decision at the same time effectively ousts all future aboriginal plaintiffs claiming recognition of their traditional land entitlements from all Australian Courts. This

may not have been the intention of the Milirrpum Court; but it is a fateful consequence of the decision, and the way in which it was reached.

In a way, the Milirrpum situation came much too late before the Australian judiciary for it to play any significant innovative role in the governmental decision-making affecting aboriginal claims. Colonization of Australia was an accomplished fact. And the intransigent legal doctrine received and shaped by legislators and judges alike, asserting the Crown's ultimate title over all land in the commonwealth was too firmly entrenched to be questioned.[5] Substantial destruction of the aboriginal society was already a fait accompli.[6] The Yirrkala aboriginals were themselves at the time of the suit under the while Australian impact for about a quarter century.[7] Dramatic advances in the techniques and range of mineral exploitation, with the growth of burgeoning overseas export markets, had begun to affect the Northern Territory since 1953.[8] The three hundred million dollar operation for bauxite mining by Nabalco had already commenced even as the Court was asked to declare invalid the very Ordinance of 1968 which authorized it. The policy of dedicating royalties for mining to an aboriginal benefit trust fund, under the Northern Territory (Administration) Act had also become well settled by the time of Milirrpum action.[9] And already under this Trust Fund, the royalties from the Nabalco operations were estimated to range from $600,000 in 1971 to $870,000 annually in 1975. Projections for the magnitude of the Trust Fund assets in 1975 were as high as five million dollars reserves by 1975, with an annual input into the Fund of about one million dollars.[10] Already, in 1963, a Select Committee of the Federal Parliament had enquired into the grievances concerning excission of the subject land from the Arnhem Land Reserve, and recommended, inter alia, a generous compensation together with effective consultation arrangements with the affected aborigine groups and for the protection of sacred sites.[11] The committee, however, had carefully refused to base this recommendation on any recognition of the legal entitlements on the part of the petitioning aboriginals.[12] The Black Power movement was nascent, nourished by a perceived failure of traditional pressure group activities of aboriginal organizations to achieve a modicum of justice in race-relations.

A very complex structure of facts, events, and policies (only silhouetted in the preceding paragraph) provided the environment in which the Milirrpum situation came before the

Court. But of these facts, events and policies explicit judicial notice was taken only of the colonization process as affecting the native land-holding and that too, only to the extent the legal context required it. Even so, the total environment must have conditioned the perception of choices open to the Court and the very act of choice-making itself. In this sense, the entire endeavour of using the Court was an act of faith, invoking the "genius" of the common law system to act as an catalyst to rectify accumulated historical imbalances inevitable (but not for that reason scarcely morally justified) in the colonial system, long after that system had been irreversibly institutionalized. Despite the monumental patience, sympathy, integrity and the industry of the Court and the counsel, was it to be reasonably expected that an Australian Court (and for that matter any court) could at this point of history come to a different conclusion than the Milirrpum court reached?

The question suggests not a kind of judicial determinism but is rather directed to the environment of overall constraints of historicity in which judgments of justice must be made. And indeed, further constraints arise from the legal process itself, from the self-definition of judicial role by the instant judge, and from the nature of demands in the title of justice brought before the Court. The constraint of the legal process arises from what might be called (following Wittgenstein) the rules of the adjudication game. But the self-definition of judicial role could reinforce or relax such rules, wholly or in part. Such self-definition cannot be expected to be consistent We glimpse part of this truth in Mr. Justice Blackburn's Milirrpum decision. On the one hand, (as we shall note in detail in Section II of this paper) the learned Judge has been liberal, flexible and policy-oriented in relaxing the rigour of the rules of the "adjudication game".[13] On the other, His Honour almost consistently maintains a sharp distinction between "law" and "policy" on dealing with a whole range of substantive issues.[14]

Such self-definition of judicial role finally is also a function of the nature and scope of justice demands made upon a Court in a specific litigational situation. And, indeed, the enormity of justice demands must have been one factor leading to a sharp segregation of "1aw" and "policy" in Milirrpum. The gist, in justice, of aboriginal plaintiffs' claim was not that the common law unequivocally recognized the communal native title in 1788 open to extinction either only by their

consent or by an appropriate legislative measure but rather that the equivocal authoritative legal materials ought to be so construed by the Court, insofar as this was analytically open, as to affirm the plaintiffs' principal contentions.

The situation before the Milirrpum Court called for a just adjustment of a number of salient conflicting interests. The social interest in the cultural autonomy and preservation of aboriginal life-style conflicted with the social interest in the "assimilation" of aboriginals into a modern industrial society. The social interest of economic well being of about six hundred aboriginals, of the Yirrikala Mission was in conflict with that of nearly 21,000 aboriginals of the Northern Territory who were all beneficiaries of royalties paid by the mining enterprise at Gove through the Northern Territory Trust Fund.[15] The social interest of all aboriginals and White Australians throughout Australia in the exploitation of natural resources and national economic development was here in conflict with the social interest of the Yirrikala aborigines in their community's economic well being through acknowledgement of its own rights of ownership and affluence dependent upon the manner of their exercise.

If one finds the calculus of interests too pragmatic a way of looking at the overall justice-situation, its formulation in terms of the grand theories of justice does not make it any the less intransigent to satisfactory rational decision. The natural law justification of the Dreamtime entitlements of the aboriginals to "their" land is here asserted against the natural law entitlements of the White colonizers resting in the ruthless belief that

> the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources: the more advanced peoples were thus justified in dispossessing, if necessary, the less advanced.[16]

How is one to rationally resolve these conflicting justnesses?[17] Blackburn J. ruled, for example, that notwithstanding the fact that Australia had "settled inhabitants" and "settled law" at the time of settlement by English people, in terms of applicable law Australia was nevertheless a "desert and uncultivated" (and uninhabited) territory at the relevant time.[18]

Admittedly, this was a gigantic legal fiction. But so was the notion of Dreamtime, the master legal fiction of the aboriginal legal system.

Are we to take the view that in such a situation that master fiction is to prevail which forms a base of the legal system commanding decisive force?

No way out of these and many other justice-dilemmas can be self-evidently satisfactory. Whatever the result, and the reasoning underlying it, it will be greeted by a chorus of dissent.

The Milirrpum decision was, therefore, a most difficult one to make, even when one recognizes that judges are accustomed to making decisions on complex matters of law and fact. Because this was so, any critical evaluation of Milirrpum must be based on an effort, which roughly corresponds to the effort invested by the Court and the counsel. The present critique is accordingly confined only to a few aspects of this historic decision. No overall conclusions emerge from it but such specific conclusions as it yields are indicative of the mood and method of the comprehensive critique now in progress, of which this present paper is only a part.

(OVER)

II THE NATURE AND LIMITS OF THE MILIRRPUM COURT'S LIBERALISM

The Milirrpum case, the very first major case involving aboriginals as plaintiffs, was argued in two distinct phases before Mr. Justice Blackburn. The Court's handling of the intricate issues of fact and law is noteworthy for its flexibility and liberalness. In part, this must be attributed to the extraordinary nature of the Milirrpum situation. And Mr. Justice Blackburn was clearly conscious of the "far-reaching significance" of the issues involved.[19] No doubt, it is a recognized duty of courts to ensure proper and fair canvassing of a whole range of relevant issues involved in the litigation. But it is equally true that the rules of the adjudication game are not self-evidently compatible with the performance of this duty. It is, therefore, important to identify the distinctive ways in which Mr. Justice Blackburn facilitated a comprehensive enquiry into the plaintiffs' claims.[20]

A. FROM MATHAMAN TO MILIRRPUM: THE SILENT WORKINGS OF HISTORY

In Mathaman v Nabalco Pty. Ltd.,[21] the first phase of the litigation, Mr. Justice Blackburn declined to exercise the inherent powers of the court to terminate the suit summarily. The plaintiffs' case, His Honour held, was neither frivolous nor vexatious.[22] Nor was it so obvious as a matter of fact and law that the plaintiffs had no case to prove as to warrant a threshold dismissal, without adequate hearing.[23] Indeed, the learned Judge was far from convinced, at this stage of the proceedings, of the defendant's argument that the "interest claimed by the plaintiff was non-existent in the eyes of law",[24] though ultimately this is what the holding in Milirrpum amounts to. On the procedural issue, Blackburn J. relied on the general principle that "convenience and flexibility should be paramount in matters of procedure" and further that this principle "should not be overridden by the desire to contain the procedural remedies within established categories".[25] Adherence to this principle dictated the learned Justice's preference for the more liberal among the somewhat divergent authorities binding upon the court.[26]

While the ultimate conclusion was thus favourable to the plaintiffs, they were directed to deliver a fresh statement of claim. The primary reason for this directive was the Court's finding that, aside from adverse possession, the statement of claim did not sufficiently reveal the legal basis of the claim, subsequently to be identified as the "doctrine of communal native title".[27] But other important directives for amendment of the statement of claim, adopted by the plaintiffs, proved in the event to be decisive against them. Thus, paragraph 6 of the original statement merely claimed that the Rirratjingu and the Gumatj clans "have and at all material times have had a proprietary interest" in the subject land. The Court directed that a full explanation of "proprietary interest claimed must be given".[28] The term "clan" was also required to be rather clearly explained.[29]

The flexibility and liberalness in declining summary dismissal of the plaintiffs' claims was thus tinged with the clarity and firmness of the directives for the preparation of a fresh statement of claim. The Mathaman Court, and parties before it, had no means of foretelling that the ultimate losses arising from such firmness will cancel away the immediate gains stemming from flexibility on matters of procedure. The Mathaman Court made look possible for the plaintiffs what the Milirrpum Court was to demonstrate as impossible. Here we have in miniature the dialectical processes of history doing their silent work.

B. THE HEARSAY CULTURE vs.THE HEARSAY RULE

The Milirrpum plaintiffs had to demonstrate that they held the subject land in continuity from their ancestors since 1788, the critical date marking the advent of common law into a territory it regarded as "waste and uncultivated". The ten witnesses of this pre-eminently oral culture were, however, confronted at the very outset by the hearsay rule of the law of evidence.[30] Was a statement by an aboriginal witness to the effect that his father (now dead) told him that a particular tract of land was the land of the Gumatj clan admissible ?

Inevitably, the so-called exclusionary hearsay rule, to which as many as twenty-one major common law exceptions have been identified,[31] was invoked by the Solicitor-General. The arguments against admissibility of such evidence were indeed formidable. The Court was asked not to depart from the law of

evidence simply on the ground that the substantive issues were "novel" and unprecedented or on the ground that matters of proving aboriginal law and custom were unusually difficult.[32] Nor was there any authority for viewing the complex modifications of the law of evidence in the British colonies in Africa as a part of the common law applicable in Australia.[33] Furthermore, the recognized exceptions to the hearsay rule permitting "reputation" evidence did not apply to the instant situation; the exceptions applied only to (a) ancient rights enforceable under English law;[34] (b) private, rather than public or general rights;[35] (c) situations where there was an "identity" of community in which reputation is held with the community "which enjoys the right which the reputation seeks to establish".[36]

Mr. Justice Blackburn agrees with the basic argument that the Court was "bound to apply the rules of evidence" regardless of the uniqueness or unprecedented complexity of the present case. But this acquiescence was immediately qualified by the refreshingly clear assertion: "... the rules of evidence are to be applied rationally not mechanically".[37] Almost all the contentions of the defendants entailed "mechanical" rather than "rational" application of the hearsay rule. The aboriginal evidence was admissible under the "exception to the hearsay rule relating to the declarations of deceased persons as to the matters of public and general rights".[38]

Not all the learned Solicitor-General's contentions can be justly characterized as "mechanical" (rather than "rational") applications of the hearsay rule and its progeny of exceptions. Thus, for example, it was not at all irrational for him to argue that the reputation evidence exception to the rule must be confined to customary rights which were "for centuries known to, and capable of determination and enforcement by, the common law".[39] To so argue is of course to limit the utilization of reputation rule only to those categories of rights for which there was some sort of precedential recognition.

In characterizing this argument as "mechanical", Mr.Justice Blackburn is in fact extending the scope of the reputation evidence exception to proof of public rights in order to make possible the verification of the plaintiffs' claim that the common law recognized communal native title in 1788. What makes the Solicitor-General's argument "mechanical" is not his

reliance on the traditional understanding of the scope of the rule, but rather His Honour's extension of this scope. The Counsel's arguments rested on his policy views that the reputation rule ought not to be so extended, though it seems to be the case that these policy views were not clearly developed before the Court.

A close and careful study of the judgment supports the above proposition. For, Mr. Justice Blackburn who commences his enquiry by clearly acknowledging that the "novelty of the substantive issues" does not furnish "any ground for departing from the rules of the law of evidence which the Court is bound to apply" ultimately concludes by acknowledging precisely the opposite:

> ... In my opinion the proper conclusion ... is not that there is no authority for the admission of reputation evidence ... but that the situation is a new one and that the true rationale of the reputation principle allows, indeed requires that it be applied.[40]

The "true rationale" of the reputation principle, however, is to waive the application of the hearsay rule when necessary; why does the Court in this case feel that such waiver of the rule is necessary? The only answer I can find in the judgment is simply in the conclusion that it is not rational to foreclose the possibility of the aboriginals proving the recognition of their communal native title by the common law in 1788 by the simple and rather crude device of denying their competence to testify. To so hold is to hammer yet another nail into the coffin of the hearsay rule; and who would today mourn its demise?[41] But to thus hold is also to seize an opportunity to do justice within the law to an unspeakably depressed and deprived minority group in Australian society. And indeed it would have been most extraordinary to hold otherwise: a hearsay (oral) culture would have been denied its day in the Court by the hearsay rule.

C. ANTHROPOLOGY AND CHEMISTRY: WEIGHT Vs. ADMISSIBILITY

The Milirrpum plaintiffs sought support for their claims in the expertise of two eminent professors of anthropology: W.E.H. Stanner and R. W. Berndt. Only the latter had done some substantial field work in the Gave peninsula (amounting to about eighteen months in all).[42] Professor Stanner's first-hand acquaintance with the subject land was limited to a rather modest aggregate of eleven days.[43] Their evidence was undoubtedly of great assistance to the Court; but it was not a product of legal ethnography, which surprisingly is still at a very nascent stage in Australia.

Once again the hearsay exclusionary rule was reiterated in support of the defendants' contention that the evidence was inadmissible. The essence of this position was that the "anthropologist's sources of knowledge of the facts upon which they based their opinion included what they had been told by the aboriginals".[44] But this reliance on "hearsay" of the culture under study is inherent in the craft of anthropology: the defendant's contention, in effect, was that the Court must forego the benefit of the anthropological understanding of the complex aboriginal social organization, in the very case in which the Court can ill afford to be thus ignorant. The hearsay rule in this version must indeed be called a "nescience" rule.

The Milirrpum Court's ruling on this issue is of considerable significance for legal ethnographists everywhere. Blackburn J. held that anthropology is a "valid field of study" in which "the process of investigation ... manifestly includes communicating with human beings and considering what they say".[45] The law of evidence through the hearsay rule cannot allow the making of distinctions between, for example, anthropology and chemistry. The former involves knowledge concerning the behaviour of human beings; the latter involves knowledge concerning "inanimate substances in reaction".[46] The courts, on this reasoning, must not discriminate between natural sciences and social sciences. The hearsay rule of legal system cannot be allowed to impugn the scientific integrity of cultural anthropology.

A further interesting objection to the admissibility of the expert evidence was that such evidence suffered from "conceptualization". It was difficult to disentangle the facts of aboriginal behaviour empirically observed by anthropologists

from the concepts used to study such behaviour and to generalize overall findings. This objection could have been more effectively raised by the defendants if they had referred at this point to the now famous, if somewhat wearisome, disputation between two eminent legal ethnographers: Max Gluckman and Paul Bohannan. Bohannan's insistence that legal ethnographer should sharply distinguish between "folk-systems" (the ideas of people who are being studied) and "analytical system" (which anthropologists create by resort to scientific methods) marches rather well with the Solicitor-General's point concerning "conceptualization".[47] Our own ideas about what "ownership" means are a part of our "folk-system"; aboriginal ideas about "belonging to land" are a part of their folk system. Aboriginal ideas should be expressed in their terms. In relation to his studies of the Tiv in Nigeria, Bohannan observed: "... it is just as wrong and just as uncomprehending to cram Tiv cases into the categories of the European folk distinctions as it would be to cram European cases into Tiv folk distinctions".[48]

Professor Gluckman is second to none in asserting that legal anthropologists ought to be vigilant and should avoid such category mistakes. But he maintains that

> however determined one may be to present a folk-system in its purity, one cannot escape from the use of one's language.[49]

And Gluckman rightly points out that social anthropologists do have to use concepts distinctive of that discipline in any field-study. If so,

> there is no difference in using the language of western social anthropology and using the language of western jurisprudence. ...Theoretically, both are equally distorting even while they may be illuminating. It is mere prejudice for social anthropologists to consider that the scheme which jurisprudents have used successfully for the analysis of western law, cannot be applied to clarify the law of another "folk-system". It is particularly prejudice, if in fact their own systems of analysis can be reduced to almost exactly the same logical procedures.[50]

Mr. Justice Blackburn can be seen to accept the Gluckman view, at least to a point. His Honour accepts as "tentatively appropriate"[51] the experts' reference to "rights", "claims", "land-owning groups". If they were not allowed to use analytical constructs such as these, they would have to express their evidence in terms of aboriginal languages or invent arbitrary symbols. The latter will no further facilitate communication than the use of western analytical constructs and the low state of learning made discourse in aboriginal equivalent terms rather impossible.[52] Conceptualized anthropological evidence was certainly admissible "without prejudice" to the Court's task of deciding whether the aboriginal relationship with land is proprietary on a "proper jurisprudential analysis of that relationship".[53]

The problem raised by the Solicitor-General was only partially met by the Court's ruling favouring the admissibility of the evidence of the anthropological evidence, including all its "conceptualizations". The ensuing problem for the Court was: what significance (or "weight") should be attached to the expert evidence ? Clearly, the expert testimony was significant when it corresponded with the testimony of the ten aboriginal witnesses, from eight different clans.[54] And the expert testimony generally would be used as providing the overall conceptual framework within which specific aspects of the aboriginal evidence could be understood and appraised.[55] So far the conceptualizations of the experts were welcome, useful and weighty.

But when the expert testimony diverged from the aboriginal evidence, the significance of the former dwindled almost to the point of extinction. The preference of the Milirrpum Court of the testimony of aboriginal witnesses over that of the experts was not an unconsidered one. The Court was aware of the constraints under which the aboriginal witnesses testified. And the great consideration and sympathy with which Counsel and the Court treated the witnesses alleviated the inherent difficulties only to an extent. The ten aboriginal witnesses were testifying probably for the first time in their lives. Miss Rose, the interpreter, spoke and understood only Gumatj language.[56] The witnesses accordingly testified both in Gumatj (in which they were all presumably proficient) and occasional imperfect English. Their unfamiliarity with the process must have added to the strain and delicacy surrounding the elaborate attempt by the Court and Counsel to obtain the most authentic evidence.

The Court was naturally, in the circumstances, reluctant to place full reliance on the aboriginal testimony.[57] Despite this reluctance, on some rather important issues the Court discounts the expert evidence precisely by invoking aboriginal evidence. This process often involves an acute conflict between "analytical" and "folk" systems, of which the Court seems to be unaware.

Thus, for example, Professor Berndt testified that the "normal composition of the band ... would be made up of a core of members of a particular" clan[58] but the Court found that "not one of the ten aboriginal witnesses, who were from eight different clans, said anything which indicated that the band normally had a core from one clan ... "[59] This was a very important, perhaps a decisive, divergence of opinion. The learned Judge prefers the aboriginal evidence, not the experts'.

But this preference is simply canvassed as compelled by direct divergence between what the experts and the aboriginals said. In the process, the all-important question is not asked: Is the notion of a "band" an analytical concept devised and used by anthropologists to understand and explain the aboriginal social organization or is it a folk concept held by aboriginals themselves ? Or, is it both?

In elucidating the notion of band, Blackburn J. characterizes it as a "technical word" used by the experts. And so indeed it was. Professor Stanner when asked whether "horde" was the same as "band" explained that it was so, adding that a number of other terms are also used by the anthropologists who are "a great word-making family".[60] It is reasonable to infer that the notion of "band" was thus an analytical conception, useful to the anthropologists to identify one facet of the indigenous social system. Another example of (what the Solicitor General termed) conceptualism was the notion of mata-mala pair which the learned Judge rightly identified as a "piece of anthropological analysis" rather than a "feature... of their every day existence as it appeared in the evidence".[61]

Was the notion of band a concept of the folk system as well ? If it was, the Court's preference for the aboriginal evidence over the expert testimony may have some justification. But if the notion of band was not a folk concept at all, the appeal to aboriginal evidence is an entirely unsatisfactory way of weighing the expert testimony. This is so because for

all that we know the witnesses might have interpreted the questions put to them as requiring, in answer, a description of what they did for livelihood. Answers such as "they" went hunting and fishing together certainly signified that members of many clans cooperated in food and material gathering activities. But the crucia1 question was: Did they perceive themselves as forming any particular sort of group ? Did the word "band" make sense to them as the term "clan" and "moiety" did ? If not, how can anything they said in evidence be regarded to be decisive (as against the anthropologists) on the issue of the band's composition ?

The analytical concept of a band was an attempt to give the traditional activities of food and material gathering by aboriginals a group character. The "group" which anthropologists called "band" was amorphous, fluctuating in composition, and of such varying degrees of duration in time that "indeed, one group might not be recognizable as such over a period of one year or even less, or might persist over a longer period".[62] It is entirely possible that the aboriginal witnesses did not regard themselves as falling within or constituting a distinctive, secular, economic collectivity just as people commuting daily by train from a suburb to the downtown offices or people drinking at a pub may not regard themselves as a group.[63]

To impeach or verify the conclusions reached by an anthropologist, fellow anthropologists will need to do substantial fieldwork. The Milirrpum Court is performing here the task of a fellow-anthropologist in conditions which do not permit its satisfactory performance at all. In other words, the notion of 'band' which was a notion about the aboriginal social system is here identified by the Court as a notion of their system, without compelling reasons or evidence. The Court's finding that the band was not an "economic arm" of the clan played a key role in the conclusion that clans as such did not have secular proprietary interest in the subject land.[64] But this finding is based on a decisive, but very dubious, weight given to aboriginal testimony and on rather inadequate appreciation of anthropological testimony.

It might be urged at this point that this distinction between analytical and folk concepts in regard to bands does not make any significant difference. For, whether the aboriginal witnesses labelled it as band or not, and also regardless of how we label it,

they did testify to a collectivity using the land for "economic" purposes. This collectivity did not have a majority of members at any given time from any particular clan. The Milirrpum Court can be understood as saying precisely the above; and its use of the term "band" in this context is unfortunate.

With this, the present writer would agree. The point of the foregoing critique is not that the Court was necessarily wrong in its conclusion; but that its approach involving a direct comparison between the anthropological testimony and the aboriginal evidence was not justified. The Court sees itself as preferring one set of evidence as against another; as giving less weight to the experts and more weight to the aborigines. Such preference would entail, however, a greater regard for the folk-analytic dichotomy urged here. And in evaluating aboriginal evidence on its own, the Milirrpum Court acts as its own anthropological expert.[64a]

Thus even as we record our admiration of Mr. Justice Blackburn's ruling on the admissibility of the expert testimony, the weight given to it by the learned Judge (and reasons for it) in arriving at the ultimate decision must be regarded as quite problematic.

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III THE DOCTRINE OF COMMUNAL NATIVE TITLE: DID ABORIGINALS HAVE "PROPRIETARY" INTERESTS RECOGNIZABLE AT COMMON LAW?

(A) INTRODUCTION

The first substantial question arising in the case involved the plaintiff clans' contention that "pursuant to the laws and customs of the aboriginal native inhabitants of the Northern Territory, each clan holds certain communal lands" and that under such laws and customs "the interest of each clan is inalienable".[65] The clans concerned had, inter alia, the right of free occupation and movement in the lands; the right to exclude "others"; the right to "live off" their lands, including the rights to exploit its resources (including minerals) and finally rights of disposal of any "products in and of the land by trade or ritual exchange".[66] The establishment of these claims was essential to the plaintiffs' further claims concerning the recognition of their proprietary interests at the Common Law in 1788. If the clans' interest in the subject land "were intelligible and capable of recognition by the common law", they were rights which (according to the plaintiffs) "persisted and must be respected by the Crown itself and by its colonizing subjects, unless and until they were validly terminated".[67]

Appraisal of this contention required, first, some sort of understanding of the distinctive aspects of the aboriginal social organization, and of the land-holding units within it. It was also necessary, second, to ascertain whether the plaintiff clans could establish on balance of probabilities that their ancestors at 1788 had the same links with the areas of land which were now asserted by them. Third, it was of critical importance to determine whether the aboriginal social organization did have some sort of law and legal system. For, the proprietary interests espoused by the clan would be "intelligible" and recognizable at common law in 1788 only if the indigenous social system contained a legal system within it. Fourth, it was necessary to ascertain whether the aboriginal legal system contained within it some conception of proprietary interests. Fifth, the identification of such interests required recourse to explication of the notion of "property rights" or "ownership". Merely to enumerate these tasks is to take an inventory of formidable problems of fact and law which the Court had to confront and resolve at the outset.

(B) ABORIGINAL SOCIAL ORGANIZATION

(i) Moieties and clans:

The judgment deals with the aboriginal social organization in terms of three basic concepts, highlighted both by the aboriginal witnesses and the expert anthropologists. The first concept "moieties", refers to two broad divisions which exhaust between them all things in the "physical and spiritual universes".[68] It is in the

> unchangeable, natural order of things that every human being, every clan, every animal and plant species, and every inanimate thing, belongs to one or the other of the moieties.[69]

But the concept of clans, which belong to either the Dua or Yiritja moieties, was the one most central to the aboriginal social organization. As the learned Judge explains it, the clan is essentially a patrilineal descent group.

> Every human being has his clan membership determined at the moment of his birth, and it is that of his father. Each clan, and therefore each member of it, belongs to either the Dua or Yiritja moiety Each clan is strictly exogamous. This has two aspects: not only can a person marry only one of another clan, but also only one of a clan of the opposite moiety. This results in there often being a special relationship between some particular pairs of clans, brought about by the fact that so many marriages have taken place between persons from each clan of the pair. Polygamy is normal. Upon marriage, a woman does not cease to belong to her own clan, though of course her children belong to the clan of her husband.[70]

But the clan was more than just a patrilineal descent group "with a spiritual linkage to mythological beings".[71] Language played an equally constituent role, as descent, in the aboriginal social organization. Aboriginals commonly used the term '*mata*' to indicate the tie of descent. But Professor Berndt submitted that they were also "highly conscious of" the classification of "clans" by language, commonly expressed by aboriginals as *mata.* Professor Berndt submitted that the "ultimately significant classification – the

classification which linked the aboriginal to his territory" was not either mala or mata classification, but a mata - mala classification.[72] The clan was thus a descent-language group. The mata-mala pair could be defined as

> those who were of a certain language and of a certain patrilineal descent, as distinct from another mata-mala which was of, say, the same language but a different patrilineal descent.

Furthermore, "each mata is usually linked with more than one mala and vice versa".[74] On the learned Professor's testimony, supported by the aboriginal witnesses, the "group linked to a particular piece of land" was always a mata-mala pair in the above explained sense. Blackburn J. found that the mata-mala pair is "the land-associated group".[75]

Mr. Justice Blackburn proceeds to clarify that the association of the clan to land is fundamentally a "religious" one:

> It is not in dispute that each clan regards itself as a spiritual entity having a spiritual relationship to particular places or areas, and having a duty to care for and tend that land by means of ritual observances. Certain sacred objects, called rangga, are at once symbols of the continuity of the clan, and tangible indications of the relationship between the clan and certain land.[76]

The learned Judge finds further that the clan conceived as a "religious entity" had "little significance in the economic sense".[77] As compared with tribes having a degree of internal organization with institutions for centralized decision-making such as that of the chieftainship, the aboriginal clan had "no internal organization of its own".[78] Nor was the clan, unlike the paradigmatic "tribe", in a "direct economic relationship with, and in control over, a 'definable' territory".[79] In the absence of such an internal organization, it was notably difficult, according to His Honour, to make accurate determination of the clan's relationships with "other social phenomena" such as the bands.

(ii) "Clans" and "Bands"

While the spiritual nexus between the clan and the land was thus clear, its economic significance was in dispute. The clan as a clan was, in other words, not a "land exploiting group". This latter group was identified by the expert aboriginal witnesses as a "band". The "band" comprised "various groups of aboriginals in various places about the land".[80]

Each group consisted of adult men, women and children. Its composition was variable with time. Mr. Justice Blackburn describes the activities of band as consisting in "hunting animals, obtaining vegetable food, getting materials for clothing and ritual observances and moving about from area to area as the economic exigencies required".[81] Changes in the composition of bands not only arose from natural causes or "economic exigencies" but also because of "ritual requirements at special sacred places at particular times".[82]

The plaintiffs argued that the band, thus constituted, was an "economic arm of the clan".[83] This was so because: first the band normally had a core or a majority of members belonging to a specific clan and second that "it was normal for the members of each clan to spend most of their time, in their several bands, on their clan territory".[84] Both these claims found ample support in the expert anthropological testimony; but the testimony of the ten aboriginal witnesses did not support, according to the learned judge, either claim. His Honour finds that "neither the composition nor the territorial ambit of the bands was normally linked to any particular clan",[85] and in fact

> the clan system, with its principles of kinship and of spiritual linkage to the territory, was one thing and ... the band system which was the principal feature of the daily life of the people and the modus of their social and economic activity was another.[86]

(C) SOME FINDINGS ON THE PLAINTIFF CLANS' RELATIONS TO "THEIR" LAND

Although this dichotomy between "economic" and "religious" use of land by aboriginals is sharply drawn and pervasively employed in the judgment, the Court nevertheless considers evidence (both expert and lay) concerning the clans' relationship with the land. The following observations represent the aggregate of all relevant findings scattered in the judgment concerning the clans' relationship with the land.

First, the aboriginal evidence was consistent in vindicating the assertion that "any given part of the subject land can be attributed to a particular clan".[87] Blackburn J. finds that "the aboriginals do... think of the subject land as consisting of a number of tracts of land each linked to a clan, the total of which exhausts the subject lands though the boundaries between them are not as precise in the sense in which boundaries are understood in our law".[88] The Solicitor-

General, on behalf of the Commonwealth, contended in effect that the boundaries of land thus attributed to different clans were so imprecise and vague as not to be boundaries at all. Blackburn J. in response adopts entirely the plaintiffs' argument that the need to delineate boundaries "in any system of law of European origin, or, for that matter, any system applicable to people who cultivate the soil"[89] was altogether wanting in the aboriginal societies. His Honour ruled: "A boundary need be as precise as the users of the land require it for the uses to which they put the land".[90] This refreshingly functional approach is, however, not (as we shall see) characteristic of the judgment in the operative parts.

Second, the Court did not find upon evidence that the plaintiffs' predecessors, on balance of probabilities, held the same areas of land in 1788 as the plaintiffs in 1935, when the Yirrkala mission was first established. The mata-mala pair was not impervious to change, and a number of mutations were probable. Professor Berndt, for example, had himself hypothesized that some mata-mala pairs were absorbed by more powerful groups.[91] Berndt also hypothesized that the presence of isolated sacred sites belonging to one moiety in the "territory" of another could be explained by a fission of a large mata-mala pair.[92] Substantial movements over history of clans from one area to another could not be ruled out. There was the almost paradigmatic situation: the Lamamirri clan land was at the time of the litigation being actually looked after by the Gumatj, since the clan was reduced to two old women, and was on the verge of extinction.[93] Similarly, the Rirratjingu-Wurulul mata-mala has "disappeared" but the men of "the Rirratjingu-Djamundar – the other mata-mala pair – seem anxious to stress the unity of the Rirratjingu mata".[94] Mr. Justice Blackburn found the expert testimony inconclusive on the issue before him, which was a "historical" one, and felt that Professor Berndt tended to concentrate on "mythological" rather than "historical" factors.[95] The mythological account may be proper and adequate as an anthropological explanation; but the Court felt it was inconclusive as far as the determination of probable links between the present clans and their predecessors in relation to the subject land was concerned.

Third, the Court does acknowledge that "the system, the pattern, of aboriginal relationship to land has been an enduring one probably for centuries" but that "within that system or

pattern there have been changes of various kinds... "[96]

Fourth, the evidence showed that:

(i) "approaches to sacred sites were made only with the knowledge of the clan concerned";[97]

(ii) "participation in ritual was, or might be, by the invitation of the clan concerned";[98]

(iii) when an individual went to land "related to the clan of the other moiety, he would take care that a responsible person of the appropriate clan was informed". This had special relevance to the subject land "which is nearly linked to one of two clans of opposite moieties – the Rirratjingu and the Gumatj";[99]

(iv) the above custom (of informing the appropriate person of the clan of another moiety) was "at least doubtful" in its application to a "man of one clan" entering the "land of a clan belonging to the same moiety";[100]

(v) on the land of "a man's own clan" there were "no restrictions of any kind" save those relating to access to sacred sites by uninitiated persons;[101]

(iv) the "custom was not to be alone in the territory of another clan (or possibly moiety) without the knowledge of some responsible member of that other clan or moiety... ";[102]

(vii) such knowledge did not amount to "seeking permission which might or might not be granted";[103]

(viii) while members of eleven plaintiff clans did "use" the land belonging to two other plaintiff clans (Rirratjingu and Gumatj) it was not proved that such use was by clans as such (except perhaps for ritual purposes) but by individuals.[104]

(D) THE ABORIGINAL LEGAL SYSTEM

One of the main arguments for the defendants was that the posited rights of clans were not "rights" at all since "in the aboriginal world there was nothing recognizable as law at all".[105] Although not so stated, this sort of argument does indeed show considerable jurisprudential sophistication in that it entails the proposition that in order to establish the clans proprietary interests, there has first to be established a legal system. H.L.A. Hart sometime ago reminded us that the statement "X has a right" is true if there is in existence a legal system.[106] But this jurisprudential sophistication is completely at odds with the reasons proposed for the non-existence of the aboriginal legal system. The Solicitor-General argued that "before any system can be recognized by our law as a system of law, there must be not only a definable community, but also some recognized

sovereignty giving the law a capacity to be enforced".[107] Predictably, the defendants argued that the Gumatj and Rirritjingu clans can have no right at law because "there was no authority... capable of enforcing them".[108] Equally predictably, but at this stage betokening a rather startling lack of any grounding in legal theory, the defendants analogized the aboriginal system with international law "the nature of which as law has often been challenged on the ground that there is no authority capable for enforcing its rules".[109]

It testifies (with respect) to the conscientiousness and perceptiveness of Mr. Justice Blackburn that he should have found no difficulty in negating this contention. Insofar as the notion of law had to be related explicitly to that of sovereignty, the learned Judge pointedly asserted that the "inadequacy of the Austinian analysis of the nature of law is well-known".[110] His Honour would prefer to define law, <u>if</u> a definition was necessary, in terms of a "system of rules of conduct which is felt as obligatory by the members of a definable group of people" to the definition of law as "a command of the sovereign".[111] Obviously, if Blackburn J. had rested his conclusions on this matter at this point, his definition would have attracted a number of criticisms, including the point that such a definition does not enable us to distinguish sufficiently sharply between rules of morality and legal rules. And the Solicitor-General's contention was precisely that whatever rules of conduct the aboriginals have, they were <u>not</u> legal rules, backed by secular "outward" sanction.

But Blackburn J. does not have to rely on definitional fiat. His Honour prefers a "more pragmatic approach", and finds that a study of the evidence in this case

> shows a subtle and elaborate system highly adapted to the country in which some people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.[112]
>
> What is shown by evidence is...that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of aboriginals which made ritual and economic use of the subject land.[113]

Similarly, absence of sanctions and machinery for enforcement, did not amount in His Honour's view to the absence of

law itself:

> The specialization of functions performed by the officers of an advanced society is no proof that the same functions are not performed in primitive societies. Law may be more effective in some fields to reduce conflict than in others, as evidently it is more effective among the plaintiff clans in the field of land relationships than in some other fields. Mutatis mutandis, the same is patently true of our system of law..... Great as the differences are, the differences between that system and our system are, for the purposes in hand, differences of degree.[114]

These memorable observations may not completely escape criticism,[115] but these observations enshrine a luminous understanding of the nature of law which no lawman can afford to overlook.

(E) ARE PLAINTIFFS' INTERESTS RECOGNIZABLE AND PROPRIETARY?

This question was in fact the heart of the case. For the common law to have recognized at or after the Australian settlement in 1788, there must be something it could recognize. Even if it can be held that the aboriginals in the subject land had a legal system at all relevant times, as indeed it was held, this holding in itself could not answer the further question which needed to be answered: Did the aboriginal legal system recognize interests which can justifiably be characterized as "proprietary" interests?

Answer to this question in turn required recourse to some explicit criteria by which certain interests could be regarded as proprietary. Such criteria were not, according to Mr. Justice Blackburn, to be found in either the plaintiff's or the defendant's contentions. The Solicitor-General's contention (noted briefly earlier in this paper) was that the boundaries of various clan-lands or "territories" were imprecise and vague. The learned Judge, we may recall, made a short shrift of this argument on the basis that the boundaries of land need only be definable with such "precision as the users of the land require for the uses for which the land is put".[116] Nor did the Judge uphold the further contention of the Solicitor-General that aboriginal witnesses, whether or not members of the clan whose land was being considered, "should have been able to say what these areas or sites were, and should not only have been unanimous, but word-perfect" (i.e. designate without verbal divergence the same sites or areas as belonging to a particular clan).[117]

The Court found this argument unconvincing for it basically entailed the proposition that "an oral register of title must be repeated in full detail by each witness".[118] This sort of thinking was fallacious insofar as it implied that "there can be no rights of property without records or registers of title".[119]

The three arguments advanced by the plaintiffs were also unproductive of criteria for identifying proprietary interests. First, it was urged that the aborigines "think and. speak of the land as being theirs, as belonging to them".[120] Blackburn J. found this argument so unhelpful as to say that "it begs the question" before the Court There was "little" evidence of the significance of linguistic usages of aboriginals before the Court. The phrases (such as "land of Riratjingu", "my country" or "my land") were consistent with ownership; but as the learned Judge rightly emphasized the "possessive pronouns, and the word 'of' are used in the widest variety of meanings"[121] not <u>necessarily</u> implying proprietary interest. The plaintiffs' argument merely amounted to saying that the aboriginals "think and speak of the land as being in close relationship to them".[122] The question, however, was: was that close relationship proprietary in nature?

The second argument of the plaintiffs indicated that aboriginals who, for example, visited the Gumatj and Rirratjingu land acknowledged it as belonging to the Gumatj and Rirratjingu, making no claim over it. Nor were there any disputes over land. The learned Judge agrees that such disputes were most infrequent but feels it necessary to hold that "it only goes to show that whatever the relationship of the clans to the land is, is not disputed by other clans".[123] Precisely that "whatever" of the clan relationship to the land was fell to be determined by the Court.

Nor, finally, was the argument from mythology (that spirit ancestors had endowed the clans with rights in land) persuasive in the light of the aboriginal evidence. To say that land was "given" to each clan "was to extract from the myths of creation only one part and regard it in isolation".[124] For, "the spirit ancestors created all things – the land, the clans, the sun, the stars, the animal and vegetable kingdom and the sacred rituals and set them all in proper relationship".[125] The learned Judge hesitated to "venture into this field" feeling at the same time that it was "unnecessary" to do so.

Accordingly, Blackburn J. held that "the proper procedure is to bear in mind the concept of property in our law, and in what I know of other systems which have the concept ... and to

look at the aboriginal system to find what there corresponds to or resembles property" [126] Right to property "in its many forms, generally implies the right to use or enjoy, the right to exclude others and the right to alienate".[127] It was not essential, in His Honour's view, -that "all these rights must co-exist before there can be a proprietary interest" or to deny "that each of them may be subject to qualifications".[128]

Applying the first criterion, the Judge observes: "It makes little sense to say that the clan has the right to use or enjoy the land".[129] This was so because, the land-exploiting group was a social unit which was properly described as a band, and not the clan. The clan's right to use and enjoy the land extended only to performance of ritual ceremonies on it.

The clan's right to exclude others "was not apparent". In fact, Blackburn J. finds that it was denied by the third Plaintiff, Daymbalipu. He claimed in paragraph 23 of the statement of claim that members of the eleven clans which he represented "are sharing and at all material times have shared the use and benefit of the said land with the Rirratjingu and Gumatj clans" and that the clans are there in the said land "with the consent and the approval of the Rirratjingu and the Gumatj clans... ".[130] This latter statement was held not to be borne out by. evidence but the former statement was apparently accepted as true. The right to alienate, recalled the Judge, "was expressly repudiated by the Plaintiffs in their statement of claim".

Accordingly, the Judge held that "there is so little resemblance between property as our law, or what I know of any other law, understands that term, and the claims of the Plaintiff for their clans, that...those claims are not in the nature of proprietary interests".[131] The Judge concluded that while the aboriginal legal system was a recognizable system of law, it failed to provide "for any proprietary interest in the plaintiffs in any part of the subject land".[132]

Any criticism of the Court which faults it for adopting a western or a "Eurocentric" concept of property in appraising indigenous claims would be altogether too facile. The plaintiffs urged the Court to engage in precisely this sort of appraisal. The interest of each member of the clan in the "communal" land was claimed to be "proprietary" by paragraph 4 of the statement of claim; likewise, the statement listed among the incidents of such interest, the right to use and enjoy

the land and the right to exclude others. Moreover, these interests were claimed to be proprietary within the meaning of Section 5 (1) of the Lands Acquisition Act 1955-1966 which defines "interest" (but not "property") as " (a) legal or equitable estate or interest in lend; or (b) a right, power, privilege over, or in connection with, the land".[133] In the face of this sort of contention, it was simply not open to the Court to adopt criteria other than these of the English law. Nor, indeed, should we expect of a Court that it embark on an intimidating exercise in comparative jurisprudence to arrive at a formulation of the "core" of the notion of "property". It took over twenty years for a team of dedicated scholars from all over the world to distill a common core of ideas and techniques on the notions of offer and acceptance in contracts; and the cognoscenti still debate the extent of what was thus achieved.[134]

IV. SOME REFLBCTIONS ON THE RELEVANCE OF ANALYTICAL CLARIFICATION TO THE APPRAISAL OF COMMUNAL NATIVE TITLE

The context of pleadings, and the virtual impossibility in a litigious situation of distilling a common core of the notion of "ownership" from the legal systems of the world, must control any critical evaluation of Mr. Justice Blackburn's explication of the "incidents" of proprietary interests. The following evaluation of this aspect of the judgment attempts to highlight the problems inherent in these criteria and in the attempted application of these to the Milirrpum situation.

(A) DISTINCTION BETWEEN "HAVING" A RIGHT AND "EXERCISING" A RIGHT

It must be said that the Court fails to make the crucial distinction between "having" a right and "exercising" it. This distinction is absolutely essential to clear thinking about rights in general.

To say that X has a right is to say (in strict Hohfeldian sense) that Y has a duty. The jural co-relative of a right in one legal person is a corresponding duty in another. But statements such as these are rolled-up ways of saying a number of things. As H.L.A. Hart, following Benthamite approaches to definition of legal concepts, rightly stressed the proposition "X has a right", in order to be meaningful, must be predicated upon (i) the existence of a legal system; (ii) existence of rule or rules within such a system obligating Y to act, or abstention and (iii) existence of further rules such as to make Y's obligation to act or abstinence dependent in law upon the choice of X to do whatever he is

entitled to do under the rules "or alternatively until X... chooses otherwise".135

But the statement "X has a right" also entails the further proposition (which Hart does not make explicit) imputing some sort of notional understanding on the part of X to make a certain demand or claim of behaviour from Y, under the protection of a legal system to which both belong. Unless a right-holder has some such understanding, the choices that activate the obligations of the duty-bearer cannot be made at all. This notional understanding of one's entitlement does not need to be as complex and sophisticated as that of the lawyer and the judge, who specialize in the art of legal interpretation, but there has to be some sort of understanding. The statement therefore that "X has a right" must in addition to the conditions stipulated by Hart, have reference to a distinctive kind of awareness on the part of the right-holder consisting in the notion of legitimate claim over the behaviour of others.

Exercising a right naturally presupposes having it but is not, equally, naturally, the same as having it. The right of A, owner of Blackacre, that no one shall enter his land without permission is a right that consists of an innumerable series of claims against all members of a community. The exercise of this right against B is not the same thing as having a right in relation to C to Z. Nor is the exercise of his right against B, here and now, the same as having a right against B for all such times as A continues to "own" Blackacre. To have a right is to nurse a potential jural relation; to exercise it is to bring forth an actual legal relation.

Having a right presupposes a degree of cognition on the part of the right-holder; whereas exercising a right entails some kind of legally relevant behaviour. Legal systems may vary in their approaches to the relationship between having a right and exercising it. Thus most developed legal systems (having Malinowski's three "Cs" (Codes, Courts and Constables) provide that at certain points a very great tension between simply having a right and not exercising it, may also lead to the legal consequence of one not having the right at all (e.g. prescription). Such legal systems may also provide the more limited consequence of denying the enforcement of rights after a certain period of time (i.e. laws of limitation of actions).

But it is equally, if not more, important to stress that legal systems need not contain such rules at all. The tension between having a right and not exercising it may not be seen by some legal systems as a problem requiring solution through provision of controlling legal norms. For sound policy reasons or even through sheer inertia, the legal system may not respond to a problem, having in the first place perceived it as such. In a way, the relationship of concomitance between having a right and exercising it at a certain point is an outcome of (i) the level of legal and societal evolution and (ii) of the overall values (e.g. mobility of resources, vigilance) underlying a given legal system.

The rule that prescription extinguishes the rights of an owner, in systems which recognize it, is obviously a rule arising out of the pursuit of certain values by a society's legal system. But even such a rule cannot be construed strictly as imposing a duty upon the right-holder to exercise the right that he has. All that such a rule does is to attach certain legal consequences which makes non-exercise of a right, under certain conditions, incompatible with one's having a right. Rules of prescription provide one way of ensuring transference of certain types of proprietary interests.

If this distinction between having a right and exercising it is analytically tenable, then inadvertence to it in the Milirrpum Case constitutes one of its principal vulnerabilities. A number of evidentiary points recognized in the judgment as valid, testify to the clans having a right to use and enjoy the clan-land. That the clans as such have a right to use and enjoy the land for religious and ritual purposes is frequently acknowledged in the judgment.[136] The judgment also acknowledges as proved upon aboriginal evidence (noted earlier in section III(c) of this paper) that: (a) that the aboriginals "do think of the subject land as consisting of a number of tracts of land each linked to a clan, the total of which exhausts the subject land..."; (b) there was a notable degree of consistency in attribution of land to each specific clan; (c) the relationship of the clan to such lands is rarely disputed by other clans; (d) the system of "aboriginal relationship to land" was an enduring one, despite important subsystemic changes; (e) the aboriginals recognize as proper and valid certain ways in which land belonging to another clan can be acquired temporarily (through guardianship, as in the Lamamirri case) or permanently (as through fusion or fission in mata-mala pairs).

Mr. Justice Blackburn finds it difficult to accept the proposition that clans as such had the right to use and enjoy the land for secular purposes. His Honour holds that the bands, as a matter of fact, used the "clan-lands" and that, as a matter of law, members of all plaintiff clans did have a right to thus use and enjoy the land of each and every plaintiff clan. But on the distinction between having a right and exercising it, the proposition that members of all plaintiff clans have a right to use and enjoy every other clan's land (in addition of course to their own) is not necessarily conclusive on the issue whether clans as such have the right of use and enjoyment of its own land. The precise relevance of other aboriginals' right to use and enjoy the land of a particular clan to the similar right of that clan as such must be sought and found in the aboriginal legal system. Did that system provide that clan A's having a right to use and enjoyment of its own land cannot exist with the similar rights of individual aboriginals from clans B to Z? Did that legal system provide that clan A's having such a right should be extinguished if for a designated period a certain number of individual members of clan B exercised their rights upon clan A's land? Or that clan A's having such rights but not actually exercising them and individual aboriginals having and exercising them extinguished the former's entitlements at a certain point of time? If so, in whose favour did such extinction occur? And what social policies were served by such rules?

Mr. Justice Blackburn does not raise these questions because the distinction between having and exercising rights was not canvassed and did not emerge at the decision-making phase. But, with respect, it should have. If counsel had perceived this distinction, appropriate answers could have been obtained in the examination of the aboriginal witnesses, notwithstanding the extraordinary difficulties of communication surrounding such examination. If the Court had become aware of the distinction at the stage of composing the judgment, it might have been led to a confession of shortfalls in evidence before it and a much more tentative decision on this aspect. In fact, given the conscientious approach of the learned Judge we might have justifiably expected a statement of difficulties at arriving at a judgement on this aspect.

But this does not happen. What did happen was a transference, albeit unconscious, of western legal concepts and social values to the appraisal of an indigenous legal order, a consequence that Mr. Justice Blackburn clearly wished to avoid.

To proceed on the basis that "western" standard of use and enjoyment of land as constituent element of the concept of property should be employed in the instant case was one thing. But to say that the indigenous legal systems should, therefore, follow certain patterns of extinction and transference of proprietary interests is another. An intemperate critic might be moved to say of this latter exercise that it is not merely blatantly eurocentric but also a manifestation of high-handed juristic imperialism. And such a critic would have a valid point.

(B) THE DISTINCTION BETWEEN ENTITLEMENTS OF CLANS AS CLANS AND OF THE INDIVIDUAL MEMBERS OF THE CLANS

Mr. Justice Blackburn holds, as already noted, that the individual members of all clans have a right to use and enjoy (for secular purposes) not merely the land of their own clans but also the lands of all other clans. But His Honour prefaces this observation by saying: "It makes little sense to say that the clan has the right to use or enjoy land".[137]

This must mean that it is senseless to speak of clans having the right of secular use and enjoyment as a group. At the same time the learned Judge is prepared to concede that the "clan as such" has the right to use and enjoy its clan land for ritual purposes. With respect, this is to talk in riddles. Either it makes sense to talk of the clan as such having a right of this nature or it does not. It cannot be maintained consistently that while the clan-entity is incapable of having secular rights of use and enjoyment of its land because it makes "little sense" to say so, one can speak sensibly of clans' right as a clan to the sacred user of the land. The entire basis of the plaintiffs' claim was precisely that the posited proprietary interests of clans as clans were infringed by the defendants.

This inconsistency is compounded by an earlier observation in the same part of the judgment where His Honour states

> I do not think that anything turns on any possible difference between the rights of the clans and the right of the individual members of the clans. None was suggested in argument. Moreover, the evidence shows that, at any rate as between initiated males, no member of a clan makes any claim different from, or adverse to, that of any other member. [138]

This observation must mean at the very least that as regards, say, the Gumatj clan's right to use and enjoy land for secular purposes and its members' similar right there is no difference at all. But to say so is in effect to concede that it makes as much sense to speak of such rights of clans as such as it does to speak of the rights of its members. And the plaintiffs' were in effect claiming protection of this complex of rights.

This inconsistency is not inconsequential. For, properly appreciated, the proposition that the members of the Gumatj clan have "rights" to use and enjoy Rirratjingu land is not the same at all as the proposition that the Gumatj clan qua clan has such rights over Rirratjingu clan land. The "rights" of the individual members of the Gumatj clan still remain individual rights even if each and every member of the Gumatj clan had this right and exercised it. To make this clear, let us suppose that all individual members of AULSA have rights over the land on which the famous Tasmanian Casino is being built. To say that they all have rights over this site is not to say that AULSA as a group has such rights. The issue before Blackburn J. precisely was whether clans as such, as group entities, have the right to use and enjoy the clan land. To say that that issue does not make sense is, with respect, to fail at the very first analytical threshold. This failure is compounded by the willingness to treat the "clan" as an entity in the sacred context but not in the secular.

But, it may be asked, what difference to the outcome on this particular issue would it have made if this inconsistency had been avoided? The answer is that the learned Judge would have had to ascertain whether the aboriginal legal system invested in all plaintiff clans as clans the right to secularly enjoy and use every other clans' land, in addition to its own. In other words, did the aboriginal legal system in effect contain norms positing (or can such norms be reasonably inferred), for example, that the Gumatj clan qua clan had the same rights of secular uses and enjoyment of Rirratjingu land as it had over its own Gumatj land?

To answer the question in the affirmative is also to say that aboriginal law made no distinction at all, on the issue of secular uses of land, between the claims of the Gumatj clan on Rirratjingu land and vice versa. This in effect is what Mr. Justice Blackburn holds, without however, at any stage asking the above question directly. This indirect holding is, however, not supported by any explicit data arising from evidence, as reflected at any rate in the judgement. In

fact, as already enumerated in the preceding section (A) of this part of the paper, a whole cluster of evidentiary points acknowledged as valid in the judgement, suggest rather the contrary.

How can it be maintained in the light of this sort of evidence that the aboriginal legal system (to repeat our question) made no distinction at all, on the issue of secular use of land, between, say, the claims of the Gumatj clan, as a clan, over Rirratjingu land and vice-versa? But precisely that would have to be said if one did not distinguish carefully between the rights of clans as collective entities and rights of members of the clans over another clan's land.

(C) SOME ANALYTICAL AND SOCIOLOGICAL PROBLEMS ASSOCIATED WITH THE NOTION OF CLAN ENTITLEMENTS TO LAND

The difficulty which Mr. Justice Blackburn felt in attributing to clans the right of secular use and enjoyment may not wholly be without some intuitive foundation, not articulated in the judgement. This intuitive feeling can be canvassed as follows.

If we use the term "right" stricto sensu it, being a relational term, entails as its jural correlative the notion of "duty". The proposition that, say, the Gumatj clan as a clan has the right of secular user and enjoyment of the Rirratjingu clan land must imply that the Rirratjingu clan as a clan has corresponding duties of non-interference with the exercise of the Gumatj clan rights. The same will hold mutatis mutandis if we reverse the proposition and assert that the Rirratjingu clan as a clan has corresponding rights over the Gumatj clan land.

Assume now that both the Gumatj and Rirratjingu clans have the right to secular use and enjoyment of their respective lands (as indeed seems to be acknowledged in evidence). This proposition entails that other clans qua clans have a corresponding duty not to interfere with the Gumatj clan's exercise of its rights.

It is clear that as between these two clans, two discrete sets of legal relations are involved. It is also clear, on the basis of the distinction made earlier between having and exercising a right, that there is nothing notionally incomprehensible about a legal system creating analytically opposed

legal relations. Legal systems can thus institutionalize conflict, with or without providing norms or specialized institutions for their resolution.[139]

The analytically conflicting right-duty relations thus created could cause a number of problems when the rights are sought to be exercised. Thus, in our present example, if twenty members of the Gumatj clan come to dig yams (as representing the clan as such) on the Rirratjingu land in area X, at a time when twenty members of the Rirratjingu clans (also representing the clan) want to extract yams on their own land in area X then, strictly speaking, neither party will be justified in exercising its rights. This is so because, in each case, the exercising of a right would also be a violation of a duty. If the Gumatj seek to exercise their clan-right on Rirratjingu land in the above situation, the Rirratjingu will be under a corresponding duty not to extract yams at the same time in the same area; but by the same token, the Rirratjingu clan has a right to use its own land in this manner, and the Gumatj are under a duty not to interfere.

This extraordinary situation must provide one major intuitional foundation for saying with Mr. Justice Blackburn that it makes "little sense" to speak of clans as such having rights or that the clans had no rights of use and enjoyment. But this conclusion does not necessarily follow. Nor indeed, is such a conclusion analytically correct. The correct analytical formulation of the situation here is not that neither clan is entitled to extract yams but that neither clan can justifiably exercise its rights in this specific situation.

But, if the above analytical formulation is unacceptable, there are other, more traditionally accepted ways, by which the conclusion reached by Mr. Justice Blackburn could be properly avoided. Thus, it might be said that, while as a general rule both the Gumatj and Rirratjingu clans have as such right to secular use and enjoyment of their own and each other's lands, the legal relations involved in our hypothetical situation may not be right-duty relations at all. In other words, one would have to presuppose a rule of aboriginal law prescribing: "Each aboriginal clan shall be entitled to use and enjoy (for secular purposes) the land of each other clan; provided, however, that no clan shall authorize its members to so do when the clan to whom a particular land belongs is actually using and enjoying a particular tract of land belonging to it".

Presupposition of such a rule is merely an analytical exercise; whether or not such a rule actually exists is a matter of aboriginal testimony and the judicial evaluation of it. But search for such testimony and its subsequent evaluation cannot simply take place if we do not entertain this sort of presupposition in the first place. There are some very good reasons for making such a presupposition in addition to eliciting proper evidence; but certainly the most decisive among such reasons is the virtual impossibility of arriving at any decision at all on the issue as to whether clans as such have any rights at all to secular uses of their land and of the lands of other clans as well.

The other good reasons for wanting to presuppose such a rule are sociological in a broad sense. If we were to accept the proposition that both the clans as such have right stricto sensu in the hypothetical situation, what will be the probable resultant behaviour-patterns encouraged by such a rule? The following behavioural patterns come readily to mind; but there might be other, less obvious, ones: (i) neither clan will be able to claim that it is proper for it to dig yams, which each presumably needs; (ii) both may do so, with varying degrees of conflict and tension, depending upon the levels of scarcity of resources and intensity of needs; (iii) the more powerful among them prevail or (iv) if both are evenly matched in terms of power, the resources they both need remain "untouchable" or finally (v) in the exercise of conflicting entitlements, norms of accommodation and reticence may develop.

If the aboriginal legal system is to avoid institution-alization of conflict, it ought to avoid also incentives to and tolerance of, behaviour entailed in propositions (i) to (iv), and must give incentives for development of norms of accommodation and reticence in mutual enjoyment of the entire territory. Our presupposition of the above formulated rule is only one way of concretizing such norms of reticence and accommodation.

Any evaluation of aboriginal testimony concerning the existence of such a rule, supporting development of reticence-accommodation norms must necessarily involve a degree of superimposition of the "Western" ways of thinking on a wholly different legal civilization. The scope of such intrusion is very substantially limited, however, by rigorous analytical procedures here canvassed as essential. These procedures

enable us to discover, first of all, the authentic aboriginal policies and rules (always bearing in mind the great difficulties of the communication-situation) and secondly, to make a choice among conflicting indigenous policies and rules in terms of their overall social context. Thus, it is certainly conceivable that a food-gathering, non-agrarian community, having law but little (if any) governmental organization, may encourage conflict of behaviour consistently on policy grounds perceived by outsiders as rational. But is it possible that the aboriginal legal system could have thus provided? Let us recall that Mr. Justice Blackburn was moved to characterize this system as a "subtle and elaborate system, highly adapted to the country in which some people led their lives which provided a stable order of society...."[140]

How can a legal system, on the one hand, institutionalize conflict, provide no effective legal means for its resolution and yet, on the other, provide "a stable order of society?" And certainly the Milirrpum Court does not characterize the aboriginal legal system as it does by way of a mere rhetorical flourish. In fact, the learned Judge's affirmation of the aboriginal legal system is based on evidence before the Court. Thus, the reference to a "stable order of society" to which aboriginal legal system contributed is, for example, significantly linked with the finding that disputes concerning the subject land were infrequent, to the point of being rare, among the plaintiff clans.

The significance of this finding, in the present submission, is precisely that a complex structure of accommodation – reticence – deference norms was nurtured by the aboriginal legal system and rendered unnecessary for this purpose any set of specialized agencies for dispute-settlement. That such a normative structure should perform such a task for centuries may seem to us startling at first sight but this initial "culture shock" will not survive careful reflection. Several factors point to an explanation of such a phenomenon. Large tracts of land were occupied by relatively few people. Division of labour, though complex, was still rudimentary. Scarcity of resources for sustenance was matched by a moderation of needs. The sharpness of the classification of clan-units into two moieties was blunted by exogamous marriage and polygamy, just as the constituent element of patrilineal descent was balanced in some ways, by the constituent element of language. Above all, the common stock of myths, folklore, legends and the distinctive role of these and of rituals must have contributed

eminently to the development of the "accommodation-reticence-deference" normative structure.

It is not my intention to suggest that the aboriginal social organization knew no conflict and that its legal system provided no means of handling any or all conflict thus arising.[141] Absence of disputes concerning land, explainable by reference to above sorts of factors, does however signify that as regards land use, the social organization minimized potential for conflict and the legal system while reflecting, also reinforced, this minimization.[142] To take the view that the absence of land use disputes is not relevant to the task of determining whether the posited aboriginal interests in land were "proprietary" is, in the light of these considerations, akin to saying (with respect) that a study of symptoms is not relevant to the task of diagnosis.

(OVER)

(D) THE "RIGHT" OF EXCLUSION

As noted earlier, the aboriginal evidence did not show that it was "characteristic of the clan's relationship to a particular land"[142a] for any other "clan" or its member to seek a prior permission for use of the clan's land, except in the realm of the sacred. And the Rirratjingu and Gumatj lands were in fact so used not just by members of the eleven plaintiff clans, but, also by members of many other clans. Mr. Justice Blackburn accordingly holds as a matter of finding on the aboriginal law that "the clan's right to exclude others is not apparent".[143] The "greatest extent to which this right can be said to exist is in the realm of the ritual"[144] And even so such ritual "exclusion" was never a complete exclusion from the clan territory. The exclusion was "only from sites".

This holding was a complete answer to paragraph 5 (b) of the plaintiff's statement of claim that the plaintiff clans' communal interest in the land included among its incidents such a "right" of exclusion. One can say with the benefit of hindsight that such a claim ought not to have been put forward in the first place. But it remains true to say that even if such a claim was not pressed, the learned Judge would in any case have regarded the right of exclusion as a constituent element of the concept of "property".

Be that as it may, the distinction between <u>having</u> a right and <u>exercising</u> a right again become crucially relevant. The evidence, as appraised in the judgment, shows that when aboriginals went on the land of another clan and moiety, it was customary to inform "a responsible member" of that clan or moiety. This act of information did not amount to the act of seeking or receiving permission. All that the customary practice established was the essentiality of knowledge, not of prior permission or of subsequent ratification.

Even so, this practice is not without any significance. It must at the very least indicate a norm of deference to elders of a clan whose land was used or visited. And this norm must be related to the internal recognition among aboriginals that certain lands belonged to certain clans. It is arguable that this norm of deference can be regarded as a legal norm, indicating an awareness of legal entitlements to land of a clan whose land was being visited or used.

But this norm would be important in the present context only if it testified to the more precise right of exclusion

claimed by the plaintiffs. Certainly, it is arguable that the absence of evidence of actual acts of permission or refusal does not in itself without more, negate the right to exclusion.

There are two ways in which it can be argued that this norm of deference is relevant to establishing the plaintiffs' contention. It might be said, first, that at least as regards use of land belonging to a different "clan-moiety", the custom of providing information was only one way of testifying to the right of exclusion that the visited clan had in the land. The absence of any adverse action by the visited clan (i.e. the clan whose land aboriginals, at least from another "clan-moiety", use or visit) signified tacit approval. This is only a shorthand way of saying that although both the visiting and visited aboriginals were conscious of the latter clans' right of exclusion, the visited clan did not exercise this right. Not to exercise the right of exclusion is not necessarily not to have that right, unless and until the relevant legal system contains a rule stipulating extinction of a right when it is not exercised for a long period of time.

The Court fails to ask the all-important question: Did the aboriginal legal system so provide? The question to be put to aboriginal witnesses on this point was not whether they had in fact to seek permission but, rather: "Why did they feel that the visited clan elders should be informed?". Was it because they felt they ought to inform visited clan-elders? Why did they feel this way? Was there a sense of binding obligation? If the answer to this last question was in the affirmative then, it would have been reasonable to attribute a shared consciousness to the visited and visiting clans concerning the "rights of exclusion".

The other, and second, way in which one can establish the rights of exclusion is simply to say that it is inappropriate to speak of rights of exclusion altogether. The appropriate Hohfeldian category here is not "right" but "power". The power in A to exclude others, in the Hohfeldian sense,[145] must entail a liability in B to be excluded at the will of A. But A's power to exclude B from his land could be accompanied by A's privilege to permit B to enter and use A's land, creating no right in B to enter. Similarly A's power to exclude B could be consistent with A's right to exclude B from his land and B's duty not to enter upon A's land. We cannot infer, for example, from the mere fact the thirteen plaintiff clans and all aboriginal clans and individuals use

and enjoy the Gumatj and Rirratjingu lands, that the latter do not have "right" or "power" to exclude the former. The evidence of such use and enjoyment in itself cannot betoken the range and type of legal relations involved; these have to come forth from the concerned legal system.

The evidence that no permission was sought or given is ambiguous in itself and needs interpretation. Mr. Justice Blackburn prefers to interpret it to mean that this evidence conclusively establishes that the clans had no "rights" of exclusion. But one can equally well construe the evidence to mean that the proper analytical relationship thus revealed between the Gumatj and Rirratjingu clans was one of privilege-no right, rather than right-duty relationship. Both these relationships are analytically open to us once we reformulate the notion of "right" to exclude into that of "power" to exclude. And the point here is that exercise of power by creation of privileges in favour of other aboriginals to visit one's clan land does not affect its range and potency, absent a contrary rule of aboriginal law to that effect. If it were otherwise, we would indeed have to assert that the visited clans had the duty to exercise their exclusionary power and, further, that certain aboriginals had a right corresponding to that duty.

If the exclusionary right is thus formulated as exclusionary power then, the following type of questions need answers in the aboriginal testimony: "Did the visited aboriginal clan feel that it had no alternative but to let visiting aboriginals from other clans visit, use and enjoy their lands? or did they feel they could, if they so willed, restrict the visiting aboriginals' movement on their land? If the latter, would the aboriginals thus sought to be restricted, recognize and accept as fair or legitimate or proper such restrictions?"

Similarly, the practice of informing the visited clan elders of the visit (at least in relation to land "belonging" to another clan-moiety) can be construed, as the learned Judge seems inclined to do, as no more than custom in the factual sense i.e. a considerably uniform pattern of behaviour. But it is possible to view it as having normative force, i.e. as being a rule of law in the aboriginal legal system. Such a rule may be expressed in the proposition: "the visited clan has a right to be informed with a correlative duty on the part of certain visiting members of the clan". If this notion would have been properly raised, it may have proved possible to get sufficient decisive (either way) information in the examination

of aboriginal witnesses. But this opportunity seems to have been foregone.

This, perhaps, wearisome insistence on reformulating the notion of exclusion as an incident of ownership as a power, rather than a right, has the merit of highlighting the rather elusive fact that the Court's ruling on the issue was not compelled by any unambiguous and decisive evidence. Rather, the holding here is the outcome of a discourse bereft of the requisite degree of analytical clarification. Absence of proof of permissive use of non-clan land by aboriginals (individually or as clans) can be seen to negate an exclusionary right stricto sensu, only if we ignore the basic distinction between having a right and exercising it. Absence of such proof is not at all decisive if what needs to be determined is the question of power of the land-holding clan under aboriginal law and custom.

But it may be argued that this reformulation does not really achieve much. Even if the exclusionary incident is better regarded as a power rather than a right, still a power that is not at all or very rarely exercised at any stage between 1788 to 1935 (or till to date) can scarcely be a proper ground for asserting the existence of a proprietary interest on this score. Assuming, arguendo, that there exists adequate evidence of non-exercise of this power for the above time-span, it must at once be said that analytically there is no reason why power-liability relations should not remain potential legal relations for long periods of time. A government may not exercise certain constitutionally authorized legislative powers for a long time but, so long as the constitution is not otherwise altered, that power remains a power to legislate and citizens of that state remain exposed to a liability to have a duty created. (e.g. the non-use for about sixty years of the "corporations power" under Section 51 (xx) of the Australian Constitution). Similarly, individual subjects of a legal order, for example, may not at any time in their lives create principal-agency relations or make wills; but the power to create such relations can still be said to exist. In other words, units of a legal order may have power to do a number of things; their not doing so is not tantamount to the extinction of that power, unless a rule of a given legal system so provides. What evidence did the Milirrpum Court have before it to hold that aboriginal legal system thus provided for extinction of powers conferred by it upon clan-units?

It may be further argued against the present position that since aboriginal law is pre-eminently customary in nature such exclusionary power might by continuous disuse be abrogated. Such an argument invoking desuetude is not compelling until it can be established that systems of customary law must, as a logical necessity, provide for desuetude. But surely one can conceive of customary law systems having no such general rule of desuetude. Where is, furthermore, the evidence even faintly suggesting that aboriginal customary law system did contain such a rule? True, there is no evidence to the contrary either. But to accept this is also to accept the present submission that the Milirrpum Court decided an issue which it should not have in absence of requisite evidence. Notwithstanding Mr. Justice Blackburn's holding to the contrary, we must (with great respect) regard the question of exclusionary power of the plaintiff clans as one which is still in search of an answer.

Perhaps the Milirrpum Court may have been influenced by some unarticulated policy considerations. Having found as a matter of fact that bands (comprising members of many aboriginal clans) made economic use of the subject land, the Court might have felt that any exclusionary "right" in clans would be inconsistent with the traditional way of aboriginal life. The learned Judge might also have felt that to recognize such exclusionary "right" in clans at this stage would be to enable the plaintiff clans to practice exclusion, this in turn contributing to the "destruction" of the traditional pattern of aboriginal life.[146]

But this sort of policy argument suffers from the fundamental lack of clarity about the meaning of the term "rights of exclusion". The activities and persistence of bands is just as easily explained by this argument as by the view that visited aboriginals did not exercise their power to exclude visiting aboriginals, but that they exercised it to create a privilege - no right relationship. Moreover, it is far too speculative to feel that recognition of power to exclude others by the Northern Territory Supreme Court, at this stage of aboriginal history of cultural contact with the "Western" world, is in itself likely to generate a destruction of inherited ways of life.

Let us suppose that the Court ruled that in 1788 the aboriginal law authorized the Gumatj and Rirratjingu clans to exclude other clans from using and enjoying their lands. This holding is not likely at all to retrospectively affect between 1788 to 1935 (1788 to 1971) the organization of economic activities of bands. So that this policy argument must have

reference only to the future consequences of the judicial recognition of the "rights" of exclusion. This recognition will not obviously be so general as to involve all aborigines in the Northern Territory or all "tribalized" aboriginals in Australia, but will have to be restricted to the thirteen plaintiff clans in the subject land. It is furthermore, open to question whether the band performs the same economic function for the plaintiffs' social organization in 1972, and will continue to perform the same function thereafter, as it was performing in 1788 and prior to that date. If the Court had indeed affirmed that traditional aboriginal law did favour "rights of exclusion" in 1788 or prior to 1788 that holding would have dealt no deathblow to the traditional aboriginal social organization, now under the manifold complex modern pressures of the economy and the state.

The only consequence of some significance would have related to the further consideration of the plaintiffs' claim, as against the Commonwealth and Nabalco's alleged entitlements with respect to the subject land, these would have perhaps been only marginally affected since the establishment of aboriginal legal system containing acknowledgement of native property rights would still have left open the question whether the common law recognized it in 1788 and whether it was desirable to hold that it so did.

(OVER)

(E) THE PROBLEM OF INALIENABILITY.

The third constituent element of the concept of property, according to Blackburn J., is the right to alienate the land by the plaintiff clans. The learned Judge finds simply that "the right to alienate is expressly repudiated by the plaintiffs in their statement of claim".[147]

This repudiation must indeed be the last straw, in view of the preceding findings concerning multiple entitlements of user and enjoyment of land by all aboriginals and the absence of rights of exclusion. On the present analysis, once again, the question is whether the notion of proprietary interest is unintelligible without the so-called "right" of alienation. Related to this is the policy question as to whether there were any compelling grounds for the aboriginal legal system to explicitly provide for the mobility of land resources served by the "right" to alienation in modern societies.

Blackburn J. recognizes that all the incidents of proprietary interest, of which jus disponendi is one, can be qualified. Clearly, also, it is inconsistent with His Honour's position for this "right" to be so qualified as not to exist at all.[148] This was precisely what the plaintiffs asserted: they had no right to alienate their clan lands. The question is whether the proposition "X has a proprietary interest but that X cannot alienate its property" is meaningless and self-contradictory.

Obviously, the question can only be answered by a stipulative definition of the notion of "proprietary interests" or "ownership". The learned Judge adopts a stipulative definition which in turn would make the above proposition formulated in the question meaningless. But it has to be noted that on other definitional approaches, one might find such a proposition meaningful on the view that jus disponendi is not a defining characteristic of proprietary interests or "ownership".

The question then is what are the good reasons for stipulating the "right to alienate" as a constituent e1ement of ownership? We recall that principal reasons for treating rights of user and enjoyment of the law, and "rights" of exclusion were that these rights were explicitly claimed as being recognized by aboriginal law and custom. But the right to alienate was not thus claimed; it was in fact denied by the plaintiffs. All that this repudiation meant was that the

aboriginal system's definition of proprietary does not require right to alienate. (It might even forbid any alienation.) Mr. Justice Blackburn's insistence that nevertheless such a right must exist before the aboriginal interests can be labelled "proprietary" is a clear, though only, example of the imposition of a Western notion upon an indigenous system which did not need it.

This insistence is puzzling, for the learned Judge could have held, as he did, that no aboriginal proprietary interests recognizable at common law existed in 1788 because there was no "right" of exclusion. That finding standing alone, would have been conclusive from the Court's point of view, and also in terms of our conceptions of property which coincided on this point with those of the plaintiffs, as shown by their statement of claim. And supporting such a conclusion, though rather feebly from the present point of view, would have been the holding that clans as such did not have a right of secular user and enjoyment of land.

Historical enquiries into the law of real property could yield a number of situations in Western law where either the right to alienation is absent for a period of time without affecting the nature of proprietary interest or where multiple and varied restrictions upon alienation exist again without any destructive impact upon a clearly recognized proprietary interest.[149] And detailed enquiries into indigenous systems of African law would demonstrate recognition of interests as proprietary, in the absence of a jus disponendi.[150] The power to alienate property is necessary to ensure mobility of resources within a society. Legal recognition of this power (it is analytically inappropriate to speak of a "right" to alienate) is only an indication, even if a strong one, of how legal techniques are used to serve clearly desired social ends: Richard R. Powell in his authoritative discussion on the law of restraints upon alienation of real property pointedly observed:

> When a society says to an owner of property "This you may not do," the prohibition presupposes a social judgment that the proposed form of disposition will significantly interfere with the long-time welfare of the affected society. .... the law on alienability ... is a variable, properly responsive to the wisdom and social philosophy of a particular society at a particular moment of time.[151]

What "social judgment" is embodied in the aboriginal legal system's total prohibition of alienation of clan-lands? An answer to this question must be sought through legal anthropology. But one can point to a number of factors relevant to such a scientific explanation. First, there was an abundance of productive assets in lend as compared with the range of needs of a pre-agrarian people. Second, the relatively low levels of technology of resource use, coupled with traditionally 1imited range of such uses, contributed to a state of continued moderation of needs. Third, the aboriginals communities were relatively small in number and geographically scattered. Fourth, the ritual and religious use of land and the relative invariability of mythical linkages creating sacred sites, may provide a deeper reason for the inalienability of land. Fifth, the apperceived relation of sacred character of some sites within the land to the overall maintenance of patterns of social cohesion could be an important value factor militating against easy alienability.

It is surprizing that Mr. Justice Blackburn, despite his awareness of the different levels of societal and evolutionary complexities, should have failed to enquire altogether into the rationale of the inalienability before attaching to it such a drastic consequence. Absence of the power to alienate need not, in the light of factors such as enumerated above, necessarily signify absence of recognized (by the aboriginal legal system) and recognizable (by common law at 1788) proprietary interests in land.

(F) "RITUAL" AND "ECONOMIC" USES OF LAND

As noted, Mr. Justice Blackburn finds that the "greatest extent to which it is true to say "that the clan as such has a right of use and enjoyment of land and of exclusion" is for ritual and religious purposes. The economic use of land was made not by clans as such but rather by bands. It is difficult to ascertain the precise nature of the impact of this finding on the ultimate holding on the issue, but it is clear that it must have had a significant, if not decisive, impact.

The obvious question here is: is it necessary (and if so for which reasons) that an interest which can be characterized as proprietary must be "economic" in nature?[152] Why is the proven religious interest full with enjoyment and exclusionary powers not to be recognized as proprietary interest? If the answer is that such an interest lacked the third constitutive element –

power of alienation – the policy arguments of the preceding section of this paper apply here even more strongly.[153]

The Milirrpum Court ought to have clearly held that aboriginal legal system did recognize proprietary interests of clans as clans in land for religious use and enjoyment. To be sure, this finding would have to be limited to delineated sacred sites. Such a holding would still have left open the further question whether the Court can impute to the common law as at 1788 recognition of such proprietary interests. On this latter question, the Court would have had much more flexibility because the comparative case law (of the United States, New Zealand, Canada, Africa India and New Guinea) had no decisive guidance to offer either way. This comparative material was focussed on property rights of a secular type; the aboriginal claims in this particular context were unique in the true sense of that word.

The Milirrpum Court could have thus, if the issue in this limited form would have been clear before it, held that common law in 1788, and in its later developments, can be said to have recognized "ownership" of certain sacred sites in the plaintiffs clans. The only difficulty in so holding could have stemmed from a long line of Australian decisions propounding the intransigent doctrine that "every inch" of the Australian continent belonged to the Crown from the moment of settlement.[154] But this difficulty is not formidable. In its examination of comparative case law, the Court has already accepted the proposition that the ultimate ownership of the Crown of the discovered or settled territory is consistent with communal native title, if such a title is (i) proven and (ii) if recognition of such title could be imputed to the common law at 1788.[155] The limited communal native title in sacred sites is substantially, if not wholly, acknowledged as proven. It is not wholly so acknowledged for the simple reason that without any well-considered reasons the power of alienation is regarded as a crucial component of proprietary rights.[156] Had the Court, however, considered in some detail the rationale for provision of such power by legal systems, it is very likely that inalienability of interests in sacred sites would not have been perceived as fatal to their characterization as proprietary. And if the Court had gone thus far, it also could have found itself encouraged (rather then deterred) by the comparative case material to recognize aboriginal rights in sacred sites consistent with the Crown's ultimate title. Furthermore, there is much to be said generally (which could be said even more effectively on the limited issue of recognition of aboriginal

"ownership" of the sacred sites) in favour of limiting the controlling range of the vast statements in "binding" Australian authorities, without necessarily affecting their authority.

It may be said that there is, however, a further difficulty, more formidable than the ones hitherto canvassed. This arises from the Court's clear finding that the predecessors of the plaintiffs did not, on balance of probabilities, have the same links with the subject land as now claimed by the plaintiffs. If this is so, how can the plaintiffs show a clear title to sacred sites, held in continuity from 1788 till 1935 (or 1972)?

The answer to this question is that there is no sufficient evidence either way to indicate the antiquity of links in regard to sacred sites. The evidence, as recorded in the judgment, was undifferentiating in its treatment of the "sacred" and "secular" use of land. The expert testimony of Professor Berndt, focussing on mythological rather than historical, explanation of mutations and dispersal of mata-mala pairs was obviously more relevant to any appraisal of continuity in the holding of sacred sites, than it was for links of antiquity in terms of landholding simpliciter.[157] For example, the phenomenon of "enclaves" created by sacred sites of one clan found in the "territory" of another, and the mythological explanation of it in terms of movements of "spirit ancestors" creating "sacred links" between a tract of land and a clan, was problematic only insofar as probabilities of holding of all land claimed by one plaintiff clan were concerned.[158] But the "enclave" phenomenon need not be problematic at all, if the focus of interest is to identify the antiquity of the links in terms of clan-claims to certain sacred sites.

It is not important for the present position to identify at this very stage a variety of ways in which the evidence could be seen as supporting an acceptable level of probable links of antiquity in relation to sacred sites. It is sufficient to maintain merely that such links could have been established on the balance of probabilities if the evidence had been gathered or analyzed in terms of a clear classification of "religious" and "economic" use of the land. One has the feeling that discovery of links of antiquity in regard to sacred sites would have been a more tractable, if not less complex task.

It must of course be admitted that the very doctrine of the communal native title which makes possible a clear holding that

the aboriginal clans are entitled to sacred sites also carries the consequential proposition that such title can be extinguished by the Crown. But the fact that the Crown is empowered to extinguish the title is scarcely an argument against its recognition. Moreover, if the title to sacred sites is recognized, it is not far too speculative to suggest that it might attract the protection of the freedom of religion clause in the Australian Constitution. Whether such protection will be afforded under Section 116 of the Constitution, or whether an escape from such possible protection by valid executive measures is open, are important questions worthy of further investigation.

Clearly, the Milirrpum Court missed an important opportunity of doing justice within the law by being altogether inadvertent to the overall significance of the clans' right to use and enjoy the land, and its powers of exclusion, in the realm of ritual uses of land, and by rather undiscerning emphasis on the centrality of the power of alienation. We must read the Milirrpum decision not as foreclosing the issue of the communal native title concerning sacred sites but, rather as raising it in the most effective manner.

OVER →

V A FRIGHTFUL LEGISLATIVE TANGLE.

(A.) INTRODUCTION

It was, of course, essential for the Plaintiffs not merely to attempt to demonstrate that the clans posited proprietary interests in their lands were recognizable and recognized at common law at relevant time but also to argue that these interests were not validly terminated at law. But the 1953 Mineral (Acquisition) Ordinance purported to "vest bauxite in Crown if it was not already the Crown's property".[160] And the agreement between Nabalco and the Commonwealth found legislative endorsement in the 1968 Mining (Gove Peninsula Nabalco Agreement) Ordinance.[161] The plaintiffs had to argue that neither Ordinance was valid and consequentially extinction by legislation of the communal native title in land was not as yet accomplished.

The various statutory provisions of the Northern Territory (Administration) Act, 1910, are so complex that at the very outset of any appraisal of judgment on these issues, one must take due note of Mr. Justice Blackburn's completely justified sense of exasperation. At one stage in the proceedings, His Honour observed:

> I do not think I have ever seen a more frightful legislative tangle...I have the feeling of walking through a dark jungle and very occasionally seeing a glimpse of light through the tops of the trees. Then it closes over again as we walk a little further.[162]

This writer shares this exasperation and, unlike the learned Judge, finds it very difficult to make his way through the legislative thicket by means of occasional limited outbursts of illumination.

(B) THE PLENITUDE OF DELEGATED POWER OF THE TERRITORY'S LEGISLATIVE COUNCIL.

The Northern Territory Administration Act 1910 (hereafter Administration Act) in its ninth section made applicable the Land Acquisition Act 1906 to acquisition by the Commonwealth of "any lands owned in the territory by any person" for a "public purpose".[163] The Plaintiffs argued that Section 9 of the Act constituted a limitation on the legislative power of the legislative authority for the Northern Territory. It was not open, therefore, to such authority to acquire any property, legislatively or otherwise, outside the framework of the Land Acquisition Act, 1906. A 1947 Amendment to the Administration Act, however, provided (by addition of Section 4U to the Act)

that "subject to this Act, the Council may make ordinances for the peace, order and good government of the Territory". Was the Minerals (Acquisition) Ordinance, 1953 providing for the direct legislative acquisition of the subject land ultra vires of the Administration Act?

Analytically, this question can be answered in at least three distinct ways. First, it can be maintained that Section 9 in itself is neither a power-conferring or power-limiting provision. All that the section requires is that once the determination to exercise the eminent domain powers is made, the provisions of the Land Acquisition Act, 1906-1955 will apply to the process of acquisition. On this sort of argument, the eminent domain power will have to be simply postulated as an inherent power of the Crown, available to the Northern Territory Legislative Council.

The second sort of answer will acknowledge that Section 9 of the Administration Act does at law limit the Council's legislative power when that power is sought to be exercised under that section. Section 9 applies only to one method of acquisition of property, involving acquisition by the executive "by means of either voluntary agreement or compelling powers". But surely other ways of acquisition are legally permissible under the Administration Act as authorized for example, by Section 4U of the Administration Act. Insofar as the 1953 Ordinance can be regarded as falling under either of these provisions, it must be regarded as intra vires of the Administration Act. This, in effect, was the reasoning of Bridge J. in Kean v The Commonwealth.[164]

The third answer, and the one elaborated by Blackburn J., proceeds on the view that the legislative power of the Territories Legislative Council is "plenary". On this view, Section 9 does not at all constitute a limitation on the legislative power. It is in fact a facilitative provision in the sense that it enables the legislative authority to carry out acquisition in a specific manner. His Honour concedes that the plenitude of the Council's power does not extend so far as to provide that, contrary to the mandate of Section 9, the Lands Acquisition Act should have no application whatever.[165] For to so provide would be in effect to "repeal" that section, "a provision of the legislature which created" the Council in the first place.[166] To enact different schemes for land acquisition is, however, not necessarily to "repeal" Section 9. Nor

indeed is a piecemeal tinkering with the provisions of the Lands Acquisition Act such a "repeal", even though its precise effect may be to exclude the very operation of certain provisions of that Act to the Territory. Therefore the 1953 Ordinance was not invalid as being contrary to Section 9.

The third answer is fraught with difficulties. Whatever one might mean by the expression "plenary", Blackburn J. is surely correct in maintaining that the Territory's Legislative Council cannot "validly enact anything directly contrary of Section 9 as, for example, a provision that the Lands Acquisition Act should have no application to the Northern Territory", for, to do so would be to usurp the authority of the parent legislature.[167] If this is indeed so, then Section 9 does in law constitute some sort of limit on the "plenary" legislative power of the Territory. But then on His Honour's own showing the Lands Acquisition Ordinance, 1911, enacted by the legislative authority did precisely that which His Honour asserts is impermissible. That Ordinance, for example, provided that Section 51 of the Lands Acquisition Act shall not apply to lands acquired within the Territory.[168] The 1911 ordinance thus repealed Section 51 of the Lands Acquisition Act. The fact that this action was, and is, not challenged does not alter the analytical point that the legislative authority did exercise a power which it did not have (on His Honour' s present view). It is of course arguable that alteration of a provision of the Land Acquisition Act is not the same as the repeal of the entire Act; and not the same surely as the formal repeal of Section 9 of the Administration Act prescribing observance of the Lands Acquisition Act. But to so argue would be to take the view that the Lands Acquisition Act as a whole is different from the sum of its parts and to authorize the repeal of substantial segments of it which may still leave the Act as a whole unrepealed. Section 9 directive must clearly apply to each and every provision of the Lands Acquisition Act. To repeal any part of it is to violate its directive.

The same sort of difficulties attend the argument that Section 9 cannot be formally repealed but that the Territory's Legislative Council can adopt a wholly different procedure of acquisition then that prescribed by the Lands Acquisition Act. The mere assertion that the power of the relevant legislative authority is "plenary" does not help clear thinking, specially when that plenitude is somehow limited by Section 9. This is so because it is conceivable, and likely, that a scheme for acquisition of land for public purpose may not at all respect

any or all of the safeguards (procedural and substantive) which the Lands Acquisition Act provides. If, nevertheless, such a scheme is within the power of the relevant legislative authority, then Section 9 is effectively repealed, though it may verbally remain on the statute-book. When such a scheme is legislated, it is tantamount to saying, albeit indirectly, that (in Mr. Justice Blackburn's words) "the Lands Acquisition Act should have no application to the Northern Territory". Assume that the Legislative Council regularly resorts to the legislative acquisition methods for a period of fifty years, and that all acquisitions in that period are under these new methods (rather than under Section 9 directive). Although, im this situation, Section 9 has not been formally repealed, the legislative power has been exercised in a manner which effectively evades His Honour's stipulation concerning restriction on that power.

There are only two analytical possibilities. Either the Territory Council's legislative power is "plenary" to the extent of its being unfettered in this respect by the directive of Section 9 of the Northern Territory Administration Act or the plenitude of this power is limited by that section. Blackburn J. finds that the power is not "plenary" to the extent entailed in the first alternative; and nevertheless rejects the second a1ternative. This surely is analytically wholly impermissible.

His Honour is not insensitive to this difficulty. Thus, on the one hand, he asserts that it is not strictly necessary for him to rely on (what he perceives to be) the reasoning of Bridge J. in Kean v The Commonwealth; while, on the other hand, his Honour resorts to it in case he is "wrong" in his "view of the proper construction" of Section 9.

Mr. Justice Blackburn takes the view that Kean v The Commonwealth[169] proceeded on the assumption that Section 9 "does provide a limit on the legislative power" but holds that "such limit was not exceeded" by the Minerals (Acquisition) Ordinance, 1953, "because, on their true construction, the Lands Acquisition Act and the Minerals (Acquisition) Ordinance are not inconsistent".[170] His Honour further agrees "with this view of the construction of these two statutes".[171] It is submitted, with respect, that the Kean reasoning is altogether free of traces of any detailed comparison between these two measures. Bridge J. in that decision no doubt observes that he does not see anything "so exclusive in the application of the Lands Acquisition Act 1906-1916, to the Territory on the 22nd April, 1953, as to preclude Commonwealth acquisition of Territory land by or under another law ... ".172

The finding that the Lands Acquisition Act was not exclusive is one thing; the finding that the Act and the 1953 Ordinance were not "inconsistent" with each other is another. The latter requires at the very least a comparative analysis of the objectives, structure and processes of acquisition. A finding of non-exclusivity is not necessarily a finding of consistency.

The fact is that Bridge J. found that the Act and the Ordinance were rather incomparable in these terms. For, the Act provided for land acquisition "being effected through the executive" whereas the impugned Ordinance effected "the acquisition itself as a direct legislative process without resort to executive action of any kind".[173] And the authority for the latter arose from Section 4U of the Northern Territory (Administration) Act 1910-1949 and Section 10 of the Northern Territory Acceptance Act, 1910-1952.[174] Because the power conferred by Section 4U (relevant also in the present case) of the Administration Act was characterized by Bridge J. in the companion case R. v Lampe[175] as "plenary", Bridge J. does not proceed to explain – in Kean as to how Section 4U can overcome the directive of Section 9. So that Mr. Justice Blackburn's reliance on Kean and Lampe help only on the basis of the "plenary" power rationale.

Section 4U of the Administration Act provides: "Subject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory". The Kean decision nowhere squarely confronts the meaning of the proviso with which the section opens but refers us only to Lampe.[176] In Lampe, at issue was Section 12 of the Building Ordinance 1955, of the Northern Territory Council which authorized inter alia the Administrator to make regulations concerning the subject of the Ordinance and also to sub-delegate such powers to the Board created by the Ordinance. The plaintiff's argument in essence was that the relevant law-making power vested either in the Legislative Council of the Territory or in the Administrator was "merely a subsidiary power of a sub-ordinate delegate" subject in its exercise to the maxim delegatus non potest delegare.[177]

The plaintiffs were also arguing that the proviso of Section 4U meant especially that the legislative power of the Council was restricted by provisions (Sections 4V, 4W, 4X, and 4Y) requiring assent of the Administration "or requiring or permitting reservation or authorizing disallowance".[178] Such power, therefore, was not of a "plenary" nature, allowing the power of further delegation and sub-delegation.

It was in this context that Bridge J. held, reinforced by a long line of the Privy Council rulings,[179] that the legislative power of the Council is "plenary". Bridge J. also endorses the opinion, expressed by Kriewaldt J., that the "subsidiary and partially representative" character of the Territory's legislature does not affect the plenitude of its power, as is indicated by the use of the formula "peace, order and good government" -- a formula typically used for the grant of a legislative power to a "fully (or semi) self governing authority".[180] But Kriewaldt J. also held that this plenitude found its limits in the proviso to Section 4U and a1so in "the over-riding power of the Parliament to make laws for the territory".[181]

Bridge J. in Lampe sees himself as in disagreement with those stated limits. But his judgment contains no discussion at all of the abovementioned second limit. Insofar as the Section 4U proviso is concerned, while Bridge J. asserts rather sweepingly that "the plenitude of the Legislative Council's lawmaking power is" not "qualified by ... the opening words in Section 4U",[182] all that the learned Judge decides upon is the ambit of Sections 4V, 4W, 4X and 4Y dealing with gubernatorial and the Administrator's assent. Bridge J. is clear that these latter provisions do not at all deprive the council's power of its plenitude. This may be true; but it does not bear out the more general claim that nothing in the Act, including the opening proviso of Section 4U, limits the exercise of Section 4U power at all. If that were so, the proviso of that section would become otiose. But on the facts before him in Lampe it was scarcely necessary for Bridge J. to consider this aspect. It was essentia1 in Lampe to arrive at a conclusion that the relevant legislative power was "plenary"; it was neither necessary nor in fact warranted for the Lampe Court to identify precisely all or even the most important limits of that plenitude. The sweeping language of Bridge J. concerning plenitude knowing no limitation, despite Section 4U proviso, can only be considered as good rhetorical flourish setting the mood for characterization of the Council power as "plenary" in the context of delegation and sub-delegation of rule-making power.

So that the Kean reference to Lampe, and the Milirrpum reference to these cases, does not really advance us much further as regards the limits, if any, of the plenitude of the Council's power. To say that that power is "plenary" is only a part of the answer. Surely, the real question is "plenary" to what extent?

As we saw earlier, Mr. Justice Blackburn himself does not confront this question. When His Honour does refer to the Section 4U proviso, he does so in a way that makes Section 9 irrelevant! Thus, according to Blackburn J.:

> If the words of S.9 do not provide a limit to the legislative power of the Council, the phrase "subject to this Act" does not take the matter any further. But in any event I agree with what Bridge J. said in Lampe's case, that the phrase is a limitation, not on the legislative power of the Council, but on the manner of the exercise.[183]

This, with great respect, will simply not do, for at least two reasons. First, as we have seen, the words of Section 9 are not seen as a limit on legislative power because that power is construed to be "plenary"! But the question that the proviso to section 4U raises is precisely as to whether that power should be construed as having such plenitude as overrides Section 9 type provision. It is scarcely an answer to an argument based on the proviso "subject to this Act" to say that the legislative power is not "subject to this Act". But that is what "plenary" power in an unqualifiable sense must mean.

Second, it is true that Bridge J. said in Lampe's case that the Section 4U proviso "subject to this Act", does not affect the plenitude of the legislative power of the Council insofar as there exist limits on the manner of its exercise. Bridge J. was referring (as shown earlier) to provisions for consent and modification by the Administrator and the Governor General. These provisions do not affect the plenitude of Section 4U power. But from this proposition it does not follow at all either that the Section 4U proviso does not affect legislative power as regards all the provisions of the Act or that Section 9 directive (which is a substantive power) may not be a limit on power attracted by that proviso.

It still remains open to argue, as Blackburn J. seems to do, that regardless of the foregoing Section 9 can be assimilated to these sections concerning the Administrator's or Governor-General's assent etc. on the principle that what is entailed is not a limitation "on the power of the Council but the manner of the exercise". This sort of argument is prima facie persuasive. It deserves close examination.

In Lampe, we repeat, the question was whether the provisions for assent, recommending amendments, or of disallowance by the Administrator or the Governor-General of Ordinances passed

by the Legislative Council of the Territory were such limits on its legislative authority as to make it a subordinate, "non-plenary" legislature. On Mr. Justice Bridge's analysis these provisions did not make "legislative powers ... non-plenary". They rather "make such an exercise incomplete until the relevant conditions are satisfied".[184]

Blackburn J. would generalize Lampe holding to suggest that the meaning of Section 4U proviso is that the words "subject to this Act" mean only that the manner of the exercise of the legislative power is restricted by the provisions of statute. This is certainly tenable. But note that this view must also imply that the "manner-of-exercise" restrictions in the Act render the purported exercise of the power incomplete. This is self evidently the case with the provisions before the Lampe Court; does this however make sense in the Section 9 context? For to follow through the Lampe reasoning on this point we will have to say that the 1953 Ordinance insofar as it does not comply with Section 9 directive, is an incomplete exercise of a plenary legislative power. But "incomplete" in what sense if the assent by relevant authorities has been given, as in the case in 1953 Ordinance? So that, Section 9 cannot even be a "manner-of-exercise" type restriction on legislative power.

On this sort of analysis there is no need to refer to Lampe or to make a distinction between a limit on a legislative power and a limit on the manner of its exercise. We are left with a bare statement then in the Milirrpum Case to the effect that Section 9 is in no sense a limit on the power of the Legislative Council of the Territory. This statement is not satisfactory, because Section 9 does mandatorily render applicable a Commonwealth law to the Territory. To enact an Ordinance which does not respect the provisions of this law is to defy this mandate, unless the Lands Acquisition Act, by clear implication authorized an alternative method of acquiring property for public purpose. It cannot be argued that the plenitude of the Council's legislative powers is so unqualified as either to overcome the limitations of the Act which creates the Council or to transcend the underlying authority of the Commonwealth. If we cannot construe meaningfully Section 9 as being a "manner-of-exercise" type limit on the Council's legislative power. then the clear wording of Section 9 and the proviso of Section 4U require us to regard the directive of Section 9 as a limit on the legislative power of the Council. To say that it does not constitute this type of limit either, is also to say that Section 9 is only

a discretionary and enabling type of provision, despite the mandatory formulation thereof. This is in effect what the Milirrpum Court holds, relaxing for once its own rather strict canons of construction. But to so :relax the construction, with respect, is in effect to legislate a change in Section 9 substituting the word "shall" therein to "may". It is inconceivable that Mr. Justice Blackburn consciously intended to make such a change. Nevertheless, such a change is indeed the outcome.

The point of departure then is not here one of strict law, but one of policy and it ought to be evaluated as such. Thus, when Mr. Woodward for the plaintiffs urged the Court to be advertent to "the traditional hostility of the law and of Parliament itself to the arbitrary acquisition of private property"[185] the Court's :response, with respect, moves back to the level of strict law. Blackburn J. finds that this sort of consideration is not "weighty" to "displace the view that Section 9 was not a limit on legislative power of "the Governor-General under S. 13, or of the Legislative Council under S. 4U".[186] The Counsel's argument was precisely that the Parliament could not have intended to confer a power of arbitrary acquisition. Neither Section 13 nor Section 4U by their wording assert the contrary. Mr. Justice Blackburn's decision must then be regarded as a policy decision involving the view either that the 1953 Mining Ordinance was not an arbitrary method of acquiring citizen's property or that even if it was an arbitrary method, it was nevertheless acceptable to the Court. The latter conclusion cannot be attributed to a judge so conscientious as Blackburn J. The former does find some support in the view attributed by the learned Judge to Kean that the Kean Court proceeded on the finding of "consistency" between the Lands Acquisition Act and the 1953 Ordinance. But as we have already tried to show, far from making any finding of consistency between the Act and the ordinance, Kean proceeds on the basis of their incomparable nature.

FOOTNOTES

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1. (1836) Legge 72.
2. See G. Robertson & J. Carrick, "The Trials of Nancy Young" (1970) 42 Australian Quarterly 34-36.
3. (1971) 17 F.L.R. 141-294 hereafter referred to as Milirrpum.
4. Milirrpum 198.
5. Milirrpum 243-52.
6. C.D. Rowley, The Destruction of the Aboriginal Society (1970) passim.
7. Milirrpum 146-49.
8. See e.g. Hansard 6. Feb. 1952, p. 14;. 18. Sept. 53, p. 405; 21. Sept. 1955, p. 803;
9. See 21 (3) (b) s. (c) of the Northern Territory (Administration Act) 1910-1969; Hansard 16. Sept. 1969, p. 1409. A study of the history of the trust fund and pattern of disbursements under it, is now in progress.
10. Hansard 16. Sept. 1969, p. 1409-1411.
11. See the Report of Select Committee on Grievances of Yirrkala Aborigines, Parliamentary Papers 953 (1963).
12. Id. at 951.
13. Milirrpum 151-65, 208, 252-62.
14. See part V of this paper.
15. See supra note 10.
16. Milirrpum 200.
17. See for this notion .A.E. Ehrenzweig, Psychoanalytical Jurisprudence (1971) 194-200.
18. Milirrpum 291, 244-45.
19. Id. at
20. Obviously, the three areas emphasized in this Section of the paper does not exhaust illustrations of "flexibility" and "liberalism". The whole judgment is imbued with this spirit. See, further examples, on Milirrpum at 193, 209-10, 211, 214, 255, 265.
21. (1969) 14 F.L.R. at 10.
22. Id. at 12.
23. Id. at 12-13.
24. Id. at 22.
25. Id. at 19.
26. Id. at 15-19. The present writer, however, must confess that the divergence stressed by Blackburn J. between the two lines of authority is too subtle for him to completely understand.
27. (1969) 14 F.L.R. at 23-4; Milirrpum 198.
28. (1969) 14 F.L.R. at 25.
29. Ibid.

30. Milirrpum 153.
31. R. Cross: "The Scope of the Rule Against Hearsay" (1956) 72 L.Q.R. 91.
32. Milirrpum 153.
33. Id. at 158-59.
34. Id. at 155.
35. Id. at 156.
36. Id. at 157.
37. Ibid.
38. Ibid; citing Phipson, Law of Evidence (1970; 11th ed.) para. 972.
39. Milirrpum 155.
40. Id. at 158.
41. See D.E. Harding, "Modification of the Hearsay Rule" (1971) 45 A.L.J. 531; but see the comments of Mr. Justice Wells (South Australia) in the same at 561-66. The rhetorical question in the text of course is put in the context of the application of the rule in civil cases.
42. Milirrpum 160-61.
43. Id. at 159-60
44. Id. at 161.
45. Ibid.
46. Ibid.
47. P. Bohannan, Justice and Judgment among the Tiv(1957) 119-20.
48. Ibid.
49. M. Gluckman, The Judicial Process among the Barotse of Northern Rhodesia (1967; 2nd ed.) 381.
50. Id. at 404. See also M. Gluckman, The Ideas in Barotse Jurisprudence(1965) 251-72.
51. Milirrpum~165.
52. Id. at 165, 269.
53. Id. at 165. What does it mean to say that the expert testimony of this kind is acceptable to the Court "without prejudice"? If the expert testimony is accepted on the basis that it should not predispose the court to view the evidence in terms of scientific knowledge, then the infusion of such testimony is rather fruitless. To put it crudely, the whole function of expert evidence is precisely to prejudice the Court, in the sense of creating dispositions (either way) for viewing the contentions before the Court from the vantage point of science. To be sure, it is the prerogative of the Court, in fact its duty, to decide the case before it; the experts cannot strictly be permitted to usurp that function. And the ultimate significance of the expert testimony for a case at hand thus depends not really on what experts say, but what the Court understands the experts to be saying.
54. E.g. Milirrpum 166, 176-77, 195.
55. Milirrpum 163, 165-68.
56. Id. at 269. The transcript is full of illustrations where the interpreter was unable to translate an English term into Gumatj and vice versa.
57. Milirrpum 179.

58. Id. at 168.
59. Id. at 169.
60. Milirrpum Transcript at 65.
61. Milirrpum 174.
62. Id. at 168.
63. On the problematic nature of the group concept in sociological analysis see, e.g. R.K. Merton, Social Theory and Social Structure (1968 Rev. Ed.) 364-80.
64. Id. at 171, 270.
64a. This is once again evident in the Court's treatment of Professor Berndt's evidence concerning the antiquity of the clans' links with the subject land. Berndt testified that the explanation of some sacred sites of one clan found in the territory of another may lie in mythology as well as in history. Mythologically, such "enclaves" in another clan's "territory" could be explained (and is explained by the aboriginals) by reference to the fact that the ancestral beings in their wanderings over aboriginal lands generally left certain sacred sites belonging to a particular clan in some other clan's territory. Historically, the enclaves can be explained by a hypothesis of movement over time by one clan from their original land to some other area, retaining despite this movement its sacred sites in the original territory. Professor Berndt maintained strongly that the latter hypothesis does not "invalidate the original interpretation" (i.e. the mythological one). In cross-examination, Berndt maintained that the mythological explanation must be taken strongly into account as this was the aboriginal explanation of the enclaves. Professor Berndt was here stressing the folk system. (Milirrpum Transcript 1115-1117)

    But the Court dismisses the expert's testimony on the ground that while the mythological explanation was the "soundest anthropological explanation" of the enclave phenomenon, the mere existence, the mere possibility of a historical explanation is of decisive import. Milirrpum 193. Note that the mere possibility of the band having a core of membership from the particular clan was not, however, regarded as decisive. Milirrpum 169.
65. Milirrpum 151.
66. Id. at 152.
67. Id. at 149.
68. Id. at 166.
69. Ibid.
70. Milirrpum 166.
71. Id. at 172.
72. Ibid.
73. Milirrpum 172-3.
74. Ibid.
75. Milirrpum 174.
76. Id. at 167.
77. Ibid.
78. Ibid.
79. Ibid.
80. Milirrpum 165.

81. Ibid.
82. Ibid.
83. Milirrpum 171.
84. Ibid.
85. Ibid.
86. Ibid.; but see Section II of this paper, supra.
87. Milirrpum 180; also at 272.
88. Id. at 179.
89. Id. at 176.
90. Id. at 271.
91. Id. at 191.
92. Id. at 191-92.
93. Id. at 189.
94. Id. at 197-98.
95. Id. at 195.
96. Ibid.
97. Milirrpum 181.
98. Ibid.
99. Milirrpum 182.
100. Ibid.
101. Ibid.
102. Ibid.
103. Ibid.
104. Milirrpum 183.
105. Id. at 266.
106. H.L.A. Hart "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 49.
107. Milirrpum 266.
108. Ibid.
109. Ibid.
110. Ibid.
111. Ibid.
112. Milirrpum 267.
113. Ibid.
114. Milirrpum 268.
115. One may wonder whether it is at all possible to identify a system of norms as a legal system solely by a study of evidence. Recourse to a concept or definition of law is analytically entailed in such an enterprise. The learned Judge propounds a definition and uses it in the evaluation of the evidence; but at the same time prefers to emphasize that his decision here is based solely or pre-eminently on evidence.
116. Milirrpum 271.
117. Ibid. Blackburn J. here is overstating the Solicitor-General's contention which was not that the aboriginals were not word-perfect but that "they were too far from being so".
118. Milirrpum 272.
119. Ibid.

120. Milirrpum 269.

121. Ibid.

122. Ibid.

123. Milirrpum 260-70.

124. Id. 270.

125. Ibid.

126. Milirrpum 272.

127. Ibid.

128. Ibid.

129. Ibid.

130. Milirrpum 183.

131. Milirrpum 273.

132. Ibid.

133. Milirrpum 273. The Court's approach to this aspect. of the plaintiff's contention is far too summary; this is perhaps justified in view of the holding that the aboriginal legal system did not recognize any "proprietary interest". One wonders how different an outcome might have been if the statutory formula had been used as a guide for identifying the constituent elements of proprietary rights.

134. R.B. Schlesinger et al., Formation of Contracts: A Study of the Common Core of Legal Systems(1968).

135. See supra n.106.

136. Milirrpum 272, 182, 171.

137. Milirrpum 272. Also see p.183.

138. Id. at 262.

139. See M.R.Kadish and S.R.Kadish, "The Institutionalisation of Conflict: Jury Acquittals" (1971) 27 J.of Social Issues 219.

140. Milirrpum 267 (emphasis added).

141. On some aspects of conflict in aboriginal societies see, e.g , L.R.Hiatt, Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land(1965) 103-126.

142. See the quotation from the judgment in the text accompanying footnote 114, supra.

142a. Milirrpum 181.

143. Milirrpum 272.

144. Ibid.

145. W.N.Hohfeld, Fundamental Legal Conceptions (1919) 50-51.

146. In his concluding address Mr. Harris Q.C. for the Commonwealth put forward an argument on the lines represented in the text. See the Milirrpum Transcript p.2944.

147. Milirrpum 272.

148. Although we must note that the learned Judge does not insist either upon the coexistence of all the three incidents as a precondition of proprietary rights. See Milirrpum 272.

149. See, e.g. 6 Powell on Real Property (1955) 1-34, 35-90.

150. See,e.g., S.N. Chinwuba Obi, The Ibo Law of Property (1963) 41-43; T.O.Elias, The Nature of African Customary Law (1956) 169.

151. See Powell, supra n.149, at 35.

152. Vinding Kruse, 1 The Right to Property (1939) 79-102, raises some fascinating questions concerning "spiritual property" in industrial society and law's recognition of it.

153. As also the clear acceptance by the Court that not a11 the three "incidents" need co-exist before any interest can be recognised as proprietary. Milirrpum 272.

154. Notably from Williams v. Attorney-Genera1 for N.S.W. (1913) C.L.R.404; Council of the Municipality of Randwick v. Rutledqe (1959) 102 C.L.R.54; Attorney-General v. Brown (1847) Legge 312, 2 S.C.R.(N.S.W.) App.30.

155. E.g., Milirrpum 211;

156. Contrary to the Court's own statement. See supra n.153.

157. Milirrpum 187-195.

158. Milirrpum 193.

159. §116 reads: "The Commonwealth shall not make any law for establishing any religion or for imposing any religious observance or prohibiting the free exercise of any religion..."

160. Milirrpum 148.

161. Id. 149.

162. Milirrpum Transcript 2327.

163. Milirrpum 286.

164. (1963) 5 F.L.R. 432.

165. Milirrpum 168.

166. Ibid.

167. Milirrpum 285-86.

168. Id. at 286.

169. (1963) 5 F.L.R. 432 (hereafter Kean).

170. Kean 441.

171. Milirrpum 286.

172. Kean 441.

173. Ibid.

174. Kean 436-37.

175. R. v. Lampe; ex p. Maddalozzo (1963) 5 F.L.R. 160.

176. Kean at 437.

177. Lampe at 166.

178. Ibid.

179. Lampe 167-169.

180. Namatjira v. Rabbe (1958) N.T.L.R. 437. (The writer has been unable to obtain a copy of the report so far.)

181. As quoted in Lampe 169.

182. Lampe 169.

183. Milirrpum 286.

184. Lampe 169-170.

185. Milirrpum 286-87.

186. Ibid. (If anything this outcome dramatically illustrates the need for a bill of rights type guarantee in the Australian Constitution. Article 51 (xxxi) requiring compensation on "just terms" for acquisition of property is inoperative in the present context by virtue of the rather summary and drastic ruling of the High Court in Tau v. Commonwealth (1969) 44 A.L.J.R. 25.)