**Research**

**Introduction**

Australia is the smallest mainland continent in the world with a population of around twenty-one million people which was ruled by British crown from 1788 to 1901. Aboriginal people were regarded as a dying race when the federation of states occurred in 1901. The Australian constitution that was formed in 1901 had only a few rights and Aboriginal and Torres Strait Islander people’s rights were unrecognized completely in the Constitution. In 1962 Aborigines were given the right to vote in federal elections and through the 1967 referendum Aboriginal people became legal citizens of Australia. The 1967 referendum gave the commonwealth legislative power over Aboriginal affairs. However, even as citizens, Aboriginal people were treated as much less than human beings and continued to remain as a poorest group of people in Australia.

In 1992, the *Mabo* case was decided which overturned the *terra nullius* doctrine. When the British saw the Aborigines having no fixed territory and recognizable system of law and customs they applied the doctrine of *terra nullius* that denotes land of no one. This doctrine was based on John Locke’s notion of property ownership stated that since the natives had no investment in the soil then they had no claim to it.

From 1901 to 1970 there was a legal policy that allowed for the removal of Aboriginal and Torres Strait Islander children from their families so that they could be brought up ‘white’ and taught to reject their aboriginality. The indigenous people were again excluded from the self-governing communities through the formation of the Australian commonwealth in 1901. The recognition of Indigenous peoples' rights and interests in with land through the Australian common law in *Mabo* 1992 and the subsequent processes established under the Native Title Act 1993 (Cth) (NTA) have been a key strategy to restore a measure of land justice and to counter the laws and institutions earlier used to deprive Australia's Indigenous peoples.[[1]](#footnote-1)

**Implications of reception**

The Aboriginal and Torres Strait Islander people have been historically excluded from the Constitution of Australia as they have been overlooked as the coerced settlement of Australia in the late 1700 and early 1800s. The indigenous people were again excluded from the self-governing communities through the formation of the Australian commonwealth in 1901.

Section 51(xxvi) of the Australian Constitution, enables Parliament to make laws with respect to the “people of any race for whom it is deemed necessary to make special laws.[[2]](#footnote-2) The law which support this is the Native Title Act 1993 which recognises but qualifies the concept of native title acknowledged by the High Court in *Mabo case*.

Furthermore, in *Western Australia vs. Commonwealth (Native Title Act Case),* the High Court disapproved the view that a law safeguarding Indigenous people’s unique rights over land was merely a ‘special measure’ to conquer disadvantages.[[3]](#footnote-3) The court opined that it was not discriminatory as the distinct identity and status of Indigenous peoples were pertinent in differentiating how Indigenous peoples' relationship with the land was acknowledged and protected.[[4]](#footnote-4)

In June 1991, the Queensland Legislative Assembly passed the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 which recognizes that Indigenous people had occupied, used or enjoyed land in Queensland before European settlement. And exactly a year after the court in the case of *Mabo vs. Queensland* held that the common law of this country acknowledged the entitlements of Indigenous inhabitants following their laws or customs, to their traditional lands. The Queensland legislation, the *Mabo (No 2)* decision and the subsequent Native Title Act 1993 (Cth) turned out new ways of thinking about dealing with the rights and interests of Indigenous people with to areas of land and waters in Queensland.

In the case of *Delgamuukw v British Columbia in 1997*[[5]](#footnote-5) and *Campbell v British Columbia,* courts have recognized the need of right of self-government.[[6]](#footnote-6) Citing the decision of Delgamuukw, the Court noted:

“The right to determine the appropriate use of the land to which an aboriginal nation holds title is inextricably bound up with that title. First, it is “aboriginal law” which is part of the source of aboriginal title. Second, the right to decide how to use that land is also a part of the right.”[[7]](#footnote-7)

**Limits on reversal**

If greater jurisdiction is accorded to aboriginal and Torres Strait Islander people to govern themselves with respect to their laws and customs then how far courts and governments would allow it to digress from western norms. It will be subjected to the constitutional framework and other political norms of the particular country. There will be conflicts between the liberal principles and aboriginal practise however not always in terms of a zero-sum game. But the Aboriginal law cannot be presumed to be necessarily varied because fundamentally opposed to civil, and political rights. Therefore, the defiance is to establish how the customary international law and Australian law can best work with each other equally given the multiplex situations in which Aboriginal people find themselves in a liberal constitutional state.

In the landmark case of *Mabo vs. Queen of Queensland (No. 2)[[8]](#footnote-8),* the majority held that the people of the Murray Islands retained native title to their land which was not extinguished by the annexation of the Islands to the colony of Queensland in 1897, nor by succeeding legislation. The court in this case abandoned the previously regulated doctrine of *terra nullius* which enabled English colonisers to apply the laws of England to newly settled areas where there was not a recognizable set of laws already in place. This doctrine assumed that the territory was empty before their arrival which the court rejected the claim that the acquisition of sovereignty by the Crown made it universals and absolute beneficial owner of all land Justice Breen man opined that if it was true then Aboriginal people would be made ‘intruders in their own homes’. The court opined that such a law is unjust and its claim to be a party of the common law to be applied in contemporary Australia must be questioned.

Aboriginal rights and interests were not ‘stripped away’ by the common law at the point of settlement but through the acts of sovereign governments. [[9]](#footnote-9) Extinguishment also occurs when there has been a loss of connection with and, whether by actual separation or the abandonment of customary laws.

**Implications of the Australian governmental system**

In the 1980s the Australian Law Reform Commission (ALRC) formally considered the possibility of including Indigenous forms of governance in the recognition of what was then described as Aboriginal customary law.[[10]](#footnote-10)

Treaties and customary international law impose legal obligations on State parties. The Council for Aboriginal Reconciliation advocated that the Commonwealth Parliament enacted legislation to put in place a process that will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.[[11]](#footnote-11)

In 1991, the doctrine of *terra nullius* was recognized when the Crown assumed sovereignty over the land in Australia. Australia has a federal system of government having a written Constitution in which the legislative powers of the federal parliament are mentioned. In the case of *Koowarta v Bjelke-Peterson*,[[12]](#footnote-12) the Racial Discrimination Act 1975 was held to be a valid exercise of the external affairs power.

If the people of Aboriginal and Torres Islands held sovereign title to their traditional lands, then their territory could be validly acquired only after obtaining the consent of the people or their sovereign. However, no treaties were concluded between the acquiring imperial or colonial powers and many of the subjects disposed of Aboriginal and Torres Island people. If the treaty was not concluded between the legitimate representatives of the relevant Aboriginal Nation, the agreement would not be more than a private contract and therefore, could not effectively cede sovereign rights.[[13]](#footnote-13) However, if the Aboriginal Nation’s sovereign status was legally recognized and the agreement concluded with the appropriate sovereign representative the agreement could be regarded as an international treaty[[14]](#footnote-14) evidencing the transfer of sovereign title to the subject lands.

The purpose of most of the treaties between the Crown and North American Aboriginal Peoples was to preserve Aboriginal self-government instead of ceding the sovereignty. The United Nations Working Group on Indigenous Populations views that these treaties between the states and Aboriginal and Torres island peoples recognize and effectively protect Aboriginal rights of self-government and self-determination and even if these treaties do not in themselves effectively protect aboriginal sovereignty, in the truancy of a formal cession, again, they would not furnish a source of a derivative sovereign title.

**Rule of law**

The rule of law entails that governments and citizens are governed by laws that are general and it excludes arbitrary exercise of power and discretionary privileges over rights. Aboriginal communities and Torres Strait islanders people reserves rights to land as well as a degree of autonomy with the Crown in consonance with the introduced common law as conditioned by the imperial constitutional norms. An averment of sovereignty over a territory does not automatically extinguish Aboriginal and Torres Strait Islander people’s rights. Specifically, common law recognizes Aboriginal practices and law and also recognizes the alternative source of law.

In the case of *Denis Walker vs. State of NSW (1994),* Mason CJ opined that:

“There could be no alternative body of law operating alongside Australian law. The recognition of Aboriginal law and thus of some form of prior Aboriginal jurisdiction in matters other than land law risked offending basic principles of equality before the law. The rule of law would be vitiated of Aboriginal jurisdiction was admitted.” [[15]](#footnote-15)

Therefore, the protection of the rule of law encompasses the prepotency of Parliament to regulate and affect Aboriginal interests without their consent.

**Conclusion**

Since the late 1980s, there have many radical changes and much progress has taken place in the battle to overcome discrimination of the Aboriginal people. In Australia, Aboriginal and Torres Strait Islander people historically have been depicted as the passive recipients of the largesse or the charity of the European majority which was demeaning for the Aboriginal people and finally, major steps have been taken to speak out and to move forward in evolving the relationship between Aborigines and Australia. Since 1992, major steps were taken from the legal standpoint. However, the most important step that must be taken by Australia is to recognize the Aboriginal people‘s ties to their lands which is going to remain an important aspect of life and that the history should be preserved.

1. Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving away from Fitting in to Creating a Decolonized Space' (2013) 18(1) Review of Constitutional Studies 19. [↑](#footnote-ref-1)
2. Australian Constitution, Section 51(xxvi). [↑](#footnote-ref-2)
3. *Western Australia vs. Commonwealth (Native Title Act Case),* (1995) 183 CLR 373. [↑](#footnote-ref-3)
4. *Gerhardy v Brown* (1985) 59 ALJR 311, 339 [↑](#footnote-ref-4)
5. *Delgamuukw v British Columbia*, (1997) 3 SCR 1010, 153 DLR (4th) 193. [↑](#footnote-ref-5)
6. *Campbell v British Columbia (Attorney-General),* (2000) BCSC 1123, 189 DLR (4th) 333. [↑](#footnote-ref-6)
7. *Campbell v British Columbia (Attorney-General)*, (2000) BCSC 1123, 189 DLR (4th) 333. [↑](#footnote-ref-7)
8. Mabo v State of Queensland [No. 2] (1992) 66 ALJR at 408. [↑](#footnote-ref-8)
9. Duncan Ivison, Decolonising the Rule of Law: Mabo’s case of Postcolononial and Constitutionalism, Oxford Journal of Legal Studies, Vol. 17, No.2 (Summer, 1997), pp. 253-279. [↑](#footnote-ref-9)
10. Austl, Commonwealth, Australian Law Reform Commission, Recognition of Aboriginal Customary

    Laws (ALRC Report No 31) (Sydney: Australian Government Publishing Service, 1986). [↑](#footnote-ref-10)
11. Australia, Council for Aboriginal Reconciliation, Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament (Commonwealth of Australia: Canberra, 2000) at xiii [hereinafter Final Report]. [↑](#footnote-ref-11)
12. *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168. [↑](#footnote-ref-12)
13. Julie Cassidy, Sovereignty of Aboriginal Peoples, Indiana International & Comparative Law Review, Vol. 9 No.1 (1988). [↑](#footnote-ref-13)
14. *Concerning Right of Passage Over Indian Territory (Port. v. India),* 1960 I.C.J. 6, 91-92. [↑](#footnote-ref-14)
15. *Denis Walker vs. State of NSW* (1994),HCA 64. [↑](#footnote-ref-15)