

INDIVIDUAL AUTONOMY,  
GROUP SELF DETERMINATION AND THE  
ASSIMILATION OF INDIGENOUS CULTURES

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A large portion of that research has focused on the Aboriginal and Torres Strait Islander peoples of Australia and, in that context, on the social, cultural, political, economic and development issues which are part of northern Australia. The range of research projects which are underway at any particular time depend very much on the priorities of the individuals who locate themselves at NARU. Aboriginal and Torres Strait Islander issues are of continuing importance in northern Australia and, consequently, to NARU. The reasons for this would be obvious to anyone who visits northern Australia – outside of Darwin, indigenous people comprise the majority of the population in the north.

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## Abstract

The most successful effort to reconcile the apparent irreconcilable clash of liberal and communitarian values has often been identified with the political philosophy of Will Kymlicka. Communitarians argue that liberals emphasise the value of the individual to the exclusion of the community, and urge us to reaffirm the value of the community and extend the protections necessary for its survival. Kymlicka argued that theoretically, there was no inherent conflict between valuing the individual and protecting the community. Underlining individual autonomy as the central value of liberal society, he claimed that a viable community is essential for providing a cultural context of choice in which autonomy is possible. He agreed that the cultural community maintains a particular cultural context, and when the cultural community is undermined, shocks to individual identity also undermine autonomous decision-making, the central value in liberal theory. Kymlicka's formulation thus brings together two concepts, that of autonomy with respect to individual agency, and autonomy as applied to the group in its independence from the dominant cultural community; and the latter is necessarily supportive of the former. These two distinct ideas are often blurred in the simple demand for the self-determination of indigenous groups, as Stephen Schechter observes.

'Self-determination is a concept that manages to combine individual and collective rights without mentioning either. It has a better press than collective rights, since the self makes us think of the individual.'

In this paper I argue that these two forms of autonomy may well prove to be antithetical in practice. I mean this not in the more familiar sense in which liberals fear that prioritising the rights of the collectives may license the suppression of individual choice and associated freedoms, but in another sense in which the successful survival of the community may inevitably mean the unconscious adoption of assimilationist forms of behaviour, which undermine the original cultural context of choice which, it is supposed, is necessary to protect a cultural based concept of individual autonomy.

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# INDIVIDUAL AUTONOMY, GROUP SELF-DETERMINATION AND THE ASSIMILATION OF INDIGENOUS CULTURES

David Lea\*

## Introduction

For many, the solution to the crisis and survival of the community has centred on special group rights aimed at both the protection of these groups and their empowerment. This philosophy has served as powerful rationale for policies designed to enhance the potential self-determination of indigenous communities, communities which in the past have suffered extensive cultural destruction from settlers and colonists.

But one needs to appreciate these developments within their historical context. In the 1970s Ronald Dworkin wrote a definitive work, *Taking Rights Seriously*, in which he contrasted liberal commitment to individual rights with utilitarian calculations associated with economic rationalism and policy driven initiatives aimed at general social welfare.<sup>1</sup> In this paper Dworkin argued that, a commitment to the protection of individual rights distinguishes liberal society as one which is willing to suffer the disadvantages to policy and economic rationalism in order to preserve the freedom and dignity of the individual. Dworkin argued that it may well be the case that greater levels of general welfare might be achieved by imposing a seamless uniformity which disregards individual rights, however, this would compromise the liberal philosophy of Western society which values the dignity and freedom of the individual.

It is from this philosophical perspective that Dworkin went on to defend tolerance and restraint with respect to the actions of dissenting individuals and groups who may offend the general mainstream of society. Since Dworkin's work appeared after the bitter winding down of United States involvement in the Vietnam conflict in which allegations of civil disobedience and disloyalty frequently surfaced, his statements were extremely apposite. At the time it was frequently claimed

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<sup>1</sup> R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977.

by those who supported United States and Western military involvement, that the actions of a minority of dissenters were undermining the efforts of the troops and thereby damaging to the best interests of society. On this basis many argued that these dissenting individuals should be suppressed. Dworkin's defence of individual rights served to remind people that any such policy contradicted the rationale, the West gave for entering the conflict, which was to oppose totalitarian states. Dworkin argued that toleration was the price society would have to pay if it were really to distinguish itself from its enemies and remain a polity and a society which accorded real dignity and respect to the individual and dissenting minorities.

Until the 1980s the liberal political philosophy of people like Dworkin and John Rawls dominated academia and was widely regarded as an authoritative and convincing presentation of the superior justice of liberal democratic societies.<sup>2</sup> Liberals like Dworkin and Rawls forcefully demonstrated how liberal societies achieved individual justice and justice for minorities through the institution of equal individual rights. But in the 1980s their arguments began to be questioned. A powerful movement sometimes called communitarian or culturist began to gain force and stress the value of community.<sup>3</sup> They questioned the liberal tendency to articulate principles of justice premised on the 'bi-polarity' of the individual on the one hand and the State on the other. They often argued that justice must go beyond the idea of equal rights for all citizens and provide special rights for communities and cultural groupings in order for cultural communities to survive and endure potentially overwhelming threats to their traditions. The political philosophers who initially criticised liberalism argued that an undue emphasis on the importance of the individual was contrary to the lived experience of human life. Communitarians argued that liberal philosophy, which based its systems of justice on the pre-eminent liberty of the individual, projected a notion of the self which conveyed 'radically unengaged individuality.' This 'liberal self' represented the so-called 'thin view of the self,' a deracinated self which was disengaged from culture and community and accordingly suffered the modern diseases of alienation and anomie.<sup>4</sup> These thinkers believe that emphasis on equal individual rights fail to protect and even undermine communities and cultural groups because these policies do not allow for cultural difference or officially recognise its possibility. Some suggested that the notion of citizenship should be redefined in a manner to incorporate difference so that cultural communities could gain collective rights like trade unions and corporations. It is in this context in which we observe the ascendancy of special group rights for indigenous communities.

One might mention that these intellectual shifts were not simply played out within the academic community. This alteration in perspective was also evident in a changing public policy toward indigenous groups, reflected in real administrative and policy rearrangement. One commentator on

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<sup>2</sup> John Rawls, *A Theory of Justice*, Oxford University Press, 1971.

<sup>3</sup> Vernon van Dyke, 'Justice as Fairness for Groups?', *American Political Science Review* 69, 1975, p 607–614; Michael Sandel, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1982; Avishai Margali & Joseph Raz, 'National Self-determination', *The Journal of Philosophy* 87, 1990 p. 439–461.

<sup>4</sup> *ibid.*

Aboriginal affairs notes that in the 1950s and 1960s institutional reform in Australia centered on exclusionary policies with respect to indigenous Australians. This initial period of institutional reform was based upon the unproblematic and uncontested ideology of equal individual rights for indigenous and other Australians. However, there began a second wave of institutional reform beginning in the 1970s through into the 1990s which has been more about group rights, especially with respect to land rights.<sup>5</sup>

But this growing tide of ‘communitarian’ thinking and public policy centered on group rights has not been without its critics. Liberals remained skeptical as to how community rather than the individual could serve as the moral basis for a reworked ‘communitarian’ vision of justice. Many liberals were uneasy with this articulation because it appeared to reintroduce a cultural relativism, which denied the universal application of the core liberal values and by implication the pre-eminence of liberal notions of justice, which had been central to Western liberal democracies. Indeed it was feared that communitarian philosophy would reopen the door to restrictions on individual liberty, promoted in favour of conformity and group solidarity.

The most successful effort to reconcile the apparent irreconcilable clash of liberal and communitarian values was to be found in the political philosophy of Will Kymlicka.<sup>6</sup> Communitarians argued that we can only understand the individual and the exercise of freedom of choice, by viewing the human agent within the context of his community and his cultural traditions. These are the circumstances in which individuals realise moral choices and live out their individual lives, and therefore rather than emphasising the value of the individual to the exclusion of the community, we ought to reaffirm the value of the community and extend the protections necessary for its survival. Kymlicka points out that theoretically there is no inherent conflict between valuing the individual and protecting the community. Underlining individual autonomy as the central value of liberal society, he claims that a viable community is essential for providing a cultural context of choice in which autonomy is possible. He argues that autonomy depends upon a range of choice, and these choices are embedded in a particular cultural context. The cultural community maintains a particular cultural context; when the cultural community is undermined, shocks to individual identity also undermine autonomous decision-making. The context in which the individual would have traditionally realised his identity is weakened or obliterated. The traditional ends, from which the individual would have chosen to mould his life, have been removed, and the individual suffers disorientation, purposelessness and alienation associated with the disintegration of the cultural context. Kymlicka draws our attention to Canadian Indians and French Canadians, groups who, he thinks, face threats to their continuity and whose individuals suffer the anomie and other forms of social disorientation associated with the above phenomena. Kymlicka claims that, far from being an

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<sup>5</sup> N. Pearson and W. Sanders, ‘Indigenous Peoples and Reshaping Australian Institutions: Two Perspectives’, *CAEPR Discussion Paper No.102*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 1995.

<sup>6</sup> Will Kymlicka, *Liberalism, Community and Culture*, Oxford, Clarendon Press, 1989 and *Multicultural Citizenship*, Oxford University Press, 1996.

interest antithetical to liberal values, the community and the protections of its traditions are essential if the core liberal value of autonomy is to be a reality.

Kymlicka's formulation thus brings together two concepts, that of autonomy with respect to individual agency, and autonomy as applied to the group. In short the argument put forth is that the latter is necessary and supportive of the former. These two distinct ideas are often blurred in the simple demand for the self-determination of indigenous groups, as Stephen Schecter observes. 'Self-determination is a concept that manages to combine individual and collective rights without mentioning either. It has a better press than collective rights, since the self makes us think of the individual'<sup>7</sup>

In the following pages I wish to point out that these two forms of autonomy may well prove to be antithetical in practice. I mean this not in the more familiar sense in which liberals fear that prioritising the rights of the collectives may license the suppression of individual choice and associated freedoms, but in another sense in which the successful survival of the community may inevitably mean the unconscious adoption of assimilationist forms of behaviour. In short I wish to point out that there is an economic component embedded in the issue of autonomy. Ultimately economic realities may entail that the survival of traditional communities in pluralistic market economies of Western states, requires the incorporation of behavioural forms which are antithetical to traditional forms of life. In short the survival of the group as a self-determining entity may result in the obviation of the original cultural context, which is conceived to be necessary to individual autonomy, according to Kymlicka.

## Protection and Empowerment of the Local Community

Kymlicka has specified practical measures which should be instituted to ensure a measure of local autonomy and effect cultural protection for indigenous minorities within larger political entities.<sup>8</sup> These are:

- special representation at the Federal level through special group representational rights;
- devolution of authority over issues relevant to local culture to smaller political units, especially issues of immigration, education, resource development, language and family law;
- polyethnic rights which protect special religious and cultural practices through the funding of special programs which would otherwise not be protected through the market.

In general terms, the goal of these recommendations is to establish indigenous communities as self determining political entities within the pluralistic state, placing limits on the central authority of the state. Often advocates of greater autonomy for Aboriginal groups envision a form of federalism

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<sup>7</sup> Christine Fletcher, 'Federalism and Civil Societies', *Federalism Studies* 14, 1999, p 97–121 at p.107.

<sup>8</sup> Will Kymlicka, *Multicultural Citizenship*, Oxford University Press, 1996.

where sub-national groups claim some form of territorial jurisdiction in which traditions and distinct cultures can flourish within a greater political entity. In some cases this involves, as Fletcher points out, the creation of new Territories such as Nunavut in Canada, lesser forms of indigenous self government in the United States or establishing inalienable freehold land rights as in some Australian States and the Northern Territory.<sup>9</sup> Of course, at the extreme we have the demand of wholesale secession.

But the issue is at the same time both political and economic. In order for indigenous people to be self determining they need to have the necessary political rights to realise this goal. The above political arrangements indicate some of the possibilities. Political re-arrangements are intended to create a potential self-sufficiency which minimises and restricts the areas in which the group will be subject to the political will of the central government, representative of the dominant majority culture. However, political self-sufficiency would also require an important component of economic self-sufficiency. Legislating a framework for the realisation of a degree of political autonomy does not guarantee the achievement of conditions of self-determination and autonomy. In addition to political empowerment there needs to be economic empowerment. Reflection indicates that autonomy and self-sufficiency are also a function of relative bargaining power. As the editors in a recent *Harvard Law Review* have pointed out, ownership and levels of personal liberty are not unconnected because property rights determine relationships of power and vulnerability. In this vein, the editors reject the tendency in modern liberal thought to assert the lexical priority of liberty over distributive justice and point out that relative levels of liberty are determined by relationships of power and vulnerability that pervade and partially determine the actual choices available.<sup>10</sup>

Aboriginal communities which find themselves within modern Western states have not only been politically weakened, they have also been economically disadvantaged. For example, the economic vulnerability of Aboriginal communities in Australia was recently underlined by Frank Brennan in *One Land, One Nation: Mabo – Towards 2001*.<sup>11</sup> Brennan points out that despite growing demands by Aborigines to manage their own affairs there is a tension between the right of an Aboriginal community to do its own thing on its own terms on its lands, and the notion of public accountability for the expenditure of funds approved by Parliament. He points out that, given the financial poverty of these communities, they are all but totally dependent on the receipt of government funds. This means that for most of these communities, the financing of education, training, health and welfare must come from outside the community, which means from the government.

General conditions of economic disempowerment can be seen to undermine the specific areas in which indigenous communities have been making tangible political gains. W Sanders in his recent work on local governments and indigenous Australians observes that a major dilemma or problem

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<sup>9</sup> Christine Fletcher, 'Does Federalism Safeguard Indigenous Rights', *Discussion Paper 14*, North Australia Research Unit, Darwin, 1999, p.10.

<sup>10</sup> Notes, *Harvard Law Review* 107, 1993, p 859–876, at p. 860.

<sup>11</sup> Brennan, Frank, *One Land, One Nation: Mabo – Towards 2001*, University of Queensland Press, Brisbane, 1995.

facing discrete predominantly Aboriginal or Torres Strait Islander communities in sparsely settled areas, who have achieved local government status, is their rather ‘weak independent financial capacity’. On the other hand, non-Aboriginal local government communities have traditionally been able to carve out a degree of autonomy from Commonwealth and State authority, through the collection of rates, an option which is not available to poorer Aboriginal and Torres Strait Island communities.<sup>12</sup> Furthermore on the issue of greater regional autonomy for the Torres Strait Islanders through a proposed Torres Strait Regional Assembly, a 1997 Report of Inquiry on greater autonomy tied greater financial autonomy (through grant block funding from the State and Commonwealth Governments) to the ability of Islanders to increase their involvement in local industry – particularly the commercial fisheries.<sup>13</sup>

Even if we feel that the federal government has a responsibility to supply this funding with no strings attached, the autonomy of the indigenous community cannot be assured, insofar as it is dependent on the good will of the donor, and the inevitable demands of accountability. As we know, Aboriginal self-determination has been put forth on the grounds that it is necessary to preserve the distinct values and cultural difference. It becomes highly imaginable that if the Aboriginal community decides to spend government funds in ways conflicting with the dominant group, the funding would cease. Being autonomous means being empowered to make one’s own choices regardless of what other groups or the dominant group think of the choices.

## Aboriginal Empowerment and Incorporated Groups

With regard to this economic issue, there do exist strategies to empower indigenous groups economically as well as politically. I will briefly discuss two similar strategies embodied in Papua New Guinea legislation, the *Papua New Guinea Land Groups Incorporation Act* and the *Australian Land Titles Act*. Although the former is not intended to empower a cultural community against a dominant majority culture, it is intended to offer economic and management control to communities exhibiting indigenous forms of collective ownership. Significantly, in 1974 the *Land Groups Incorporation Act* provided for the legal recognition of traditional groups and their incorporation for purposes of acquiring, holding, disposing and managing land.<sup>14</sup> Papua New Guinea legislation

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<sup>12</sup> W. Sanders, ‘Local Governments and Indigenous Australians: Developments and Dilemmas in Contrasting Power to Sell, Lease, and Dispose of Customary Land Otherwise Than to Natives in Accordance with Custom, and a Contract Circumstances’, *CAEPR Discussion Paper No. 84*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 1995. Sanders notes that predominantly Aboriginal or Torres Strait Island Communities have gone furthest to becoming local governments in sparsely settled areas of Queensland and the Northern Territory, p 17–20.

<sup>13</sup> W.S. Arthur, ‘Towards A Comprehensive Regional Agreement: Torres Strait’, *CAEPR Discussion Paper No. 147*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 1997, p.15.

<sup>14</sup> *Land Groups Incorporation Act*, (1974) ch. 147, s. 1 (e). This was enacted by the PNG Legislative Assembly a year after power was transferred from the Australian Commonwealth Parliament to the PNG Legislative and a year before official independence in 1975.

provides that all dealings with respect to customary land between customary owners and non-citizens are void and unenforceable.<sup>15</sup> In order to avoid this result the customary owners can lease their land to the government who then lease it back. As a result of the *Land Groups Incorporation Act*, landowner groups form associations and deal with developers directly and their standing is recognised by the courts. The upshot is that the Papua New Guinea landowners exercise a direct negotiating role.

However, experience indicates that the empowerment of the group representatives or leaders may not necessarily empower the group or promote its interests and well-being. This point is illustrated by the fact that the landowner companies which are now assuming a negotiating role are often not entrepreneurial enterprises in the true sense of the word, but are more accurately seen as brokers or middlemen interposed between the foreign interest and the customary landowners. Given this reality, the interests of those managing the Landowner Company may not coincide with the best interests of the traditional customary owners. For example, it has been demonstrated that landowner companies which sprang up in Manus Province in the 1980s actually frustrated the Province's efforts to manage the timber harvest on a sustainable basis.<sup>16</sup> Against the Province's wishes they interposed themselves into negotiating roles with foreign logging interests and effected deals which exceeded sustainable quotas of timber. As these landowner companies seldom offer their own expertise, management, capital or labour to the enterprise, they can best be described as opportunistic middlemen rather than entrepreneurial associations, an impression which is further strengthened by the fact that these associations are most often led by a small elite of the more literate westernised tribesmen rather than organisations with the full participatory involvement of the greater community.<sup>17</sup>

The Papua New Guinea experience indicates that organisational structures like the modern corporation, or trusteeship arrangements have not been successful vehicles for the economic mobilisation of indigenous people. There are two reasons. First, because they are Western organisational models, they are foreign to the traditions of the indigenous communities. Second,

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<sup>15</sup>. Revised laws of Papua New Guinea, *Land Act of Papua New Guinea*, 1982, ch. 185, s. 73. Subject to Sections 15 and 15A, a native has no power to sell, lease, dispose of customary land otherwise than to natives in accordance with custom, and a contract or agreement made by him to do so is void.

<sup>16</sup>. Rodney Taylor, 'Sustained Yield Forest Management in Papua New Guinea', *Resources, Development, and Politics in the Pacific Islands*, eds. Stephen Henningham & R.J. May, Crawford Home Press, Bathurst, 1992, p.129–144.

<sup>17</sup>. *ibid.*, p.141. Author points out that the so called landowner companies which sprang up on Manus Province to deal with the foreign timber interests failed to satisfy the legitimate reasons for their formation which include: 1) bringing customary land and associated rights under corporate title, the by use of the *Land Groups Incorporation Act*; 2) forming a business for the carrying out of forestry and spin off enterprises; 3) managing funds accruing from the enterprise for community development projects. In reality they simply operated as middlemen between logging interest and customary owners.

successful adaptation to such an organisational structure requires adoption of Western thinking and behavioural models. This means that only the most Westernised and educated members of the community can understand and avail themselves of the opportunities. This then creates a division within the community between the traditional membership and their minority Westernised counterparts who are able to participate and take advantage of the economic possibilities. Those who remain attuned to a traditional lifestyle find themselves alienated from the processes and decision-making procedures designed for economic empowerment. At the same time enrichment will flow to the minority who have adapted their behaviour to these western organisational models designed for wealth generation. Consequently, the community as a whole is not empowered, but often divided because only a minority acquire the economic advantages. In general, rather than working to preserve the traditional community, these strategies tend to create divisions between those who are integrated into the cash economy and the economic market and those whose lives adhere to indigenous traditions. Gradually this becomes a division between the have and the have-nots. The result, as in the Bougainville crisis, can lead to the fracturing of the community into warring generations, thus destroying its social fabric.<sup>18</sup> I will now briefly look at the Australian *Native Title Act 1993*, which was drafted to give effect to the Supreme Court decision of *Mabo v State of Queensland 1992*, which recognised a form of customary land title which Aborigines possess. Under the *Native Title Act*, the Aboriginal registration of land title requires that there exist an incorporated body under the *Aboriginal Councils and Association Act 1976* (ACAA). It is obvious that the *Native Title Act* parallels the older Papua New Guinea legislation in its attempt to implement a form of indigenous empowerment through the incorporation model.

Patrick Sullivan, in a study published by the Australian National University, does a thorough job distinguishing those areas of the incorporation process which are at variance with customary law. In discussing prescribed bodies under the *Native Title Act* he makes the general point that the holders of Native Title in Aboriginal law are a social community with a distinct political structure which is not embodied in the Western concept of an incorporated body.<sup>19</sup> He argues that the rules and mechanisms for regulating a corporation are inappropriate for governing a social community in possession of a discrete territory.

Sullivan does a thorough job documenting the incompatibility between indigenous customary law and the provisions of the *Aboriginal Councils and Association Act*, which requires incorporated bodies. For example, the simple provision requiring that the incorporated body claiming under the *Act* keep a register of its members, is already incompatible with the full exercise of common law Native Title holder rights because customary law does not keep lists. According to customary law, title holders are determined by relationships and processes. In contrast, the possession and exercise

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<sup>18</sup> C. Filer, 'The Bougainville Rebellion, the Mining Industry and the Process of Social Disintegration', in *The Bougainville Crisis*. eds. R J May and M Sprigs, Crawford House Press, Bathhurst, 1990.

<sup>19</sup> Patrick Sullivan, 'A Sacred Land, A Sovereign People, An Aboriginal Corporation: Prescribed Bodies and the Native Title Act', *NARU Report Series No. 3*, North Australia Research Unit, Darwin, 1997.

of title under the *Aboriginal Councils and Association Act 1976*, requires application and registration.<sup>20</sup> If the application of and exercise of rights is dependent on corporate bodies then some title holders will be missed and unable to exercise their rights, since no list can be entirely conclusive, he argues. On this point it is interesting to note that when the Papua New Guinea government in July 1995 pushed for a policy of land registration following structural adjustment recommendations from the International Monetary Fund, there were violent protests. Eventually the government abandoned the policy in the face of strikes by students and soldiers. I suspect that much of this hostility was also based on the fact that Melanesian customary law operates informally and flexibly and cannot easily reduce entitlement to a comprehensive list. Glen Banks, for example, gave a graphic illustration of the flexibility of kinship systems, and their application to land entitlement, in his study of compensation claims related to the Porgera Mine in Enga Province.<sup>21</sup>

Furthermore, the *Act* provides that the Registrar is required to refuse incorporation if the rules of the corporation 'are inequitable, or do not make sufficient provision (as required by section 58b) to give the members effective control over the running of the association.'<sup>22</sup> Sullivan points out that this provision allows for inappropriate assimilationist measures to be inflicted on groups who are required to incorporate. Again, we see that a form of organisation which is intended to empower the community in order to protect cultural difference, could actually be used to enforce conformity through the discretionary powers of the Registrar. Furthermore, Sullivan points out that the Registrar usually prefers that the method of decision making at meetings be by voting and that the method of appointment to the governing committee be by election.<sup>23</sup> Again Sullivan suggests that this procedure may be contrary to customary law. Also section 49B governs office holding by persons with criminal convictions, which may contravene rights under customary law.<sup>24</sup> Sullivan's conclusion is that the *Aboriginal Councils and Association Act 1976* is weighted to the mainstream Australian interpretation of corporate accountability and produces Aboriginal corporations that are distinct from and differently structured to the communities they are supposed to embody.<sup>25</sup> He states:

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<sup>20</sup> *ibid.*

<sup>21</sup> Glen Banks, 'Compensation for Mining : Benefit or Time Bomb – The Porgera Case', *Resources, Nations and Indigenous Peoples*, eds. R Howatt, J Connel, & P Hirsh, Melbourne, Oxford University Press 1995, especially page three. He state 'Land ownership in Porgera consists of a series of rights which an individual may claim through either parent (a system of cognatic descent).' This has allowed a large number of kin who were born and living outside Porgera to move in and occupy land to which they do not have full ownership rights, although they can only do so with the permission of the landowners themselves. This group is referred to by the Ipili (the local tribe) as *epo atene*, 'those who have come' or 'invited guests.'

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*, p.21.

<sup>24</sup> *ibid.*, p.22.

<sup>25</sup> *ibid.*, p.16.

What is required is a social and political structure that will unite once more the system of custom with the fact of land holding. The assumption that native title is a property right bearing with it no political rights, and that it therefore need only be administered by a corporation established by the general law, is manifestly contradictory. A parallel political and legal system necessarily exists side-by-side with the mainstream European – based law, it is from this that native title derives in the first place. Of course, it will vary from place to place.<sup>26</sup>

## Aggregates and Collectivities

Sullivan has done a significant job in demonstrating variation between the provision of the incorporating act and customary indigenous law. My particular criticism of the suggested policies for Aboriginal empowerment is that they overlook important characteristics of the organisational structure of communities and the special characteristics of indigenous communities. What I intend to demonstrate is that there is not simply rule conflict between indigenous customary law and Western law, as embodied in the modern company, but rather that there are fundamental functional differences between communities and modern economic organisations. Furthermore the introduction of the latter into traditional societies may undermine the cultural cohesion of the community.

Self-determination for indigenous communities has become associated with the notion of group rights. However, a group is a generic term and we need to know the special features of groups to which we ought to ascribe rights. We might begin by noting that a community is obviously a group of people, but we need to ask ourselves what exactly makes a group a community. Some writers have suggested that we distinguish between aggregates and collectivities, collectivities are said to be 'self collecting' in the sense that the members engage in rule following activity. Sometimes the rules are said to be formal as in the case of the rules of incorporation, or of nation's constitution, while in other cases they may be more informal as in the case of the rules uniting a tribe or a village.<sup>27</sup> To this point this analysis is fairly simple and persuasive. Emphasis on recognition of a common set of rules allows us to distinguish groups which are clearly accidental aggregates from more meaningful collectives like corporations, nations and communities. Groups, such as all the people who are presently crossing main street, or all the people currently at Bondi Beach, or all the left handed baseball players, are clearly accidental aggregates in this sense, and no one would be interested in ascribing them a set of special group rights.

It is suggested that we might further distinguish between self collecting groups, consisting of those in which membership is based on will or choice and those in which membership is based on recognition of some significant commonality. Falling into the former class we find clubs, teams,

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<sup>26</sup> *ibid.*, p.25.

<sup>27</sup> Michael McDonald, 'Collective Rights and Tyranny,' *University of Ottawa Quarterly* 56 (1986), p.115 at p.120.

corporations, and governments, while within the latter class we might find families, communities, clans, tribes and societies. In a related point one writer has made the following observation:

In traditional societies, we would expect values to be based more on recognition than on choice, with the result that the collective and individual identity and well-being would be less open to volition than, in say liberal individualistic societies. This, I claim marks the major difference between native communities and our own.<sup>28</sup>

Another commentator makes similar observations:

Members of the (indigenous) community are expected to participate in communally-orientated functions, and to respect the authority of the community and its traditions and values; withdrawal from participation is equated with withdrawal from the community, since membership can mean nothing other than participation.<sup>29</sup>

Drawing from the above analysis and these accounts, the point I wish to make is that membership in a traditional indigenous community is not one of choice (as it is with many communities), but rather is marked by community orientated obligations rather than individualistic forms of freedom of association and choice. The fact that membership in a traditional indigenous community has not usually been a matter of choice would seem almost too obvious to mention, but this fact is important in a comparison of communities with economic organisations. Within the economic realm the most important vehicle for the production and distribution of wealth in Western society, for almost three hundred years, has been the corporation. The modern corporation and its predecessor, the joint stock venture, have historically been organisations whose membership is voluntary. One is not usually born into a corporation, one creates, joins or chooses to be associated with a corporation. This is to say that corporations are highly voluntary in character, in contrast to traditional indigenous communities which are far less so.

Returning to the observation in the first of the above quotes, it is usually accepted that there is a higher level of choice and voluntary association in Western cultures than is found in traditional cultures. Frank Brennan, in his recent work on Aboriginal self-determination, observes that in contemporary Aboriginal society there is often a tension between the demands of custom or Aboriginal law, and the freedom of choice which is found in the white man's culture.<sup>30</sup> He claims that younger Aborigines often complain that following traditional Aboriginal law should be a matter of choice, or that they should have the same freedom of choice as members of the dominant white

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<sup>28</sup> Michael McDonald, 'Indian Status: Colonialism or Sexism?' *Canadian Community Law Journal* 9 1986, p.23 at p.42; See also Darlene Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation,' in *The Rights of Minority Cultures*, ed. W Kymlicka, Oxford University Press, 1995.

<sup>29</sup> Frances Svensson, 'Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes', *27 Political Studies*, 1979, p.431.

<sup>30</sup> F Brennan, *op. cit.*, note 11, p.196.

society. While choice and voluntary association may be more prominent in the dominant Western culture context, from the perspective of economic organisation they are fundamental. Similarly Davis notes the differences in cultural outlook between members of Aboriginal communities and the young Aborigines who work cattle stations in the Kimberleys. The latter are often far more closely linked to the global commercial culture and the aspirations for world wide rodeo fame, money etc, than the traditions of the aboriginal community.<sup>31</sup>

Francis Fukuyama has recently argued that there is a high correlation between the presence of voluntary associations, and societies that have generated significant economic wealth. With reference to the United States he states:

...most serious social observers have noted in the past that the United States historically has possessed many strong and important communal structures that give its civil society dynamism and resilience. To a greater degree than many other Western societies, the United States historically has a dense and complex network of voluntary organizations: churches, professional societies, charitable institutions, private schools, universities, and of course a very strong business sector.<sup>32</sup>

Fukuyama argues that these are associations, which flourish in the intermediate realm between the family and the state, are found most often in economically successful nations like the United States and Japan. Following this line of thought, my point is that modern economic collectivities are organised according to the principle of voluntary association and therefore, it is not surprising that societies which encourage these values are also economically successful.

These facts underlie the incongruous situation in which legislation seeks to empower and preserve one organisational structure, which is based on authority, tradition and conformity to custom, by superimposing a different form of organisational structure, based on the dynamics of choice and voluntary association, typical of the dominant culture. From the earlier discussion of incorporated land holding groups, it is evident that those who may be successfully adapted to a traditional organisation and its customary rules, laws, and life style, may be entirely unadaptable to the dynamics of a voluntary organisation like a incorporated body. Sullivan has done an excellent job documenting specific areas of conflict between specific provisions of the *Aboriginal Councils and Associations Act* on prescribed corporate bodies, and customary Aboriginal law. My argument is that not only will one find specific rule conflict, but moreover, there are profound structural dissimilarities between the two organizations, not in the least is the fact that in one organisation, membership and participation is based on choice and initiative, while in the other, membership and participation are based on traditional relationships and custom. Ultimately I agree with Sullivan's

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<sup>31</sup> Richard Davis, *Black Spurs: Aboriginal Pastoralists in the Kimberleys*, draft paper presented at the North Australia Research Unit, Australian National University, Dec, 1, 1999.

<sup>32</sup> F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, Penguin Books, London, 1995, p.50.

conclusion that the former cannot represent the latter and adequately meet its needs and expectations.

But this does not mean that the issue is easily reconcilable by making the organisational structures fit the traditional mould. The dilemma will persist, with respect to the issue of autonomy or self-determination and its resolution. In order to be sufficiently autonomous within a traditional culture, 'the cultural context of choice' must be protected against incursions from the dominant culture and Western Capitalist systems. But it is apparent that societies ineluctably placed within the context and realities of the modern market economy, are economically vulnerable. This means they are susceptible to loss of self-determination (autonomy) if their membership is not in control of sufficient income generating rights or cannot utilise resources to protect the community. In order to protect themselves economically they will have to form income generating organisations and these collectivities will necessarily vary from the dynamics and structures inherent in traditional community organisations, in part by the very nature of their voluntary character, as we have mentioned. At the same time, as members of a traditional community form financial organisations and initiate corporate bodies and associations, the more they will find themselves assimilating to the dominant culture and assuming behavioural forms and values which are adapted to, and consistent with, income generating functions, and inconsistent with custom and tradition.

## Political Organisation and Culture

This sketchy analysis of economic organisations and voluntarism can also be applied to political life. In Western societies, the facts of membership and association by choice also applies to political life. The division of labour inherent in Western society means that livelihood and position are to a greater degree a matter of choice. This also applies to the role of governing. One usually chooses to join the government or run for office – it is a career decision. In traditional societies leadership is often a matter of inheritance or it is bestowed through customs and tradition. The usual recommendations for political empowerment, e.g., special representation at the federal level, and greater autonomy at the local level again, may undermine the cultural context insofar as these proposals often embody forms of procedure and processes which are foreign to indigenous traditions. For example, proposals for representation at the federal level often envision some form of popular election which may be at variance with customary procedures for selecting leaders. The act of 'running for office' would certainly have been a behavioural form unknown to traditional societies. Likewise, greater autonomy and self-government at the local level, often mean the institution of councils to draft bylaws and other forms of municipal legislation, as in the *Canadian Indian Act*. Similarly in the Australian experience, one commentator has noted that local governments drawn from Aboriginal and Torres Strait Island communities face both financial hurdles and structures that are simply State government imposed.<sup>33</sup>

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<sup>33</sup> Sanders, op. cit, note 5, p.22.

## Conclusion

My conclusion is that if the survival of indigenous communities as distinct cultural enclaves is guided by a policy which aims for autonomy and self-determination, it is difficult to avoid the economic imperative which links self-determination with a degree of financial self-sufficiency. The political autonomy of the community may depend on an effective command of financial resources. This means that members of these communities must be capable of engaging in income earning pursuits and otherwise participating in the modern, growing global market economy, either on an individual basis or in concert with other community members through viable economic organisation. This means the formation of corporations and financial associations which actually work commercially and which are more than symbolic vehicles for the political ascendancy of particular individuals. However, the more successfully the community becomes integrated into the economic mainstream, the more irrelevant the traditional cultural context may become. One Canadian commentator, for example, has attacked Kymlicka's argument for greater rights and protections for Quebec, complaining that the Quebec cultural context is no longer a significant determinate of behaviour within the province. 'In Quebec, as in most other places, people turn for guidance not to in group ideals of their ethnic group but to the beliefs of their religious community, to the consumerist standards of market society, to the meritocratic standards of the corporations they belong to, to the media and so on.'<sup>34</sup> Obviously, Aboriginal societies, unlike the Quebecois, have a non-Western religious culture, but the other points will apply equally. As traditional communities become integrated into the modern market economy, it is unavoidable that their values and choices will become determined by a dominant economic culture even if the presence is subtle. Margaret Rodman, in her observations of cultural changes in Vanuatu as result of cash cropping, remarks that the course of differentiation is proceeding very slowly. This, she says, allows the illusion to persist that the inequalities between ordinary people and wealthy landowners are fundamentally no different from the inequalities between ordinary men and those of rank in the past.<sup>35</sup>

This is the dilemma facing any argument based on the protection of cultural communities through empowerment and self-determination. The subtle assimilationist pressures can be an ineluctable consequent of engagement in economic self sufficiency and associated political strategies like the legal struggle for special group rights. Bruce Morito, a Canadian Indian and professional philosopher, has argued that fairness demands fiduciary arrangement for the mutual protection of the well being of diverse cultures. Rather than competing in the market place and legal arena, indigenous peoples should maintain their independence from European law. In short, by competing in these arenas, indigenous peoples unwittingly adapt the values and strategies of these Western institutions, and the culture, which underlies these forms of life.<sup>36</sup>

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<sup>34</sup> Brian Walker, *Culturist Dilemmas: On Some Convergences between Kymlicka and the New French Right*, draft presentation at the CPSA Annual Meeting 1995, Montreal.

<sup>35</sup> Margaret Rodman, *Masters of Tradition: Consequences of Customary Land Tenure in Longana Vanuatu*, Vancouver, University of BC Press, 1987.

<sup>36</sup> Bruce Morito, 'Aboriginal Right: A Conciliatory Concept,' *Journal of Applied Philosophy* 13, No. 2, 1996, p.123-140.

Following this line of thought it might be safer for Aboriginal communities to demand greater fiduciary responsibility on the part of government, rather than to press for self-determination. The price of the latter may well be countervailing demands for greater economic self-sufficiency on the part of the indigenous communities, as in the recommendations of the *Report on Torres Strait Island Regional Autonomy*.<sup>37</sup> In North America, for example, the Lockean scholar James Tully has argued that native Indians represent sovereign independent nations under the fiduciary protection of the North American States, the United States and Canada.<sup>38</sup> Tully argues that the original understanding based on treaty and negotiation recognised the co-existence of both Amerindian and European cultures within a fiduciary relationship requiring mutual respect and necessary operational protections. The *Terre Nullius* principle embodied an original refusal to recognise indigenous title in Australia. Now indigenous communities can reasonably make a request for the assumption of increased fiduciary responsibilities on the part of the Commonwealth, based on the facts of dispossession, based on the recent repudiation of the *Terre Nullius* principle. This strategy can then provide a moral basis for justifying continuing government financing of poorer indigenous communities who wish to maintain a traditional lifestyle, independent of the mainstream of the market economy. This would involve the recognition that territory (the Australian Continent) can never be held absolutely by the modern settler state, but in part, is held in trust for the beneficiaries, the dispossessed indigenous people who possessed and possess the original common law title.

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<sup>37</sup> Arthur, *op. cit.*, note 13, *Report on Torres Strait Islander Regional Autonomy*, 1997.

<sup>38</sup> James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity*, New York, Cambridge University Press, 1996, p.66.

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