FEDERAL MULTICULTURAL POLICIES AND THE POLITICS OF INDIGENEITY IN CANADA AND AUSTRALIA BETWEEN 1988–1992

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Én, Tóthné Espák Gabriella teljes felelősségem tudatában kijelentem, hogy a benyújtott értekezés a szerzői jog nemzetközi normáinak tiszteletbentartásával készült.

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1. INTRODUCTION

Area and Objective of Research

This dissertation attempts to explore the interaction of multiculturality and indigeneity in Canada and Australia in the context of federal politics. Double aims of this study are (1) to dispel the myth of success surrounding multiculturalism as a population management policy, and prove that minority interests in the two countries under observation are much more complex than what a social policy unacknowledging legal, historical, and philosophical backgrounds can manage in the long run; and (2) to highlight that indigenous interests (claims to land, identity, and political voice) in Canada and Australia cannot be realized and fulfilled, because they are perceived as threatening to fundamental national interests such as the maintenance of state sovereignty and protection of territorial integrity, and not because they might be culturally and politically inferior, as earlier views might suggest. Furthermore, (3) by providing a comparative assessment of indigeneity and multiculturality, my dissertation also intends to fill in a thematic gap in the body of historical, political, and legal academic writing about Canadian and Australian multiculturalisms.

I will differentiate between indigenous and ethnocultural minorities, and recognize indigenous minorities as societal cultures and national minorities if they perceive themselves so. Ideally, ethnocultural minorities (often referred to as multicultural or ethnic groups in the literature) are the subject of multicultural policies; I will demonstrate, however, that this is not necessarily so in political practice. Some ethnocultural groups can also claim national minority status. On the theoretical level, an important thread of coherence for my diverse analyses will be to examine how and why identity/identities are becoming central to cultural and political discourse in the diverse politics of identity, indigeneity, belonging, citizenship, and nationalism.

Canada and Australia between 1988 and 1992 provide comparative context for this examination, because in both countries this is a transitory period when differing methods of minority management conflict and generate complex, non-consensual political phenomena. In Canada this period saw acute constitutional crisis from Meech Lake to

Charlottetown and beyond, which pushed debates about Canadianness into the foreground, together with evaluations about the role that constituent cultural groups play in Canadian federal life. From the Bicentenary to the Centenary of Federation (2001), in Australia this is the time of anniversaries celebrating nationhood. Yet, the *Mabo* decision of 1992 overtly questioned the celebrated version of Australian identity. For my academic purposes, a special "merit" of the events in the period of observation is that they demonstrate an acute conflict between the interests of (indigenous) minority nationhood and the majority nation represented by the government, which generates inescapable government reactions. In Canada the scene of this struggle is the constitutional crisis, whereas in Australia it is the crisis of national identity generated by a pressure to re-evaluate the history of the land. In neither case do the solutions proposed by the respective governments fit into the predefined framework of multiculturalism.

For practical reasons I could not proceed beyond 1992. On the one hand, events inducing seminal change in the treatment of minority and identity issues took place in both countries that year, which offers an obvious choice for time framework. On the other hand, restrictions on the length of the present study do not allow me to proceed into a later period which (a) I perceive as very distinct from the one under my observation; (b) would therefore double the volume of the present work; (c) concludes developments that are already outlined in the period of change between 1988-92. (The period before 1988 has already been covered extensively.) Accordingly, the dissertation consists of four major units: two of Canadian and two of Australian concern. The Canadian units focus on two constitutional compromises: the Meech Lake Accord (1987-90) and the Charlottetown Agreement (1991-92). The Australian units are centered around the Bicentennial celebrations (1988) and the *Mabo* decision (1992).

Position and Significance within the Scholarship

My comparative and interdisciplinary cultural study of multiculturalism and indigeneity in Canada and Australia in the period between 1988-1992 moves within the disciplines of history, law, and politics. Although multiculturalism is not an exclusively Australian or Canadian concept, these two countries have developed its institutions, policies, and theories further than other countries. A comparative analysis provides a better understanding of both local situations—and, ultimately, of the larger questions of collective indigenous rights movements—within a critique of liberal humanism and its politics. Although a better understanding of race and ethnic relations is crucial for us to

grasp the essence of recent social turmoil and nationalist revival, and indispensable to advance the process of healing and reconciliation, I am not aware of a systemic study that has sufficiently explored the complex interaction between indigeneity and multiculturality—political manifestations of the concepts of multinationality and polyethnicity—in the federal contexts of Canada and Australia. This is my attempt to accomplish.

Accordingly, my study attempts to supersede relevant published works about the topic, or some aspects of it, in three areas.

(1) *Identity politics*

Post-1988 scholarly works usually focus on aspects of identity politics and citizenship rather than making a more detailed assessment of policies. A discourse of identity (focusing on citizenship as its legal and political manifestation) may prove to be promising in terms of electoral support because it is inclusive of ethnic and indigenous identities (allowing for multiple identities under the umbrella of Canadian/Australian citizenship), without forcing special responsibilities on the government. However, the approach of identity politics can easily be politically biased, so a careful theoretical, historical, and legal grounding is needed for a study to proceed in this direction. I am aware of the existence of recent identity-related literary and cultural theories, but I have found them far too abstract for possible incorporation and application in an interdisciplinary study of mostly political texts and events.

(2) *History, law, politics*

Comparative (Canadian and Australian) works on the historical and political background of race and ethnic relations are scarce. Their scope is usually limited to the examination of either multiculturalism and immigration (mostly in political context) or indigenous issues in one country (mostly in strictly legal context), and they usually only cover the period up to 1988. More recent legal and political developments, however, call for theoretically and historically informed studies that are also sensitive to the identity issues involved.

(3) *Sociology*

Studies abound on the sociological and demographic features—such as birth and mortality rates, health and unemployment, criminal statistics—of multiethnic societies. These quantitative works usually focus on very specific topics, and their research is based on fieldwork and statistics. These studies can provide a reliable source of data. I will use them as numerical support and background to my analysis.

For theoretical background, I will especially rely on Will Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) for (1) terminology, and (2) the logic of how group-differentiated rights can be accommodated by an essentially individualist liberalism. Kymlicka's liberal theory of minority rights supports the proposition that it is possible to reconcile indigenous claims within the liberal rights framework. Kymlicka considers two major forms of cultural pluralism: "multination" states (with "national minorities") and "polyethnic" states (with "ethnic groups"). He provides a typology of minority rights, differentiating between self-government rights, polyethnic rights, and special representation rights. He also explores the connection between group-differentiated rights and individual rights, and argues that "external protections" for group-differentiated rights are not in conflict with individual rights but "internal restrictions" might easily be. He classifies arguments for group-differentiated rights into equality-based arguments, history-based arguments, and arguments for cultural diversity, and he explores how group-differentiated rights may affect shared identity for a stable social order. Although policy-formation is necessarily influenced by activist approaches which may not reflect an ideal theoretical position, Kymlicka's systematic treatment helps identify the forces that influence policy-formation.

I proudly acknowledge the definitive influence of the following scholars' writing on my thinking: I have learnt insider facts about the Meech Lake negotiations from Patrick Monahan; Henry Reynolds taught me a revisionist, "black-armband" view of history; Bain Attwood called attention to the importance of perceiving history as historiography; Richard Bartlett taught me how to conduct logical legal deductions; Haig Patapan directed my attention to the political role of courts in a democracy; and David Brown lent me the concept of "multicultural nationalism," which I have revised.

Thesis Outline

Comparing and contrasting Canada and Australia, this thesis will explore questions about the prevalence of multiculturalism as public policy. It will argue that Canadian multiculturalism has developed within a context of serious federal crisis, and that the Canadian Multiculturalism Act (1988) can be regarded as a policy to search for and find a shared identity and so provide for a stable social order. Such a crisis has been absent from the history of Australia, where multiculturalism was launched not to manage federalism but to manage cultural diversity. In the *National Agenda for a Multicultural Australia* the phrase "all Australians" is a convertible item of political rhetoric to emphasize individual

equality and/or shared national commitments. Unlike in Canada, attempts to entrench multiculturalism in a statute or in the Constitution have not been successful, which suggests that controversies about Australian multiculturalism are not acute enough to affect federal law and the structure of federalism.

Decades-long constitutional negotiations—designed to keep Quebec in the confederation—highlight a Canadian federal crisis where the federal structure of equal provinces does not match the historical social composition of two founding nations and several Aboriginal nations. The Meech Lake Accord (1988) did not fail because of disagreements over the distribution of power among the provinces but because of Quebec's insistence on a "distinct society" clause. In other words, there is an ongoing cultural paradox beneath the structural problems. The Constitution Act, 1982 recognizes the importance of preserving and enhancing the multicultural heritage of Canadians, yet this has not been enough to sustain actual policies. By 1988 a separate Act of Parliament was ratified to ensure the future of multiculturalism, because neither the constitution with its Charter of Rights and Freedoms (due to Quebec's dissent) nor a set of federal policies (due to the "opting out" formula) in the name of the "national interest" could do that. Had the constitution been unanimously supported, the Canadian Multiculturalism Act may not have been conceived at all.

Immigration trends imply that Canadian and Australian multiculturalisms in the descriptive sense have developed along broadly similar lines. In both countries, indigenous populations make the ethnic composition of the settler society much more complex. Yet, the underlying dualism of a benevolent bilingual and bicultural confederation in Canada has unwittingly assisted indigenous claims to add a third pillar to federal sovereignty (federal, provincial, and indigenous) and opt for proposals towards creating a third order of government. My study suggests that Canadian policy-making is driven by such internal pressures. The absence of internal divisions in Australia cuts off this option for Aborigines and Torres Strait Islanders, so Australian ethnic and indigenous policy-making tends to be more responsive to international initiatives rather than domestic ones.

In terms of conclusions, I propose to point out that both countries use multiculturalism to pacify indigenous claims because it seems a good and riskfree way to manage problems of cultural diversity. When national minorities engage in "political rights talk," multiculturalism refuses to listen because it is not prepared to handle claims for group-differentiated self-government rights. Yet, the discourse of indigeneity has already moved beyond the individual human rights agenda into the battlefield of

"sovereignty talk," demanding unconditional recognition of the group right of self-determination.

In chapter 2 "Why Meech Lake Failed" I will focus on underlying motives of Canadian identity that clashed in the constitutional debate over the distinct-society clause. Therefore, I will treat the Meech Lake (and subsequent) constitutional negotiations as symptoms of a country suffering from identity crisis. I will examine Indigenous peoples and multicultural groups—the major societal components that disturb a traditional view of Canada as composed of two founding nations. Starting at the constitutional debate and concluding with the Canadian Multiculturalism Act, I will assess how the symbolic problem of identity surfaces in government measures.

This chapter will bring together the loosely related topics of federalism, constitutional negotiations, indigenous rights and, more broadly, human rights, and multiculturalism in a Canadian context. A description of the structure of Canadian federalism and its potential to accommodate the political demands of enclosed societal cultures will be followed by a closer look at the Meech Lake constitutional negotiations to see why Quebec's claim for recognition as "distinct society" was the most difficult problem to reconcile. I will argue that other components of the Canadian polity may also qualify for special status: Indigenous peoples as national minorities can claim self-government rights whereas polyethnic groups cannot, however significant their economic and cultural contributions are. Finally, highlighting the identity- and society-forming principles in the Canadian Multiculturalism Act and testing them against the political and cultural structure of the federation, I propose to identify why this policy could not solve the federal and cultural identity crises.

In chapter 3 "Identity and National Minorities in Australia" I will present how a seemingly unified national interest can be strongly debated. Since 1988 the issue of an Australian national identity has gradually come to the foreground in a way it has not happened since the turn of the century. Measures and events to assist strengthening a national identity gained priority over other, less "Australian" things. Therefore, the game of politics attempted to paint "national" such measures that would or would not have had a reasonable standing without referring to the national interest.

At the beginning of the chapter I will give an overview of two national myths that form the foundation for the modern Australian success story: a "lucky country" built upon a *terra nullius* stood firm and unshakable in 1988. The series of bicentennial celebrations strengthened such foundations of a nationalist rhetoric, because they provided occasion for

accompanying summaries of historical achievements as well as for celebratory predictions for the future. However, a section of society evaluated the past differently, and their vision of the future was also different from the official Australian version based on the obsolete myths of *terra nullius* and "lucky country." I will describe how an Aboriginal version of history came to light and examine a multiculturalist perspective of the future. Finally I propose to answer the question how and why the historical, federal, and social contexts of Australian multiculturalism and identity politics are different from the situation in Canada.

In chapter 4 "The Charlottetown Accord" I will analyze the governing model in the Charlottetown Accord (1992)—a model of government that almost succeeded. However, as it eventually did not, it is timely to collect the other options Canada might have chosen to reorganize itself. I will survey what other governing models (alternative to multiculturalism) have been offered in the course of debates and political negotiations, and what their foundations are in law and history.

As opposed to previous negotiations for a constitutional change, the Charlottetown Accord incorporated the theory of Indigenous peoples' inherent right to self-government based on pre-existing sovereignty for the first time. Although the Accord failed at referenda in 1992, its impact has been visible in later government policies. I will argue that a special willingness to accommodate shared sovereignties over land, identity, and political voice is prerequisite to resolving the federal crisis. I will test the proposition that Canadian identity politics has emerged because of the structural troubles federalism had to face, and that any reform attempts to change the structure of government need to consider the identity of its elements. I will critically investigate the Third Order model of government proposed in the Charlottetown Accord, and contrast it with the existing model of multiculturalism in a bilingual/bicultural context. Following that, I will introduce the hypothetical models of secession and two-row wampum to see if they provide plausible solutions for the structural and identity crisis.

In chapter 5 "*Mabo* and the Native Title Legislation" I will attempt to answer why the *Mabo* judgment shook the foundations of the Australian legal and political system. I propose to explore a historiographical and legal paradigm-shift ushered in by the *Mabo* decision. Following explanatory sections about the content and significance of the High Court's 1992 judgment in *Mabo v. Queensland (No.2)*, which overruled its countervailing precedents, I will argue that the falsification of a legal concept, *terra nullius*, also consolidated a historiographical paradigm-shift in Australia. Legal and moral justice had been competing for recognition, and both required unquestionable evidence to be provided

by new academic research as well as a new approach by justices in the High Court. Their new policy is manifested in a willingness to find implied rights in the Constitution and to consult developments in international human rights and indigenous rights law in case domestic precedents are unsatisfactory. I will argue that as an unavoidable necessity, this practice derived from the Court's role as an interpreter of a constitution without a bill of rights, from Australia's tarnished international reputation for human (especially indigene and refugee) rights, and from the call from new academic social and historical research filling in the "great Australian silence." Implications of the *Mabo* decision forced new legal and moral obligations on political leadership as well as the wider citizenry, and provided a radically new premise for the identity and citizenship debate by officially introducing Indigenous people as prior occupants and owners of the continent.

Befitting the requirements of a comparative and interdisciplinary study, chapter 6 will consolidate the radial threads of legal, historical, and political analytical evidence in the individual chapters, overview the argument, and draw conclusions. I will bring common issues of the individual and separate chapters together in a logical train of thought that will rely on the analytical evidence of the preceding chapters and lead to the confirmation of my thesis. I will not reference the consolidating statements because that will have been done in the course of my argument in the relevant chapters.

Methodology

My study is going to be qualitative, comparative, and interdisciplinary, based on a close reading and textual analysis of written policy documents (including laws, acts, agreements, government and media statements and opinions). Chapters do not follow the logic of the thesis chronologically, rather the dissertation has a *quasi*-radial structure: issues resurface in new contexts and so extend and generalize initial local meanings. In order to achieve this, I have consciously endeavored not to mix settings or set up untimely parallels, even if they seemed obvious and unmistakable (such as between "aboriginal title" and "native title," or the Multiculturalism Act and the *National Agenda*). The structure and composition of the chapters will make these parallel developments self-evident, and the way the chapters build upon one another will highlight differences even if I do not repeat them explicitly. The structure of my dissertation, in this sense, is similar to those comparative and synthesizing treatises which garner studies by various authors under one broad topic and so provide a polyphonic overview in multiple context (see among many others Havemann; Ivison, Patton, and Sanders; Peterson and Sanders).

Qualitative secondary sources informing especially on historiographical and identity-related sections of the thesis will be treated as primary sources. (Because of the political nature of these writings, I have approached such sources with special critical attention.) Because I presuppose knowledge of the historical background, introduction into Canadian and Australian history of race relations and immigration, as well as Canadian and Australian political structure will only be provided to the necessary extent as topics develop in the relevant chapters. Occasionally it will be necessary to quote longer texts where legal analysis (to be exact) and stylistic concerns (to demonstrate rhetoricity) require. I opted against placing these texts in appendices because they are closely interwoven with the argument in the chapters. In advance, however, I need to define some basic terms used in the thesis and comment on their culturally specific usage.

"culture": I shall use this term in the anthropological sense of "societal culture": "a culture which provides its members with meaningful ways of life[1] across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language" (Kymlicka, *Multicultural* 76). In this sense, "community," "group," and "people" can be synonymous with "culture."

"multiculturalism": It will be primarily dealt with as a government policy directed at population management. I am aware, though, that it is also possible to discuss multiculturalism philosophically as a liberal theory and ideology, descriptively as ethnocultural diversity, and historically as a contemporary period of race and ethnic relations. These meanings also surface in the text, either defined explicitly or by the context.

"c/Constitution": In Canadian context, "constitution" is the accepted spelling, unless in proper titles such as the Constitution Act, 1982. In Australia, "Constitution" is more widespread, although there are exceptions, such as the *Journal of Australian Studies* house style, which prefers minimal capitalization. Further in the text, then, I may opt for lower or upper case usage depending on the context.

"a/Aboriginal": "Aboriginal" in Australian context will mean "Aboriginal and Torres Strait Islander," for the sake of brevity. It will be used in a politically neutral sense,

[1] "Meaningful ways of life" seems to be an undefined (or rather, self-defined) expression in Kymlicka's definition. Substitutiong it with "access to" would provide us with a basically identical but less-objectionable definition: "a culture which provides its members with access to the full range of human activities, including [. . .]."

synonymously with “i/Indigenous”. Small case “aboriginal” in Canadian context will be restricted to discussions of legal texts for reasons of consistency with the usage in the constitution. Otherwise, I will either use “Aboriginal,” “i/Indigenous,” “Indian,” “Inuit,” “Métis,” or “First Nations,” depending on my message. Small case “aboriginal” will be avoided in Australian context (unless in discussions of historiographical change) because of its outdated, depreciating, and racist connotations.

“i/Indigenous”: Both small case and capitalized versions of the word are politically correct. I have generally opted for “Indigenous” when it refers to people or peoples, because it seems to be slightly more prevalent and more consistent with my thesis.

I fully identify with the importance of being politically correct in using the language of race relations. In case I seem not to observe this principle notwithstanding, obliging legal terminology (such as “aboriginal” in Canadian law, and “native” in Australian jurisdiction) or necessary demonstration of political rhetoric explain my divergence.

In all matters of referencing, the dissertation strictly follows the standard MLA style of parenthetical referencing keyed to a list of works cited as put down in the fifth edition of the *MLA Handbook for Writers of Research Papers*. In matters of layout, for better readability and aesthetic purposes I have slightly diverged from the MLA research format inasmuch as I have opted for justified body text instead of left alignment. In matters of spelling I will follow standard American English, but I may need to divert from it in the discussion of some Australian legal and political sources, for the sake of maximal consistency.

2. WHY MEECH LAKE FAILED

> "With the demise of Meech Lake, Canada has been plunged once again into a divisive and life-threatening debate over its future." (Monahan xvi)

Canadian Federalism

A most striking feature of Canadian society is its diversity. The Canadian confederation consists of ten provinces and three federal territories which, because of the vast distances, economic interests, and cultural heritage, also form five distinct regions: the Atlantic or Maritime, Quebec, Ontario, the West, and the North. Officially bilingual and multicultural, Canada is the second largest country in the world, with a population of about 29 millions concentrated along its southern border. English is the most widely used language in most provinces, but French is the principal language in Quebec spoken by about 80 per cent of the population there (about a quarter of all Canadians). Although large-scale migration since WWII has changed the social composition of the country so that people of other origins than British or French represent more than a third of the population by now, the English–French duality still dominates political life. Indigenous peoples (First Nations, Inuit, and Métis) with their numerous nations, cultures, and languages constitute about three per cent of the population of Canada.

Four self-governing colonies united under the British North America Act, 1867 (now known as the Constitution Act, 1867) to form the beginning of modern Canada. The line of accession of other colonies and territories to the confederation has closed just recently: the Constitutional Amendment 1999 (Nunavut) authorized the creation of the Tungavik Federation of Nunavut by splitting the Northwest Territories into two. The British North America Act was the "first federal constitution in the British Empire, and Canada was the first federation to combine a parliamentary regime with the system of responsible government" (Beaudoin 225). At federation the BNA Act divided governing powers into federal (section 91) and provincial powers (s.92), with a special article (s.93) allocating education to the provinces and other articles (s.94A and s.95) dealing with concurrent powers. The legislation over Indians and the lands of Indians [s.91(24)] was rendered exclusively to the federal sphere. Attempting to reconcile "two nations warring in

the bosom of a single state" (Lord Durham qtd. in MacIver 241), the constitution created a strongly centralized, asymmetric federalism. The Supreme Court's power of judicial review was enshrined to exercise ultimate control over the constitutionality of federal and provincial legislation. In 1982 the British North America Act was patriated, and a Canadian Charter of Rights and Freedoms to protect human rights was entrenched in the new Constitution Act, 1982.

Confederation proceeded mostly because the provinces wanted a model of government that would satisfy the only majority French province, Quebec, so that it could maintain extensive jurisdiction over issues that were crucial to the survival of French culture. While pointing out a distinction between political and constitutional asymmetry (65-67), Ronald L. Watts argues that some recognition of political asymmetry was entrenched in the Constitution Act, 1867 "in provisions relating to language, education and civil law. But efforts within the past three decades to recognize the reality of Quebec's distinctiveness by increasing constitutional asymmetry have been highly controversial" (24). That is so, because the constitution awards priority to the principle of provincial equality, even if political asymmetry in the confederation is undeniable. The asymmetry of federal power has proved economically, politically, and culturally more advantageous for the English-speaking provinces—or so Quebec perceived. After decades of negotiations to rebalance the federal structure failed, Quebec refused to give assent to the patriation of the constitution, thus expressing grievances and demanding historic rights. Although the 1982 constitution was nevertheless legally binding on the dissenting province, politicians decided to reopen federal–provincial negotiations for the sake of political peace. A series of meetings began in 1986 to rebalance federalism and resulted in the Meech Lake Accord (officially named the 1987 Constitutional Amendment), which failed to pass in each province by 22 June 1990. With it withered the reconciliation of federal–provincial interests.

One potential problem to be considered in a federal structure is the degree of power-sharing, which Senator Beaudoin[2] identifies as the "dilemma of Canadian federalism, its essential difficulty" (225). In spite of this "essential difficulty," the Meech Lake Accord and the Charlottetown Agreement proved that it is possible to reach a

[2] Lawyer and law professor, joint chairman of two special constitutional joint committees of the Parliament of Canada in 1991-92.

compromise about the degree of power-sharing between central and provincial governments. These agreements failed due to other problems inherent in federalism.

Federalism is a form of government ideally suited to accommodate cultural pluralism. It is possible to have a pluralist society without a federal governmental structure, and it is also possible to have federations where the governing structure is primarily an administrative strategy or a historical accident. However, cultural pluralism where a number of national/ethnic societies coexist best works if the country has a federal structure:

> One mechanism for recognizing claims to self-government is federalism, which divides powers between the central government and regional subunits (provinces/states/cantons). Where national minorities are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society. (Kymlicka, *Multicultural* 27-28; Walker)

Until 1999, Canadian federalism accommodated only the Québécois as a national unit, whereas Indigenous participating nations did not have constitutionally recognized governmental roles arising from an inherent right to self-government. When in *Calder* (1973) the Supreme Court of Canada acknowledged the existence of aboriginal rights based on prior occupation, an ongoing legal, political, and scholarly debate began to determine whether aboriginal rights contain fundamental political rights, such as the right to self-determination. The attempt to entrench a third (Indigenous) order of government into the constitution failed with the Charlottetown Agreement. Following the recommendations of the Royal Commission on Aboriginal Peoples (1995), the government issued a formal policy entitled "Indigenous Rights to Aboriginal Self-Government" as a basis for redefining state–Indigenous relations (Fleras, "Politicising" 202). Most recently, the success of Nunavut, 1999 (a self-governing territory of the Inuit) shows that federalism in its Canadian manifestation is capable of accommodating some Indigenous claims if historical and political factors coincide. But to reach that far, Canada had to survive a federal crisis, which has proved that the concept of equal citizenship and the vision of a multicultural Canada (the national unity model) following from post-WWII immigration

policies and culminating in the Charter of Rights and Freedoms are dubious in a confederation that is multicultural in a double sense: its modern polyethnicity is underpinned by historical multinationality.

The Meech Lake Accord[3]

Decades-long constitutional debates were renewed in 1986 when first ministers decided to launch a "Quebec Round" to bring Quebec back into the constitution. As it was announced in the Meech Lake Communiqué on 30 April 1987, they met to finalize the amending principles to the 1982 constitution. "Meech Lake" quickly became an umbrella term covering not only the accord (let alone the place) but the whole process of negotiations and a symbolic act of reconciliation between Quebec and "the rest of Canada." It is necessary to discuss the Meech Lake Accord because of the symbolic significance attributed to it by all the negotiators as well as the Canadian and Québécois public.

As a condition of reopening the constitutional negotiations, Quebec presented a five-point list with its demands, which are often referred to as "conditions," although in the text of the Accord (in the section entitled "Motion for a Resolution to Authorize an Amendment to the Constitution of Canada") they are carefully worded as "proposals":

> AND WHEREAS the Government of Quebec has established a set of five proposals for constitutional change and has stated that amendments to give effect to those proposals would enable Quebec to resume a full role in the constitutional councils of Canada; [. . .]

The five points had been formulated as part of the Liberal Party program *Mastering Our Future* (1985) on which Robert Bourassa was elected Premier in 1986:

1. Recognition of Quebec as a distinct society
2. A greater provincial role in immigration
3. A provincial role in appointments to the Supreme Court of Canada
4. Limitations on the federal spending power
5. A veto for Quebec on constitutional amendments (Can. SJCSHC, ch.IV).

[3] I have relied on Patrick Monahan's *Meech Lake: The Insider Story* for factual accounts of what really happened behind the closed doors during the Meech Lake negotiations. A professor of constitutional law, Monahan worked as senior policy advisor in the Ontario government and participated in the constitutional process from 1986-1990.

Most observers seem to agree that it was justified and desirable to restart negotiations with Quebec in order to heal the wound that the non-ratified 1982 constitution made on the body of the Canadian polity. (Sceptics sounded their contrary opinions only after the initial promising prospect failed to deliver results.) Political and personal constellations were favorable, with Liberals in government in Quebec and Conservatives in Ottawa, both committed to reconciliation. Prime Minister Mulroney and Premier Bourassa were good friends, too. Requiring the unanimous consent of each provincial legislation for constitutional amendments, section 41 of the 1982 constitution also pressed for change in Quebec's political and moral position. Even though the French-speaking province was legally bound by the constitution without having given its assent, its deliberate absence from pre-scheduled constitutional conferences hindered and precluded urgent governmental actions, such as the constitutionalizing of self-government as an aboriginal right, because the required unanimity provision could not be satisfied.

Meech Lake is better remembered as a three-year-long process of dragging negotiations that ended in failure. Although an agreement was achieved in all points of debate three times during the course of three years,[4] the constitution itself set up constraints to successful amendments. Satisfying Quebec's demands would have required unanimous support by all the provinces, as well as ratification of the proposed amendments by the two houses of the federal parliament and the legislative assemblies of the ten provinces.[5] All these needed to be completed within three years [s.39(2)] without adding further amendments, therefore Georges Mathews rightly observes that the "failure of the Meech Lake Accord is the failure of a system, not of individuals" (102). Accordingly, I treat the process of negotiations as medical symptoms of the critical condition of the structure of the state. The Canadian constitutional structure could not adapt to the historic and synchronic requirements set by the ethnocultural composition of the population. As manifested in the Meech Lake process, arguments derived from the constitution in the name of the modern ideology of equality ignored Quebec's historic arguments, which, however, paralyzed the very same principle of equality "the rest of Canada" would adore.

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[4] First Ministers' Conferences at Meech Lake, 30 April 1987; Langevin, 2-3 June 1987; and Ottawa, 3-9 June 1990.

[5] Sections 38-49: Part V "Procedure for Amending the Constitution of Canada" of the Constitution Act, 1982; for the amending formula see especially s.41.

After initial enthusiasm and support, criticism of the accord came from many directions. Unanimity among the negotiators was most difficult to achieve, and with growing pressure and shortening time, the process involved more and more procedural blunder and personal grievances (Monahan 228). "Zero-sum" bargaining in the provinces was the most difficult task the federal government had to tackle: for every concession achieved by Quebec (in a round that was brought about to treat its grievances), each province demanded something equally valuable. Paradoxically, the equation had to produce winners only, otherwise the sacred institution of equality would have been damaged. Provincial demands for amendments considering, for example, fisheries in Newfoundland, a Triple-E Senate, Aboriginal constitutional issues, women's equality rights, and a Canada-clause were pacified by the tactic of promising second rounds after the text is ratified *verbatim*. As Patrick Monahan reports, the "Quebec premier insisted that the accord had to be ratified 'as is' first and then there could be discussions designed to deal with concerns of the hold-out premiers" (211).

Non-participants to the negotiations could threaten the fate of the accord because the constitution did not provide a mechanism to consult the public during the amending process. In their final report, the Special Joint Committee of the Senate and the House of Commons observes that during the federal public hearings "concern focused on the 'closed' nature of the negotiating sessions" (Can. SJCSHC, ch.XIV: 2). This means, on the one hand, that meetings proceeded behind closed doors with no news and updates for the media, and on the other hand that sections of society such as women, Indigenous peoples, as well as representatives of the Yukon and Northwest Territories could not approach the round table. With the passing of time, opposition gained strength and ethnocultural minority groups mobilized. Their interests found strong support especially in the provinces of Ontario and Manitoba, who pushed for amending the "distinct-society clause" so that it would protect the charter rights of Aboriginal Canadians and multicultural groups. Such an amendment was denied not because the federal or the Quebec government disagreed with the importance of protecting multicultural and Indigenous interests, but because any changes to a clause to recognize Quebec's distinctness would have been regarded in the province as damage to its "honour and dignity." This highlights latent difficulties with the "distinct-society clause": the discussion of one ethnocultural problem necessarily involved discussing its relation to other cultural components of society. As the constitution was supposed to serve the whole country, it was difficult to pass an amendment that seemed to

satisfy the demands of one province only. At this point, practical and political considerations "to allow Quebec to resume its place as a full participant in Canada's constitutional development" (Can. *Communiqué*) clashed with social and cultural realities.

One of the most influential critics of Meech Lake was former Prime Minister Pierre Elliott Trudeau. His article "Say Good-Bye to the Dream of One Canada" established precedence for criticising the accord as a "total bungle" by incapable politicians. He argues that the accord threatens the equality of provinces unnecessarily because Quebec, whose made-up grievances threaten the unity of Canada, is already in the constitution. The article was published on 27 May 1987 in *Toronto Star* and Montreal *LaPresse* simultaneously, at a time when the accord first seemed to unravel. In Trudeau's powerful and highly symbolic language apocalyptic darkness is coming to Canada from the hands of the devil and his disciples, unless the Canadian people decides otherwise:

> [. . .] the advantage was on the Canadian government's side; it no longer had anything urgent to seek from the provinces; it was they who had become the supplicants. From then on, "Canada's constitutional evolution" could have taken place without preconditions and without blackmail, on the basis of give and take among equals. Even a united front of the 10 provinces could not have forced the federal government to give ground: With the assurance of a creative equilibrium between the provinces and the central government, the federation was set to last a thousand years!
>
> Alas, only one eventuality hadn't been foreseen: that one day the government of Canada might fall into the hands of a weakling. It has now happened. And the Right Honourable Brian Mulroney, PC, MP, with the complicity of 10 provincial premiers, has already entered into history as the author of a constitutional document which — if it is accepted by the people and their legislators — will render the Canadian state totally impotent. [. . .] (A12)

Trudeau's criticism hindered the Meech Lake process considerably. On the one hand, it attracted much media attention, which helped speed up the staggering negotiations and resulted in the Langevin compromise (3 June 1987). On the other hand, however, it mobilized opposition to the accord and set an example of populist rhetoric and reasoning relied on later throughout the process (Monahan 109-13). The fact that Trudeau could

garner such attention with such unreasonable comments suggests that the debate was not so much about facts but about symbols and identity.

Monahan argues that the real "turning point for Meech was to come in mid-December 1988" (155) when Bourassa decided to pass Bill 178: an act that prescribes French-only signs outside public places and allows other languages (English, practically) only inside provided that signs in French are prominent. Despite the fact that the Supreme Court of Canada ruled it unconstitutional, the bill was passed with the help of the override provision (s.33) of the constitution, which gives the right to provinces to opt out. Also known as the "notwithstanding clause," section 33 of the Constitution Act, 1982 (Canadian Charter of Rights and Freedoms) follows as: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter." With the invocation of the notwithstanding clause to protect its distinct society, Quebec's arguments about its historic rights turned inside out. Anglophone Canadians—traditionally associated with having privileges—began to argue that Quebec misused its power and historic rights to gain extra powers within the confederation. They complained about the grievances of the English-speaking minority in Quebec, felt by all anglophones in Canada. The introduction of the French sign act fundamentally questioned the validity of historic argument in English Canada, where critics had argued since the beginning of the Meech Lake process that the "hidden agenda underlying the accord was the denial of the rights of the anglophone minority in Quebec. Now, Bourassa had seemingly confirmed, that this, indeed, was the 'real meaning' of the Meech Lake Accord" (Monahan 161). Even though Quebec's "grievances" and demands for special status originated from an ethnocultural historicity, in public rhetoric they were contrasted with the principle of the equality of the provinces—a newer ideology which applies the individualist human rights argument to groups: the way every individual is equal so all the provinces should be equal too.

The sign act could carry symbolic significance because it interfered with images about Quebec and the Canadian society. An awareness of this significance is filtered through the language of the Accord and most of its commentaries. A. C. Cairns argues that the "language used in the debate was dominated by the considerations of constitutional status and social recognition, [. . .] haunted by comparison, driven by the ubiquitous fear that one has lost, or might lose, constitutional ground relative to some other group" (qtd. in

Monahan 257). Similarly, most commentators agree that the clause on "distinct society have caused the most controversy" (Mathews 85; Resnick). As a result of post-WWII demographic changes, Canada has turned into a multicultural country where a previous British–French duality now shares space with "others" comprising about a third of the population. "At the same time, aboriginal peoples have become increasingly visible politically, and they, too, challenged the traditional image of Canada as being comprised of two 'founding peoples'" (Monahan 27). It has been only a question of time for these elements of society to break their constraints and demand space and voice, for which the constitutional negotiations and especially the distinct-society clause provided forum. However, it is likely that power relations would have been questioned and reshuffled even if this forum had not prompted it—as Australia and many other countries with issues of ethnic/racial coexistence on the agenda justify. (The course and format of settling these frictions depend on the political settings as well as intellectual and economic welfare of the individual countries.) I question the popular image of Meech Lake as a "total bungle" concerning both the process (that is, secret negotiations conducted by unskillful politicians) and the content (that is, the accord), and argue that the cause of the failure to ratify the accord went to the heart of the structure of Canada's federal and cultural complex: the federal structure does not match Canada's ethnocultural complexity.

The Meaning of "Distinct Society"

Of all the points of the debate in the negotiations, the distinct-society clause generated the largest opposition and led eventually to the failure of the accord. However, there was little controversy about the issue when it first came under discussion or even at Meech Lake when the first agreement was signed (Monahan 93). All sides seemingly agreed that the Québécois society was indeed distinct. Complication came only when conversion of the draft into legal terms required specifying what Quebec's distinctness meant and implied. When the accord first began to unravel during May 1987 (before the Langevin compromise, and when Trudeau published his infamous article), opinions diverted about the distinct-society clause and the federal spending power.

I reproduce the text of the clause here for analysis and insight. The sections under debate at any time during the negotiations are underlined to highlight that no meaningful particle of the text went unchallenged. That is because even if the participants all agreed

about Quebec's distinctness, they disagreed about what distinctness meant for Quebec, for Canada, and for future interpretations of the constitution. Politicians were precautious not to codify imprecise terms, which suggests that they were aware of actually codifying various visions of Canada's future.

> **1.** The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:
>
> **2.**(1) The Constitution of Canada shall be interpreted in a manner consistent with
>
> (a) the recognition that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec, constitutes the fundamental characteristic of Canada; and
>
> (b) the recognition that Quebec constitutes within Canada a distinct society.
>
> (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1) (a) is affirmed.
>
> (3) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec referred to in paragraph (1) (b) is affirmed.
>
> (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

"*immediately after section 1*" (s.1): As secret negotiations before Meech (30 April 1987) proceeded, Quebec became more and more determined not to allow any amendments to the distinct-society clause. In the first written version of the accord they changed the original proposition, and shifted an acknowledgement of Quebec's distinctness from the preamble of the constitution to the main body of the text. Consequent of the opinion of legal experts that sections in the main body of the constitution carry stronger legislative power than those in the preamble, this change generated much opposition among the egalitarian provinces.

"*interpreted*" [s.2(1)]: Quebec's reasoning for inserting the distinct-society clause into the main body of the text was that as a mere interpretive clause it would help the courts interpret Quebec's existing powers, without adding any new ones. Since similar interpretive clauses already exist in the main body about aboriginal peoples (Charter s.25) and the multicultural heritage of Canadians (Charter s.27), Quebec as one of the "founding nations" would consistently resist being marginalized in the preamble. Ottawa's objections, however, were based on a federal worry that Quebec was striving for special status over other provinces by entering its distinctness into the main body of the constitution. The three experts invited to give interpretations of the clause after negotiations reached halt at Langevin argued that the clause was unlikely to have any significant effect on the interpretation of the Charter, other than reinforcing the existing judicial practice (Monahan 128; Slattery 271).

"*French-speaking Canadians*" [s.2(1)(a)]: In the first draft of the accord (30 April 1987) that Trudeau fulminated about, the clause talked about "French-speaking Canada" and "English-speaking Canada." In Trudeau's opinion, such wording implied separating the country into two halves (Trudeau A1)—a worry that negotiators shared and understood. "French-speaking" is the only place in the clause where the French language is explicitly mentioned, even if Quebec regarded it as the core of its distinctness. Furthermore, section 2(4) disqualifies any sense of linguistic privileges for Quebec, other than the ones that already exist. The other parties did not understand how vital the French language actually was for the distinct society of Quebec until the invocation of the notwithstanding clause to defend the French sign act (Bill 178) in December 1988.

"*centered in Quebec but also present elsewhere in Canada*" [s.2(1)(a)]: In Monahan's account, Quebec originally asked for recognition that it was the "main homeland of Canadian francophones" (66). The final text places a special emphasis on the sociological and demographic fact that francophones live also outside Quebec. It is not clear whether Quebec has any responsibilities in protecting and promoting their culture, but mentioning them as present elsewhere provides a more balanced vision of Canada.

"*English-speaking Canadians, concentrated outside Quebec*" [s.2(1)(a)]: Calling the clause "distinct-society/linguistic-duality" clause—as Monahan does in his report—would be closer to the essence of its proposed role in the constitution. As a concession on Quebec's exclusive distinctness, the clause acknowledges Canada's linguistic duality, while it protects English and French linguistic minorities living within or outside Quebec,

respectively. However, while extending the clause from acknowledging Quebec's distinctness to Canada's fundamental linguistic duality so that the vision of Canada would not be derogated, the drafters forgot about describing the rest of Canada's ethnocultural reality: Indigenous peoples and multicultural groups.

"*fundamental characteristic of Canada*" [s.2(1)(a)]: Quebec proposed that the constitution recognize the "fundamental duality of the Canadian federation" (Monahan 66). What constitutes this fundamental characteristic of Canada remained as vague and debatable as what constitutes Quebec's distinctness.

"*Quebec constitutes within Canada a distinct society*" [s.2(1)(b)]: The clause does not specify why and how Quebec is distinct. Whereas Quebec demanded recognition of the French language as fundamental characteristic of its distinctness, one which needs to be preserved and promoted by the province, "[o]ther provinces rejected the references to the French language" (Monahan 116). When Bourassa used the notwithstanding clause to pass the French sign act—which he could have avoided had the Meech Lake Accord with the distinct-society clause been ratified—the rest of Canada interpreted it as "the distinct-society clause in action" (Monahan 165), even if in legal terms the notwithstanding clause had nothing to do with the distinct-society clause of the Meech Lake Accord.

"*Parliament of Canada and the provincial legislatures to preserve*" [s.2(2)] and "*preserve and promote the distinct society of Quebec*" [s.2(3)]: The word "promote" created fervent debate because, while Quebec was affirmed in the role to preserve and promote, the Parliament of Canada and provincial legislatures could preserve but not promote this fundamental characteristic of Canada. Quebec asked for recognition of its special responsibility so that the federal government would not interfere with its cultural development within the Canadian duality. Monahan argues that "the distinct-society/linguistic-duality clause merely codified the existing constitutional position" (245). Through a series of compromises, the clause attempted to preserve a constitutional *status quo* which, however, ignored any unacknowledged idiosyncrasies in Canada's ethnocultural composition. Unavoidably, such a provision was to initiate further constitutional amendments to accompany predictable changes in the vision about the fundamental characteristics of Canada.

"*Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces*" (s.4): This section, which found its way into the clause upon the request of

Manitoba and Ontario, served to satisfy advocates of the equality of power among provinces and to maintain the *status quo* of power-sharing between the federal and provincial levels of government. It also served to ensure that no special status was given to Quebec, by effectively ruling out any legislative implications that s.2(3) might have carried. The series of compromises leading to the accord resulted in such precarious balancing of points of view in the text that no one mentioned in it actually won or lost: in fact, nothing changed. Therefore, Monahan is right to point out that "right from the very beginning, the distinct-society clause was vulnerable to the criticism that it was unjustified and unnecessary" (254). The text was too general, so that it could satisfy diverse demands to the utmost extent. Paradoxically, as soon as interpretations were given to the interpretive clause, the different implications became visible.

The federal government in Ottawa worried that with inserting the clause into the body text of the constitution instead of the preamble, Quebec wanted to achieve extra powers that the other provinces were not entitled to get. The opposition regarded the clause as abandoning pan-Canadian equality and giving special status to Quebec—one that would introduce a form of unequal or asymmetric federalism. For Quebec, the distinct-society clause became a symbol of belonging: its ratification by the rest of Canada would have meant that they embrace Quebec's distinctness. Quebec officials were objecting to amendments to the clause (and to the whole accord, consequently) not only because they felt that those would effectively strip the distinct-society clause of all meaning. An equally plausible explanation for Quebec's rigid stance is that by late 1989 both public and political sentiment in the province evaluated the refusal of Meech as the symbolic refusal of Quebec (Monahan 174).

Aboriginal groups and women's organizations were the first to protest against the Meech Lake Accord. Their arguments found protection in Ontario and Manitoba (as well as Newfoundland), who "proposed an amendment stating that charter rights as well as aboriginal peoples were not affected by the distinct-society society clause" (Monahan 116). This proposal highlights the connection between the distinct-society clause and aboriginal rights and foreshadows why an Indigenous member of the Manitoba Legislative Assembly precluded the ratification of the accord. Amid the hagglings the "most that Bourassa would accept was a provision stating that aboriginal rights and the multicultural character of the country were not effected" (Monahan 129). Eventually, this provision appeared as s.16 under "General" heading. Bourassa's statement points out that the problem of aboriginal

rights and multiculturalism was not ignored for ideological reasons but because political reality did not allow their inclusion into a package designed to pacify Quebec. The practical meaning of the "multicultural character of the country" and its relation to the English-French duality specified in the distinct-society clause remained equally vague.

Monahan points out that Quebec has always enjoyed a *de facto* distinct status that was uncodified in the constitution until the attempt at Meech Lake: "The importance of Meech Lake within Quebec was precisely that it proposed to entrench formal constitutional recognition of Quebec's character as a distinct society" (240). Brian Slattery shares this opinion:

> I suggest that the Constitution incorporates a particular fiduciary relationship with the Province of Quebec. This relationship is grounded in various historical acts and practices that cumulatively have recognized the right of the largely francophone community of Quebec to retain its distinctive laws, religions, language, and culture, and to live under a separate government with powers sufficient to sustain the society's unique character. [. . .] On this view, a constitutional amendment recognizing explicitly the distinct status of Quebec (as is currently proposed) would only carry to its natural conclusion a doctrine already deeply ingrained in the fibre of the Constitution. (271)

The symbolic significance of the accord outside Quebec also derived from the distinct-society clause but with opposite result: its perceived negative implications grew with the approaching deadline to ratify. No objections were raised as long as only informal arrangements ensured Quebec's distinctiveness, but not to constitutionalize them became a question of principles.

The proposal to include a "Canada clause" into the accord—describing, protecting, and promoting a distinctive Canadian identity—was refused, which sheds light to the fuzzy concepts the various parties had about what elements constituted a Canadian identity. The argument Slattery presents (in another context, elaborating on the existence of a fundamental trust that the modern Canadian constitution owes its supremacy to) does not even appear in the mainstream of the debate over the Meech Lake Accord: "In its distinctive Canadian incarnation, the doctrine holds that the governmental trust is owed not just to individual citizens but also to various communities represented in our confederal structure, to wit the Provinces, the First Nations, and Canada as a whole" (Slattery 270). In

the text of the Meech Lake Accord, First Nations are not represented as part of the Canadian federal structure.

2.1. Indigenous Peoples and the Constitution

> "If anyone is more distinct, surely it is the peoples of the First Nations." (Erasmus 180)

In this subchapter I will argue that components of the Canadian polity other than Quebec may also qualify for special status within the federal structure: Indigenous peoples as national minorities can claim self-government rights both on the basis of legal and historical evidence.

About 3.6% of the Canadian population are Aboriginal, that is, indigenous to the land (Behrendt 4). In section 35(1) of the Constitution Act, 1982, the term "aboriginal peoples" includes the "Indian, Inuit and Metis peoples of Canada." "Indigenous peoples" is synonymous with "Aboriginal peoples," which prevails, however, because of its use in the constitution. Legal texts (including the constitution) spell the term "aboriginal" in lower case. "Indians" nowadays are referred to as First Nations, which is sometimes used in a broader sense to include all the Indigenous peoples of Canada.

The legal status of Indigenous peoples is described in various legislative documents, most recently in sections 25 and 35 of the Constitution Act, 1982. Preceding acts, like the Royal Proclamation, 1763; the Indian Act, 1860; and the British North America Act, 1867, also defined the rights, duties and, all in all, the fiduciary relationship that have existed between "Indians" and the Crown. Recent Supreme Court decisions, such as *Calder* (1973), *Sparrow* (1990), and *Delgamuukw* (1997), have become vital in interpreting colonial and post-colonial legislation. Concurring with Supreme Court justices, legal scholars such as Brian Slattery and Kent McNeil argue that First Nations' aboriginal rights were not extinguished during colonial rule, and "aboriginal rights" protected in section 35 of the Constitution Act, 1982 include an inherent, limited, and supreme right to self-government. John Borrows in "Wampum at Niagara" examines the Royal Proclamation, 1763 together with the Treaty of Niagara, 1764 from a historical point of view, and he gets to the same conclusion as legal scholars such as Slattery, McNeil, and the Supreme Court in *Sparrow*: the right to self-government is inherent because the Royal Proclamation has to be interpreted through the Treaty of Niagara which highlights that First Nations never seceded their sovereignty.

However, the constitution does not actually spell out the origin, scope, and exclusivity of aboriginal rights. Unless an agreement can be reached through negotiations about these essential legal duties, the responsibility of defining these rights resides with the courts. In section 37.1(2), the Constitution Act, 1982 prescheduled constitutional conferences on the interpretation of aboriginal rights, in order to come to an agreement about what they actually include: "Each conference convened under subsection (1) shall have included in its agenda matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters." Acknowledgment of an inherent aboriginal right to self-government was at stake. Similarly to Quebec's "distinct society," most people would not debate that Indigenous Canadians are also distinct, and that their aboriginal rights include the right of self-government based on pre-colonial sovereignty. The unresolved debate seemed to be essentially about the post-colonial relationship of Indigenous peoples and the federal government, because an expansive interpretation of "self-government" was capable of shaking Canada's federal structure.

In his analysis prepared for the Royal Commission on Aboriginal Peoples, Brian Slattery argues that the aboriginal right to self-government should be recognized as inherent to the Indigenous peoples (as opposed to derivative from the constitution or common law); limited by the trust relationship between the federal government and the Indigenous peoples described in the constitution (as opposed to unlimited); and supreme over provincial legislation (as opposed to being subordinate to it) (280). A series of four aboriginal conferences between 1983–87 failed to agree on such an interpretation of "self-government" not the least because Quebec abstained from the discussions. Indigenous peoples responded by blocking the Meech Lake Accord that would have recognized Quebec's distinct society: an issue they regarded as of smaller practical significance than their own right to self-government. Provided that Slattery's proposition is correct, if the right to self-government (and aboriginal rights in general) is supreme over provincial legislation, then Quebec's vote would not even have to be considered at the conferences, for other reasons than the practical existence of First Nations on Quebec's provincial territory.

Slattery argues that as collective entities, First Nations are on a par with provinces in the federal structure, because the federal government is bound by fiduciary (trust-like) relationship to the provinces, First Nations, and individual citizens:

> The Crown's fiduciary obligations are owed to Aboriginal nations as corporate entities, even if the individual members of the nations are also affected. This collective aspect of the relationship puts it on a par with the trust relationship implicit in the federal structure, whereby the Provinces enjoy certain powers and rights as collective entities considered apart from their citizens. From the legal perspective, Aboriginal nations are constitutional entities rather than ethnic or racial groups. (273)

Slattery's legal opinion underlines Will Kymlicka's political theory about national minorities' group-differentiated right to self-government,[6] too. This said, it seems legally unfounded that Indigenous nations as a corporate body do not sit at the round-table when constitutional amendments are made. First Nations do not have a place in the amending procedure described in Part V (sections 38-49) of the Constitution Act, 1982. Their agreement was certainly not asked in the Meech Lake process (1987-90), which, in turn, took place before the Supreme Court of Canada decided in *Sparrow* 1990 that the inherent right to self-government is part of the aboriginal rights recognized in section 35 of the constitution. This constitutional lapse had to be quickly remedied in the Charlottetown Agreement, 1992, which eventually introduced a new model of Canada's confederation—to be discussed later in Chapter 4.

Aboriginal Rights in the Constitution

A closer look at sections 25 and 35, the two provisions regulating the constitutional relationship between Aboriginal peoples and Canada, is necessary to understand post-colonial Indigenous–Canadian relations in terms of the structure of the confederation. The two sections are cross-referenced, and both are about Aboriginal peoples' rights. Otherwise their position and function in the constitution are different.

> *section 25, Constitution Act, 1982*
>
> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

[6] This will be discussed extensively later in this subchapter, in the section "National Minorities and Group-Differentiated Rights."

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

section 35, Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 25 is incorporated in Part I (Canadian Charter of Rights and Freedoms) of the Constitution Act, 1982. Under the heading of "General" provisions, it regulates the relationship of the Charter and section 35 that protects aboriginal rights. As a regulatory section, s.25 does not give or recognize any new rights (Wildsmith 2). Aboriginal rights are recognized exclusively in section 35, which is placed in Part II (Rights of the Aboriginal Peoples of Canada) of the constitution. Its separate location within the constitution highlights that Aboriginal peoples form an independent unit within the Canadian polity.

It is a contradiction within the constitution that, whereas the Charter is animated by the principle of equality of universal human rights, the constitution (comprised of the Charter and other Parts) gives exemptions from this universality. The Charter was incorporated into the constitution under the strong influence of the United States Bill of Rights, because the newly patriated constitution (formerly known as the British North America Act, 1867) needed revigoration to describe and protect Canada's new, post-WWII multicultural diversity. However, the new Charter also had to consider the historical and legal fact that Canada is not composed of coequal unitary elements that can be dismantled and managed as individuals. Therefore, the constitution tries to eliminate this contradiction by including exemptions that are foreign to the spirit of the Charter. Such an exemption of

Indigenous peoples' aboriginal rights and freedoms from other provisions of the Charter is expressed in section 25. (Similarly, section 33—the notwithstanding clause—is also an exemption, which gives the right to the provinces to opt out of certain sections of the Charter.)

In his study of *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (1986)—a singular authoritative source on this section of the Constitution, Bruce Wildsmith draws three major conclusions:

[1] The "purpose and effect [of s.25] are to maintain the special position of Canada's aboriginal peoples unimpaired by the Charter" (2).

[2] The "specific rights and freedoms embodied in section 25 cannot be stated with precision. It can probably be said, though, that: (a) The aboriginal and treaty rights and freedoms in section 25 include both those in existence on 17 April 1982 (section 35 "existing" rights) and those new rights and freedoms that might be created and recognized at a later date" (3).

[3] A "section 25 right is not by the terms of section 25 protected from being taken away by Parliament in the same way that these rights could be taken away before the *Constitution Act, 1982* [. . .], modifications may require native consent, or failing consent, give rise to claims for compensation" (4).

The same conclusions in plain words are that, first, s.25 exempts s.35 aboriginal rights from the Charter; secondly, the rights protected in s.25 are the same as the rights recognized in s.35; and thirdly, these rights cannot be taken away unless with Aboriginal peoples' consent. It may seem from Wildsmith's analysis that whereas section 25 is a new provision entirely connected to the birth of the 1982 constitution, section 35 is a lot older, perhaps contemporary with the act of colonization. In reality, s.35 is a first instance of constitutional recognition of aboriginal rights, which consolidates the provisions of the Royal Proclamation, 1763 and the Indian Acts (Bartlett 2-10), and advances the "process of internal decolonialization" to a more democratic stage (Slattery 272). Due to its colonial background, however, the brief phrasing of section 35 leaves several questions unanswered and open for legal speculation.

What are the "existing aboriginal rights" (s.35)? Considering the origin, scope, and exclusivity of these rights, most scholars by 1992 agree that aboriginal rights are inherent, limited, and supreme. About their content, Slattery writes that s.35 "affords protection to Aboriginal land rights, laws, and powers of self-government, and perhaps also Aboriginal

languages and cultures" (273). It is a telltale "perhaps" in Slattery's interpretation: apart from the legal fact that they contain aboriginal title, the content of aboriginal rights is still being debated and negotiated. Whether the clause explicitly protects Aboriginal languages and culture is unclear for several reasons. First, the right to language and culture may already be protected as implied in the fundamental freedoms section (s.2) of the Charter. Secondly, it remains unclarified whose duty it would be to enforce financially and morally the implications of rights protecting Aboriginal languages and cultures. Thirdly, it is unclear what happens to languages and cultures on the verge of extinction; and fourthly, protecting a right to language and culture might have the effect of fixing that language and culture in some colonial form and precluding the chance of development and change. Thus, the complexity of problems deriving from a simple "perhaps" illustrates the complexity of Indigenous–Canadian relations. About the term "existing" the Supreme Court of Canada in *Sparrow* (1990) declared that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (qtd. in Slattery 273), meaning that aboriginal rights are not only inherent to Aboriginal peoples, but they are capable of change to adapt to new circumstances. This would make a more specific constitutional definition undesirable and shift the task of identifying rights to the courts or to governmental negotiations on a case-to-case basis. Some scholars, such as Kent McNeil, doubt that the government has any interest in negotiating, unless the courts fully support Aboriginal claims (152). If this is so, Elijah Harper's vote that failed the Meech Lake Accord through a procedural question can be interpreted as a powerful enforcing factor: a new method to voice Indigenous claims.[7]

Who is Aboriginal? Section 35(2) defines who counts as "aboriginal peoples," but it does not elaborate on membership criteria for "the Indian, Inuit, and Metis peoples." The constitution presupposes that Aboriginal peoples hold Canadian citizenship, which, in Slattery's opinion, is self-evident because it follows from the special fiduciary relationship between Aboriginal peoples and the federal government as representative of the Crown (274)—recognized by the Supreme Court in *Delgamuukw* (1997). Although an overwhelming majority indeed claim to be Canadian citizens, nevertheless, not all Aboriginal people regard themselves as Canadians, because generally they feel a strong personal attachment to their nation, which prevents them from any allegiance to another

[7] The significance of Elijah Harper's vote will be discussed later in this subchapter, in the section "Elijah Harper's Vote."

one (Alfred 19). By rejecting Canadian citizenship they may also reject all its consequences and can (re)claim an independent Indian nationhood. Moreover, the constitution is silent about membership questions also because it is regulated under the Citizenship Act and the Indian Act, and because defining membership belongs under the scope of an aboriginal right to self-government, which was not recognized by the courts until 1991. According to 1985 amendments to the Indian Act, Indian bands might assume control of membership "by establishing membership rules in writing upon the consent of the majority of the electors of the band" (Bartlett 15). Richard Bartlett explains that such membership rules, unlike other decisions of the band, are not subject to disallowance by the minister, which "reflects the appallingly difficult decisions which the federal government would like to distance itself from and force the bands to make" (15). Indeed, that is the direction the government tends to take, inasmuch as they prefer negotiating with Aboriginal peoples instead of going to court. The principle of negotiations was seriously damaged in the Meech Lake process, which turned away from the unfinished business of Aboriginal conferences—attempts to negotiate a definition of aboriginal rights and inclusion of the notion of inherent right to self-government into the constitution—without ensuring another round dedicated to finishing that business. It gave priority to Quebec's "distinct culture" over that of Indigenous peoples, but eventually, by alienating Quebec, it also risked the interest of Indigenous peoples living in the region.

The phrase "distinct society" in the text of the Meech Lake Accord could gather extra amount of attention and sensitivity from Indigenous peoples because it had been up in the air in various forms ("distinct/ive culture") as the courts proceeded in aboriginal title cases. For example, Justice Macfarlane in *Delgamuukw* expressed his opinion that:

> the nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as "an integral part of their distinctive culture." He derived the "integral part of their distinctive culture" aspect of this test from the *Sparrow* decision, where Chief Justice Dickson and Justice LaForest had said the anthropological evidence suggested that, "for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture." (McNeil 145)

The difference between "distinctive" and "distinct" is significant. "Distinctive" is a term established in legal practice for testing whether Aboriginal claimants can prove aboriginal title rights on the basis of belonging to a group. "Distinctive" is defensive, because

claimant groups have to prove their identity against others and define themselves as different from others. “Distinct” might mean the same, but it is used in theoretical, cultural, and social texts. “Distinct” is assertive, because it is used in texts that already acknowledge the difference and uniqueness of a group. “Distinctive,” therefore, includes differentiation and dichotomization. The court’s choice for “distinctive” is understandable for two reasons. First, “distinctive” implies a co-ordinated relationship, meaning that in a society all cultural groups stand on the same level in the hierarchy of power. This view allows for difference, yet provides for equality, and it is coherent with multiculturalism as preferable social theory. Secondly, “distinctive” with its differentiation from others makes clearcut conceptual borderlines, which the precise language of law prefers and prescribes.

Consequently, since *Sparrow* the “integral part of their distinctive culture” or “integral to the distinctive society” test has been part and parcel of public knowledge. Contrary to Quebec, however, where the contents of the distinct-society clause had never been dissected (with the exception of the French language being at the core of it, which is also the only specifically mentioned feature of Quebec’s distinctness in the clause), Indigenous peoples had been facing decades of legal quibble (since *Calder* 1973 in court, since 1982 in the constitution) to define the contents of “aboriginal rights.” This double measure means double grievance for Indigenous peoples, who believe that their constitutional position should put them on a par with the provinces.

The relation between the Charter of Rights and Freedoms and Aboriginal peoples was a controversial issue and a cause for lots of debate during the Meech Lake process. Manitoba and Newfoundland wanted to achieve amendments that would protect Aboriginal peoples from any measures of the Charter that might curb their aboriginal rights. Examining the aboriginal right of self-government, Slattery makes two premises: “First, the right of self-government enjoys protection from the Charter because it is covered by section 25 of the Charter, which shields Aboriginal rights from Charter review. Second, at the same time, individual Aboriginal persons also enjoy a measure of Charter protection in their dealings with Aboriginal governments” (286). Eventually, he concludes that the “Charter must be interpreted and applied in a manner consistent with the culture and traditions of the Aboriginal people in question” (287), because section 27 says that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” In other words, Aboriginal culture and traditions form part and parcel of the multicultural heritage of Canadians. A

similar view is reflected in the Supreme Court's opinion formed in *Delgamuukw*: while Justice Macfarlane supports negotiated agreements, he also suggests that they should be directed by the principles of equality (of cultures) and tolerance above all: "I would encourage such consultation and reconciliation, a process which may provide the only real hope of an early and satisfactory agreement which not only gives effect to the aspirations of the aboriginal peoples but recognizes there are many diverse cultures, communities and interests which must co-exist in Canada" (qtd. in McNeil 152). Interestingly, both Slattery and MacFarlane regard Aboriginal culture as part of the "multicultural heritage of Canadians" (s.27), which seems a reasonable conclusion founded in the Charter, but it can certainly generate considerable debate about the interpretation and inclusiveness of the policy and theory of multiculturalism.

National Minorities and Group-Differentiated Rights[8]

Introducing subchapter 2.1 "Indigenous Peoples and the Constitution" I proposed that Indigenous peoples as national minorities can claim certain group-differentiated rights. I also argued later that aboriginal rights awarded to the Aboriginal peoples of Canada in the constitution are in conflict with the principle of universal human rights in the Charter of Rights and Freedoms. Indigenous peoples boggle at being included in the multicultural heritage, for fear it would relegate them into an inferior position as one of the numerous coequal ethnic groups constituting the Canadian mosaic. Can the concept of multiculturalism be expanded or interpreted so that it would be inclusive of Indigenous peoples? If so, then are the Charter and the constitution compatible with such an expanded concept of multiculturalism? If this "expanded multiculturalism"—a liberal political theory that can accommodate national minorities—is operable, then what interpretation of the constitution can filter conflicts out? These questions will be answered with the help of Will Kymlicka's liberal theory of minority rights.

"A liberal democracy's most basic commitment is to the freedom and equality of its individual citizens" (Kymlicka 34). This indisputable argument forms the basis of western democracies and is reflected in bills of rights or other forms of measures to ensure

[8] Unless stated otherwise, references to Kymlicka in this section cite his *Multicultural Citizenship: A Liberal Theory of Minority Rights*.

the equality of individuals without discrimination. Article 2 of the United Nations' Universal Declaration of Human Rights (1948) reads:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Similarly, section 15(1) of the Canadian Charter of Rights and Freedoms declares that:

> Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

However, these societies, usually as a result of colonization, do have internal groups of people who proclaim their difference as a group and ask for special recognition as an unit of individuals different from other sets of individuals constituting the country. There are hardly any societies in the world today without internal or ethnic minorities, and international politics is moving towards accommodating their claims instead of deconstructing cultural groups into a loose set of individuals. Peter Read observes that the demand for equal rights and citizenship is over, as "it was replaced with the demand for the status and privileges of *unequal* citizens with which we are familiar today [. . .] (172). This is a reasonable direction provided that, as Kymlicka also points out, the single largest reason for conflict all over the world today is over unsatisfied land or cultural claims of national minorities (43).

National minorities can support their claims with arguments based on equality, history, and the value of cultural diversity (Kymlicka 107-30). Equality-based and historical arguments are rooted in a theory of justice, whereas an argument for cultural diversity would appeal to the self-interest of the majority. The three kinds of arguments are usually applied together to present a claim for group-differentiated rights successfully. Coined by Kymlicka, the term "group-differentiated rights"—referring to self-government rights, polyethnic rights, and special representation rights awarded to societal groups—expresses a distinction from the overgeneralized term "collective rights," which is often

used quite misleadingly to emphasize a collective/individualist dichotomy. Among many others, David J. Elkins struggles with the concept of "collective rights," arguing that they have been a source of confusion, because "some are really individual rights in disguise, [others] may be more accurately labelled community rights" (702). Nevertheless, he does not offer new terminology or a clearer distinction. Kymlicka argues that group-differentiated claims of ethnic and national groups are different but not necessarily inimical to individual rights, and he dissolves the "collective"/individual opposition by distinguishing between minority claims for "internal restrictions" and "external protections":

> Internal restrictions involve intra-group relations [. . .] where the basic civil and political liberties of group members are being restricted. External protections involve inter-group relations [. . .] to protect [a group's] distinct existence and identity by limiting the impact of decisions of the larger society. [. . .] External protections, however, can only arise in multinational or polyethnic states [. . .]. (35-37)

Liberals should endorse group-differentiated citizenship inasmuch as it serves as external protection of a group's identity. Not so with internal restrictions, which should be rejected because they might curb individual group members' human rights (37).

Elaborating on how the three types of group-differentiated rights can provide external protections, Kymlicka explains:

> Special group representation rights within the political institutions of the larger society make it less likely that a national or ethnic minority will be ignored on decisions that are made on a country-wide basis.
>
> Self-government rights devolve powers to smaller political units, so that a national minority cannot be outvoted or outbid by the majority on decisions that are of particular importance to their culture, such as issues of education, immigration, resource development, language, and family law.
>
> Polyethnic rights protect specific religious and cultural practices which might not be adequately supported through the market (e.g. funding immigrant language programmes or arts groups), or which are disadvantaged (often unintentionally) by existing legislation (e.g. exemptions from Sunday closing legislation or dress codes that conflict with religious beliefs). (37-38)

Arguments for group-differentiated rights that appeal to obligations of the majority arising from the concept of equality are especially revealing in this respect, because they prove from within the liberal tradition that external protections are not contradictory to the notion of equality. In such instances, group-differentiated citizenship would work as a sort of permanent affirmative action or positive discrimination to promote equity between individuals and societal groups so that beneficial cultural diversity could be preserved:

> Group-differentiated rights — such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights — can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions. These external protections ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority. (109)

When this argument for equity is backed up with arguments based on historical agreements such as treaties, court decisions, or a federal constitution, the theory of justice can gain powerful legal support, which is obliging on the majority as well as the minority culture. To ignore these powerful arguments with a sort of "benign neglect" inherent to the American form of liberal democracy and multiculturalism is incoherent, Kymlicka argues, because

> [it] reflects a shallow understanding of the relationship between states and nations. In areas of official languages, political boundaries, and the division of powers, there is no way to avoid supporting this or that societal culture, or deciding which group will form a majority in political units that control culture-affecting decisions regarding language, education, and immigration. (103)

Kymlicka's liberal theory of minority rights reconciles the conflict between the spirit of equality in the Canadian Charter of Rights and Freedoms, and the exemptions from the provisions of the Charter allowed in the constitution, for example, in section 25. The relationship between provisions of the Charter and other parts of the constitution has proved controversial in the constitutional process, yet legal interpretations—as I have demonstrated through Slattery's analysis earlier in this subchapter—justify the existence of "external protections" in the constitution. Section 35 provides external protection for Aboriginal peoples as groups, which section 25 protects from Charter intervention. However, the Charter as a whole also protects individual Aboriginal persons against

attempts of internal restrictions within their own societal culture. Therefore, by converting the theoretical distinctions between external protections and internal restrictions into legal practice, the constitution satisfies Kymlicka's most serious reserve considering group-differentiated rights.

Kymlicka's essential argument for a liberal theory of minority rights is that cultural membership is vital for the maintenance and survival of one's self-identity. In a healthy liberal democracy, the state is to make provisions to preserve and promote distinct societal cultures in order to maintain the connection between individuals and their cultural identity and to preserve the right of the individual to cultural identity. So, when Trudeau objected to self-government rights for Quebec "by saying that he believed in the primacy of the individual, and that only the individual is the possessor of rights" (Trudeau qtd. in Kymlicka 35), he promoted a false distinction between "collective rights" and "individual rights," without realizing, as the constitution does, the opportunity to accommodate external protections for societal cultures—should it be Quebec or Indigenous peoples. Unfortunately, the Canadian Multiculturalism Act also reflects such a false theoretical dichotomy, which could have been easily eliminated by introducing the terms "multinational" and "polyethnic," as versions of multiculturality, into academic and social policy discourses.[9]

Elijah Harper's Vote

In order for the Meech Lake Accord to pass, it had to achieve unanimous support in each province (Constitution Act, 1982, s.41) within the "expiration of three years from the adoption of the resolution initiating the amendment procedure" [s.39(2)]. Two weeks before the ratification deadline, Manitoba and Newfoundland still remained outstanding. Since the house rules of the Manitoba Legislation required unanimous consent of the representatives to expedite public hearings and debate, a single vote on this procedural question was able to put an end to the motion. Even though the three party-leaders had agreed to pass the accord with majority voting, the representatives never got the chance to cast their vote in Manitoba. The three-year limit to pass a constitutional amendment expired on 23 June 1990.

[9] I will further elaborate on the lack of application of these terms in the next two subchapters.

In the legal sense, when Elijah Harper voted "no" on 22 June 1990, he did not vote as a representative of a national minority with group-differentiated rights but as an individual MNA (Member of the National Assembly) delegated by the New Democratic Party. However, in moral and political sense, he acted as a representative of the First Peoples. Harper was a "laconic and reserved [. . .] Cree Indian who had once been chief of the Red Sucker Lake band" (Cohen 258). As a devoted politician, he successfully represented the interests of Indigenous Canadians by legally boycotting the constitutional process. By withholding his consent for two weeks until the Manitoba legislation ran out of time, he expressed his creed: "It's about time that aboriginal peoples be recognized" (Harper qtd. in Cohen 258).

Harper's vote was just as much a symptom of the crisis of the federal structure as all the other objections to the accord during its three years' struggle. Robert Bothwell correctly observes that the deal "came apart in terms of public politics because [of] Elijah Harper" (208). However, it was not Elijah Harper alone who killed the accord but the body of Indigenous peoples represented by him, who used the only possible political action available to express their interest. It is ironic how an insignificant procedural vote could outweigh a constitutional amendment, but it shows the unrecognized potential power of Canada's First Nations.

Meech Lake brought to surface several problems with the constitutional process in Canada and, in fact, with the structure of government, the federal system, and the individualist philosophy underpinning them. These lost credit by 1990, when Indigenous Canadians decided to take action into their hands because they wanted to deal with the federal government on a government-to-government basis, without committees interfering, like a national minority with rightful claim for superior self-government right to that of other minorities in Canada—even superior to Quebec. Head of the Assembly of First Nations, Ovide Mercredi proclaimed that "[o]ur future as aboriginal peoples in Canada will not be decided by the prime minister or the premiers. Nor, for that matter, will public opinion be the final arbiter of aboriginal destiny. At the end of our struggle for self-rule in Canada, our liberation will be decided by our people" (220). Later he added:

> We feel we should be there to negotiate for ourselves what we believe is in our best interests. A constitutional process where we can negotiate with the government would provide us with that opportunity. A committee would

> treat us as mere individuals and not acknowledge our collective status in Canada" (221).

Accordingly, Andrew Cohen reports that when senior federal officials went to Winnipeg to meet Native leaders in a final attempt to resolve the situation, the discussion lasted only an hour: "The natives were not interested in the federal government's six-point plan, which offered a royal commission on native issues and a commitment to recognize native people as a fundamental characteristic of Canada. They could not be persuaded" (259).

The distinct-society clause could easily be an immediate cause for action. As a former policy analyst and cabinet minister, Harper was well aware that the meeting at Meech Lake in April 1987 followed only weeks after a series of four constitutional conferences on aboriginal rights (1983-87) had failed. Quebec's participation only as an observer precluded any agreements in these negotiations, which gave enough cause for grievances. Moreover, Cohen reports that the aboriginal conferences "collapsed, principally because the western premiers felt that the concept of native self-government was too ill-defined for inclusion in an entrenched constitution. Yet, just a few weeks later, the premiers embraced a nebulous notion of Quebec as a distinct society, playing down concerns that the concept lacked precise legal definition" (259). Indigenous peoples' reasons for the hard stand against the Meech Lake Accord in Manitoba is summarized succinctly by Ovide Mercredi: "we realized that the concept of a founding nation was being entrenched into the constitution and that the place of our people and our history in Canada were not being respected and, in fact, we were being ignored" (222). This argument is valid even if the expression "founding nation" does not appear *verbatim* in the text of the accord. "Aboriginal peoples" do not appear either, apart from a reference saying that the sections of the constitution and the Charter dealing with them are not affected by the clause (s.16), which underlines the argument that the distinct-society clause had larger symbolic than legal impact. Aboriginal peoples also complained about missing out on the schedule of constitutional conferences: four prescheduled Aboriginal conferences ended in failure before Meech, yet the Meech Lake Accord did not schedule one for being taken up, even though a major cause of failure of those conferences—Quebec—was just being remedied in the accord.

There is, in Indian culture, a primary concern for spirituality and equality: "There is another fundamental understanding in Indian government, and it is that all life is equal. [. . .] Furthermore, all human beings, black, red, yellow, and white, are equal and of the

same family" (Prof. Oren Lyons, a peace-keeper with the Six Nations, qtd. in Slattery 266). This fundamental belief in equality is expressed in Indigenous claims to rebalance the constitution. It also adds another argument to explain why the "distinct-society clause" was so much objected against. Perceived as extra emphasis given to Quebec in a constitution supposedly serving a whole country (while Indigenous peoples are refused to get equal share of the negotiating power), the distinct-society clause was refused because it drove towards a form of unequal federalism of which First Nations were not recognized elements. Harper's stand raised the accord out of the Canada–Quebec, English–French polarity, not only because First Peoples saw the "opportunity in light of that uncertainty across the land, to come up with a new arrangement for the nation-state called Canada" (Mercredi 222), but because of concerns for their future as peoples. Serious warnings had been given during the previous decades for Mercredi to justify his claim: "Québec cannot separate without, first of all, resolving issues with aboriginal peoples. They have no right to take all the land and resources when aboriginal peoples in that province have standing rights to land and resources" (222).

One of Monahan's prophetic conclusions says that "Meech Lake died, not because it was rejected by elected representatives, but rather because those elected representatives were denied the opportunity to vote on the matter" (236). In my opinion, however, nothing ensures that the representatives in Manitoba or Newfoundland would have supported the accord. A dozen of other factors could have equally overturned the Meech Lake process. Depending on the political preference of the critics, several parties were found at fault for threatening Canada's future, which points to the multiplicity of causes leading to non-ratification. History played a joke when, out of all the serious objections, a seemingly insignificant ballot of a Native member in the Manitoba House precluded public hearings and voting about the accord and blocked the ratification process. Elijah Harper's negative vote carries symbolic significance: it gives sound to the thin, inaudible voice of Indigenous peoples that was not heard during the negotiations. This symbolic vote carried such a weight that the new government model offered during the Charlottetown constitutional negotiations treated First Peoples as partners, which is not likely to have happened without the failure of the Meech Lake Accord.

Newfoundland Premier Clyde Wells is blamed by some for the failure at least as much as Elijah Harper (Cohen; Monahan). They seem to suggest that Wells's role is even more prominent, because he had participated in the negotiations since his election and

undid an already ratified accord in his province. Wells's major objections concerned the protection of the rights of minority groups. Similarly to Manitoba, the Newfoundland representatives did not get the chance to express their opinion in a formal voting because Wells utilized the stalemate in Manitoba and adjourned the Legislative Assembly without putting the accord to the vote. I conclude, then, that chronologically, the deed of frustration remains with Elijah Harper, which does not reduce the symbolic significance of his act. Indigenous peoples, women's groups and multicultural groups were the first to express objections to the accord: they also uttered the last word in the debate.

2.2. Immigration and Ethnic Groups in the Constitution

> "Our charter's most serious *omission* lies in its
> lack of specified protections for the collective rights
> of *all* Canadian ethnic communities." (Kallen 335)

Ethnic organizations expressed their disapproval of the Meech Lake Accord early in the process of negotiations. "The Canadian Ethnocultural Council, a coalition of thirty-five ethnic organizations, announced itself dissatisfied with the accord and indicated that amendments were necessary to ensure that the interests of multicultural communities were protected" (Monahan 119). This subchapter will examine how "multicultural communities" are presented in the constitution and become objects of a state policy. I will examine the human rights context of the Charter in its relevance to ethnic groups. I will argue that the post-WWII immigration that had boosted the identity-debate in Canada and generated the policy of multiculturalism did not necessarily bring a new perspective into society building. Rather, multiculturalism accomplished a new way of labor-management in order to boost the Canadian economy. I propose that multiculturalism as state policy introduced another, post-assimilationist, way of managing people of various ethnic origins, so that an idealized Canadian society would be an attractive place for more immigrants, a cradle for a healthy economy, and eventually the nurturing place for the devoted Canadian citizen.

Post-WWII immigration has been the most recent and formative contribution to the social composition of Canada today. Although giving exact data about ethnic belonging is difficult because of identification problems arising from intermarriages, political, cultural, and linguistic assimilation, as well as personal affiliation, we can say that people of ethnic origin constitute about 42% of Canada's population. In the 1991 census 41.7% of Canada's total population of then 26,994,045 reported having some non-British or non-French ethnic origins (Leman 3). Besides, Richard J. F. Day notes that the reliability of census survey into the ethnic composition of the society varies in time, as data change following the introduction of new categories. For example, the evaluation of the 1986 census shows that when it was possible to claim multiple origin for the first time, over 28% of Canadians did so (199), which turned people of "multiple identity" into the single largest ethnic group in Canada. Conclusions drawn from these figures may point in

different directions. Day concludes that the Canadian identity (which he claims never to have existed) is being increasingly diluted (202-04), to the extent that the official categories of "ethnocultural origin" tend to lose their meaning. I doubt, however, that a Canadian identity can be diluted In my opinion, rigid categories of ethnicity can be transgressed, which does not contradict but rather strengthens a devotion to Canadianness as citizenship. Today's concept of "ethnocultural origin" went through several changes as a category of identification during the history of the country: race, civilization, culture, language, ethnicity, and ethnocultural origin had been used at various stages in policies that were directed at managing the population and upholding power-positions. Not to lose Day's point that the concept of the "ethnic" is problematic, I will identify controversial rhetorical and political constructs in the language and intentions of multiculturalism as a state policy in Canada. I will also reconsider and defend Kymlicka's theory of minority rights from this perspective in a later section of this subchapter.

The Constitution Act, 1982 refers to the multicultural heritage of the country in section 27, which states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Section 27 is not subject to the override provision in section 33, which means practically that measures promoting multiculturalism (that is, multicultural policies) are relegated to the federal government, with no provincial right to intervene. Like s.25 of aboriginal rights, s.27 is another interpretive clause that is claimed to promote a group-differentiated right. However, it is worded rather vaguely to refer to the mixed ethnocultural origin of the country's population as the "multicultural heritage of Canadians." In this sense, and without the later enactment of the Canadian Multiculturalism Act 1988, the clause does not seem to say and promote more than the obvious recognition that Canada is made up of various ethnic/cultural/language groups. When it comes to the "enhancement" of the multicultural heritage, in comparison with other sections of the Charter and constitution, it becomes obvious that provisions of any sort are only made regarding the English and French linguistic groups (whose differentiating factor is the language), as well as Aboriginal peoples. Two meanings can arise as interpretation of "aboriginal": "aboriginal" as a point of origin (not specified in the constitution), and "aboriginal" as belonging to the Indian, Inuit, and Metis peoples of Canada (as specified in s.35). Thus, the constitution is inconsistent in the use of linguistic or ethnic differentiations, and any reference to cultural differentiation is altogether missing. In this semantic context, the reference to

"multicultural heritage" seems to be rather vague. Although the intention of the drafters (in accordance with Trudeau's vision) was to make a provision that is inclusive of all cultural groups (whether based on language, ethnicity or aboriginality), in the context of the whole constitution it seems that multicultural heritage refers especially to citizens other than English-speaking, French-speaking, or Aboriginal. It seems that people whose first language is not English or French — that is, those who by the close-knit relation between language and ethnicity are not likely to belong to one of the "founding races" — will belong under the heading of "multicultural" and will be covered by measures of the policy of multiculturalism.

Multiculturalism as a state policy is self-acknowledgedly directed to manage the ethnocultural diversity of Canada. Day quotes *Multiculturalism: What Is It Really About?*,[10] a 1991 policy document which describes multiculturalism as a "social policy for handling diversity" that "works better than assimilation and other models" (192). Especially actively encouraged and promoted after WWII, large scale immigration has been the major source of this diversity. As Valerie Lemiux argues in her article about immigration in case law and the constitution, the federal government enjoys paramountcy in the regulation of immigration into the country, whereas the regulation of the settled life of immigrants is a provincial task (116). Although there are federal-provincial immigration agreements, only Quebec took active steps to manage immigration at the provincial level.

Immigration was one of the five issues discussed in the Meech Lake Accord, and one of the most easily settled points of dispute. Two general tendencies met the expressed interest of the negotiating parties. On the one hand, Quebec was willing to undertake tasks which it reckoned were advantageous for economic and nationalist purposes. On the other hand, the federal government was willing to give more administrative power to the provinces in areas that influenced their development, in accordance with the trend of decentralization professed by the Mulroney government. At Meech, the following agreement on Immigration and Aliens was reached:

> 2. The Government of Canada will, as soon as possible, conclude an agreement with the Government of Quebec that would
>
> (*a*) incorporate the principles of the Cullen-Couture agreement on the selection abroad and in Canada of independent immigrants, visitors for

[10] Canada. Ministry of State for Multiculturalism and Citizenship. *Multiculturalism: What Is It Really About?* Ottawa: Supply and Services, 1991.

> medical treatment, students and temporary workers, and on the selection of refugees abroad and economic criteria for family reunification and assisted relatives,
>
> (*b*) guarantee that Quebec will receive a number of immigrants, including refugees, with the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by five per cent for demographic reasons, and
>
> (*c*) provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation,
>
> and the Government of Canada and the Government of Quebec will take the necessary steps to give the agreement the force of law under the proposed amendment relating to such agreements.
>
> 3. Nothing in the Accord should be construed as preventing the negotiation of similar agreements with other provinces relating to immigration and the temporary admission of aliens.

The wording of the same agreement in the Schedule, Constitutional Amendment, 1987 reveals a concurrent legal position, but with a different emphasis. Whereas the language of the first agreement suggests a primacy awarded to Quebec over the other provinces, the Constitutional Amendment deliberately covers up any such allusion. It is constructed as an agreement concluded between the Government of Canada and any province (s.95A and s.95B), and rendered subject to the Canadian Charter of Rights and Freedoms [s.95B.(3)]. Such a wording served the purpose of satisfying Quebec's claim for a more equitable share of the migrant intake, while paying lipservice to the principle of the equality of provinces and the supremacy of human rights as layed down in the Charter. To avoid provincial conflict and the accusation of giving Quebec more power than the rest of the provinces, the text is generally worded so that it would leave open and encourage the possibility of similar arguments with each of the other provinces:

3. The said act is further amended by adding thereto, immediately after section 95 thereof, the following heading and sections:

Agreement on Immigration and Aliens

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

95B. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95C (1) and shall from that time have effect notwithstanding class 25 of section 91 or section 95.

(2) An agreement that has the force of law under subsection (1) shall have effect only so long as and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provisions that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

(3) The *Canadian Charter of Rights and Freedoms* applies in respect of any agreement that has the force of law under subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

95C. (1) A declaration that an agreement referred to in subsection 95B (1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is party to the agreement.

[. . .]

John D. Whyte accuses the Meech Lake Accord of shifting away from ethnic accommodation by constitutionalizing ethnic duality in a very dramatic way: “in vesting a

stronger form of political community for Quebec and, of course, the other provinces, [the accord] hampers the development of what might be a richer and more suitable political form" (266). Whyte is clearly pro-diversity as opposed to pro-provincialism. In his interpretation, Meech Lake proposes an obsolete dualistic model of state that had already been superseded in the 1982 constitution. To return to the old 1867 model of two nationalities—as he presumes the Meech Lake Accord does—would mean to support an outdated model of government that is dangerous to concurrent liberal developments propagating social and political diversity. In my opinion, however, this is a misplaced argument. The Meech Lake Accord was not intended to restructure the state or to reverse liberal policies. It was intended to rebalance English–French relations within the context of the 1982 liberal constitution, by changing the principles laid out there as little as possible. The aim was to get Quebec to sign the constitution and not to set up a new one based on new/old ideas. Québécois can rightfully claim national minority status in a multinational state, rather than being just another ethnic group in a polyethnic society. Therefore, while building on the heritage of the protection of individual rights in the 1982 constitution, I do not think it was a mistake to consider historical arguments forwarded by Quebec to justify its distinct status during the negotiations. Whyte is clearly of another opinion when he argues that:

> the Meech Lake agreement does not embrace ethnic pluralism. If [. . .] the real ethnic tensions to be faced in Canada are no longer the tensions between French and English but, rather, the tensions of multiculturalism and multiracialism, then the special regard for Quebec as the protector of French is at best non-responsive and, at worst, illiberal. The political values of tolerance, adaptation, accommodation, celebration of diversity and promotion of the worth of difference are not represented in the Meech Lake agreement. (268)

To the contrary, I believe that the Meech Lake Accord did embrace pluralism in its multinational form, it accommodated diversity and promoted difference. Only, as a matter of course, because its focus was directed only at Quebec, it could not deal with other manifestations of Canadian diversity. Eventually, this resulted in the failure of the Accord.

Propagating a model of government that is closer to Whyte's preference, the Canadian Multiculturalism Act (to be discussed in subchapter 2.3) follows on a legislative necessity created by the inclusion of "the multicultural heritage of Canadians" (s.27) in

the Canadian Charter of Rights and Freedoms. In order to understand the real scope of the act and its relation to the "problem" of immigration and human rights, it is necessary to look into those other issues first.

Human Rights in the Charter

Compared to the ancient concept of citizenship, the concept of human rights is relatively new: "the fuller development of international human rights law did not occur until the creation of the United Nations" (Leary 251). Whereas citizenship has always generally meant a set of rights and obligations arising from one's belonging to a political community (on this notion of belonging, "citizenship" is sometimes used synonymously with "nationality"), "human rights" is exclusively in the language of rights. The international movement for human rights has targeted governments, whose obligation is perceived as to protect individuals' human rights. In this way, the notion of "rights" and "obligations" have become separated. Individuals hold human rights (including natural rights and civil rights), whereas governments have obligations under international law to protect those rights. Inversely, individuals only possess obligations as citizens, and the government gets the right to demand certain things from them.[11] So when predimonantly individual "human rights" parallel a community-based "citizenship," the latter can actually lose from its original rights-content because the language of human rights takes that over.

There is still a lot of confusion in international law as to what extent human rights are universal (Leary 262). According to the principle of cultural relativism,[12] rights have a cultural context, so eventually it depends on a culture what rights are awarded to its people and to what extent those rights are limited. Thus, in Leary's argument, cultural diversity presents problems for the international human rights movement (Leary 260-62). In Canadian and Australian contexts, however, the inverse of this argument can also be true: the international human rights movement presents problems for cultural diversity because of the former's universalist underpinning. It is difficult to find the fine balance between the

[11] The relationship between human rights and citizenship has been critically observed recently by Keith Faulks in *Citizenship* (139-45). Like many social theorists, he notes the rising tide of human rights outlined above and calls for a renewed concept of citizenship detached from the notion of nation as cornerstone of liberalism. At this point, he differs from Kymlicka, because he does not share the idea that national belonging (based on common culture) can entitle groups to group-differentiated rights.

[12] "This doctrine [of cultural relativism] holds that all cultural systems must be approached (and assessed) as if they are equally good and valid, when situated within their historical and environmental context" (Fleras and Elliott, *Multiculturalism* 57).

principles of universalism and cultural relativism. Kymlicka's theory of minority rights tangentially addresses this problem when he distinguishes between external protections of a cultural group and internal restrictions within that group, as I have demonstrated in the previous subchapter. A community may set up a fence of external protections to protect its culture from the outside world and maintain its internal socio-cultural integrity. These external protections are acceptable in the name of the universal good of diversity. However, internal restrictions drawn up in the name of the same community culture in order to abridge individual members' fundamental human rights are unacceptable. While universal human rights have an important role at the level of the individual in society, cultural relativism still has relevance at the level of the community as a cultural group.

The Canadian Charter of Rights and Freedoms is underpinned by the international doctrine of the universality of human rights. Although the Charter allows for possible restrictions of these rights, section 1 subjects them "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In the case of Canada this means that the United Nation's Universal Declaration of Human Rights (1948) together with the International Convention on the Elimination of All Forms of Racial Discrimination (1969) and the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights (1976) back up the constitution. These documents all support the principle of universal human rights as it developed after WWII, and so does the Canadian Charter of Rights and Freedoms.

The Charter discusses human rights under a number of headings: *fundamental freedoms*[13] (s.2); *democratic rights* (s.3-5); *mobility rights* (s.6); *legal rights* (s.7-14); *equality rights* (s.15); *language rights* (s.16-22); and *minority language educational rights* (s.23). Out of the long list of protected rights, political rights (that is, *democratic rights* and *mobility rights*) are limited to citizens only. Likewise, *minority language educational rights* are awarded only to citizens of Canada. All these rights are also individual rights, because individuals (or citizens) as members of the broader Canadian public can possess them.

Language rights as specified under s.16-23 are awarded to "any member" of a linguistic community. It is difficult to judge if these *language rights* are individual rights or group-differentiated rights. I suggest that *language rights* as described in section 16-23 are individual rights, for two reasons: first, language communities have amorphous,

indescribable membership, whose only common thread of belonging is the language. Language in itself, severed from nationality, ethnicity, gender, religion, culture, and so forth, is not a qualifying factor for a group-differentiated right. That is so, because a language can be learnt, shed, mastered as mother-tongue or mumbled as a second/third/fourth language, and eventually the degree of such a "belonging" would have to be judged on an individual basis. Not only does this come down to judging one's language skills, but to setting up membership criteria. Secondly, people would enjoy such rights as individuals, because *language rights* as in s.16-23 are not exclusive and not automatic. They may or may not be opted for on an individual basis. Nevertheless, they are still based on the principle of equality. Therefore, I think that the only truly group-differentiated rights are *aboriginal rights*, as protected in s.25 under the "General" provisions of the Charter, and then later in s.35 of the Constitution (Part II: Rights of the Aboriginal Peoples of Canada).

The Charter discusses the French–English dualism of Canada in language terms, and presupposes an artificial separation of language, culture, and ethnicity. While theoretically this is very understandable, because French-speakers are not identical with French-Canadians, and English-speakers are not identical with British-Canadians, it results in the same sort of confusion as the one in the text of the Meech Lake Accord. The text of the Charter is general so that it could refer to *language rights* for the English as well as the French while in minority position. Seen through the dimension of language, absolute equality is ensured for all Canadians, whichever of the official languages they happen to speak. Seen through the prism of Canadian federalism, however, language rights revolve around one province: Quebec. Thus, because of the unclear boundary between language and culture/ethnicity, the Charter allows for two readings: one supporting the principle of equality, the other supporting cultural differentiation. The same confusion lives on in the Meech Lake Accord, where the distinct-society clause eventually ended up talking about English-speaking and French-speaking Canadians, instead of using terms of ethnic origin/nationality. The person who was most influential in achieving this change of the text was Pierre Elliott Trudeau, whose government had also passed the Canadian Charter of Rights and Freedoms.

According to the Charter Project (1989), the first survey published about the state of opinion in Canada of *language rights* in the Charter, French-speaking Canadians are

[13] Throughout the chapter expressions in italic stand for the terminology used in the Charter.

less likely to use double standards in their support for minority language rights. This quantitative survey considered both mass and elite attitudes in both francophone and anglophone citizen and decision-maker groups. One of the conclusions of the survey states that "a majority of anglophones support the right of francophones to have federal government services in their own language but that anglophones practise a double standard in being far more likely to support this right for anglophones living inside Quebec than for francophones living outside Quebec" (Sniderman, et al. 268). In interpreting this result, the surveyors found that, contrary to previous research conclusions, it is not a strong commitment to civil liberties, but rather a belief in egalitarianism, "a willingness to accept historically unpopular and stigmatized groups as equals" that generates support for bilingualism as policy (Sniderman, et al. 274). This explains the strong support for the language rights sections of the Charter, and highlights why anglophones employ double standards: a belief in the civil right to government service in one's mother tongue has negligible influence when it comes to the language of education. Equality is what matters, and the survey shows that anglophones in majority feel more equal and biassed toward their rights. On the other hand, to explain the lack of double standards expressed by francophones, the survey concludes that francophones "react supportively to language rights for anglophones not because they are more committed to minority rights in general, but because they are committed to a special status for rights embedded in linguistic communities" (Sniderman, et al. 274).

I strongly agree with the surveyors' closing argument that the "Charter is inherently and fundamentally political" (282). I would even pursue this idea further to say that it is possible, relevant, and advisable to discuss the Charter in other than exclusively legal-constitutional analyses. Concurring with Sniderman and his co-authors, I associate the double standard in *language rights* with political factors and argue that even though the Charter and the consequent accords were worded in language terms in order to follow the tendency in international law to broaden human rights, to satisfy the principle of equality inherent in the Canadian federal system, and to pacify Québécois sensitivity, the real distinctions were still between the ethno-politics of Quebec and the rest of Canada.

The broadening range of human rights in international law may easily conflict with domestic law if they interfere with regulations made within the realm of sovereignty.[14] For

[14] "According to this doctrine [of sovereignty], States exercise supreme political authority within their territories and in relation to their citizens" (Pritchard 8).

example, it is within the domestic sphere for a country to select its citizens (Leary 252-53). However, if someone is refused citizenship (in other words, if s/he lacks nationality),[15] then s/he is excluded from many areas of rights. For example, political rights in the Charter only apply to citizens. Authority over citizenship is one of the characteristics of a sovereign state, therefore immigration in a federal country can be a sensitive issue: when the federal government shifts the right of decision-making over immigration from Ottawa to a province, it shifts certain sovereignty rights. Several people disagree with such strong decentralization especially because it happens parallel with Quebec's attempts at independence. Selecting future citizens (that is, defining a social group's membership) is an important component of self-government. For the same reason, self-government as an aboriginal right is also a sensitive issue because it includes the right to define membership and so it might interfere with federal control over human rights.

The Charter can be considered as a political attempt at constitutionalizing universal human rights without evading sovereignty issues. It is open to interpretations both in terms of universal human rights and cultural relativism because it is incorporated in the constitution. That it is frozen in a limbo position between interpretations because of an unmanageable amendment process is symptomatic of the Canadian political identity crisis.

Polyethnic Groups and Group-Differentiated Rights

Ethnocultural diversity may not originate only from the co-existence of national minorities with a national majority within the border of the same country, but also from the presence of various ethnic groups who arrived in the country through individual or familial migration. The group behavior of incorporated national minorities and ethnic groups are significantly different. National minorities "typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure survival as distinct societies" (Kymlicka, *Multicultural* 10). On the other hand, ethnic groups "wish to integrate into the larger society [. . .]. While they often seek greater recognition of their ethnic identity, their aim is [. . .] to modify the institutions and laws of the mainstream society to make them more accommodating of

[15] Unless justified by domestic law, denial of citizenship might conflict with international law because Article 15 of the UN Declaration of Human Rights says that "Everyone has the right to nationality."

cultural differences" (Kymlicka, *Multicultural* 11). For an easier overview, I have summarized the differentiating characteristics of these groups:

	national minorities	polyethnic groups
history	prior territoriality and self-government	incoming migration
social demography	aim at distinction	aim at integration
politics	seek self-government	seek ethnic accommodation

Canada is both multinational and polyethnic, so the term multicultural in the descriptive sense is doubly true for it. Nevertheless, I find it important to distinguish between diversity arising from multinationality and polyethnicity (or both), because significant differences between the two require a differentiated notion of multiculturalism at the policy level. In an earlier section of the previous subchapter, I have already discussed the demands national minorities can make. Now I will discuss what rights ethnic groups need to have within a multicultural state. Again, I will rely on Will Kymlicka's liberal theory of minority rights.

Ethnic groups in a polyethnic society may originate from individual or familial migration. Until the 1960s, immigrants were expected to assimilate to the norms of English Canada. (Similarly, the White Australia policy did not simply involve the preference of whites during the selection of immigrants but the expectation that they would rapidly conform to the predominantly British customs of the country). In the 1970s, however, a new model of diversity management was introduced in both countries, as it was becoming increasingly obvious that the assimilationist model had failed. Cultural pluralism was no longer regarded as a threat to the unity of the country which, instead, was to be managed under the new policy of multiculturalism. Such a change in the perception of diversity was effected not only by the dissolution of the British Empire, the mass migration of displaced persons after WWII, and the civil rights movements in western democracies, but it was also driven by the recognition that a sustainable Canadian (and Australian) economy was highly dependent on a continuing influx of skilled labor-force. It has been in the most fundamental interest of these countries to provide a socially and politically friendly environment for prospective immigrants who would otherwise not leave their homeland in search of a better life.[16]

[16] I am not discussing political and economic refugees here.

The group-specific rights that ethnic groups can claim are polyethnic rights and special representation rights. (The third group-differentiated right—that is, self-government right—is not applicable to ethnic groups, not the least because they lack a prior territorial basis, which is indispensable for self-governing institutions.) Polyethnic rights first emerged as a form of opposition to assimilation: ethnic groups demanded the "right freely to express their particularity without fear of prejudice or discrimination in the mainstream society" (Kymlicka, *Multicultural* 30). The civil right of freedom of expression [Charter s.2(*b*)] was extended to all media: including presentation of one's culture through clothing, cuisine, customs, arts, and celebrations. The freedom of association [Charter s.2(*d*)] was realized in a growing number of ethnic associations. The right to education found some protection in the provision for immigrant language teaching in schools, as part of the facilitation of heritage language skills in s.5(1)(*f*) of the Canadian Multiculturalism Act. These demands and policy responses, however, all resulted from a greater acceptance of human rights as protected by the Charter, which the policy of multiculturalism actively encouraged to ensure "the effective exercise of the common rights of citizenship" (Kymlicka, *Multicultural* 31). Even preferential funding for ethnic cultural production can be regarded as a countermeasure to avoid racial discrimination, acted out in the name of the common good of cultural diversity. It can be argued that rights and exemptions granted to ethnic groups always derive from individual human rights, applied to one or all special groups to help them "express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society" (Kymlicka, *Multicultural* 31). There is an implied recognition here that the well-being of the society depends on the well-being of the individual who is located in his/her culture. It is in the interest of the state to treat all of its citizens equally, but it must also recognize that individuals differ according to their cultural space. The recognition of cultural differences, probably most visible in religious practices, can account for exceptional treatment in police dress-code (an example of external protection), but it cannot go as far as offending the rights of individuals (internal restrictions). The ultimate aim of polyethnic rights, then, is to ensure equitable treatment of culture-bound individuals in diverse societies. Hence it is impossible to separate certain group-specific measures from individual human rights in the Charter.

Even if ethnic groups cannot claim self-government because they had not had it *a priori* and because they normally lack the historic territorial basis required for it, their

economic contribution to the society may substantiate claims for another kind of political representation. Special representation rights can be awarded to groups of society that would otherwise remain unrepresented via the individual-based democratic election process. Kymlicka argues that "there is increasing interest in the idea that a certain number of seats in the legislature should be reserved for the members of disadvantaged or marginalized groups" (*Multicultural* 32). However, economic contribution is not accepted as an argument for special representation rights because it is regarded as the duty of citizens rather than a merit to be rewarded. An economically powerful social group will find other forms of political representation through lobbies or party politics. Moreover, economic strength is an advantage that will not be given extra support under a policy of multiculturalism that is dedicated to helping disadvantaged groups.

Special representation rights can be demanded if there is some "systemic disadvantage or barrier in the political process which makes it impossible for the groups views and interests to be effectively represented" (Kymlicka, *Multicultural* 32). Polyethnic groups can make a claim for equitable representation in politics, whereas national minorities' claim would be phrased in terms of self-government rights. No avenues of guaranteed representation for ethnic groups, official language minorities or Aboriginal peoples were discussed at the Meech Lake negotiations, and there is no such provision in the Canadian constitution, either. Had there been any, the Meech Lake Accord might not have failed on a procedural vote.

2.3. The Canadian Multiculturalism Act

> "Canada is popularly depicted as a country perpetually in search of an identity. A formal commitment to multiculturalism is now considered a central plank for addressing our longstanding identity crisis."
> (Fleras and Elliott 167)

In this subchapter I will provide a critical reading of the Canadian Multiculturalism Act to see how deeply inculcated it is with the liberal principle of equality. I will argue that even though egalitarianism deeply penetrates Canadian identity and is justifiably the ultimate principle in the public interaction of individuals, it requires extra caution not to mistake equality for sameness in theory and policy, because cultural differences arising from a different route of historical development may call for differential treatment. A political vision of multiculturalism may not work in a society unless it considers ethnocultural demands at the policy level so that equity could be ensured.

Canada was the first country in the world to introduce multiculturalism as official government policy (1971). A consequent range of policy documents was eventually followed by the Canadian Multiculturalism Act, a singular piece of legislation which enured in 1988. Although the act was passed by the Mulroney government, it legislated for Trudeau's vision of an egalitarian, meritocratic and unified Canadian identity in its multicultural diversity. By the time the Canadian Multiculturalism Act was passed, multiculturalism in the descriptive sense had already been a social reality in the country, which is clearly expressed in the subtitle of the act: "An Act for the preservation and enhancement of multiculturalism in Canada." The text of the act suggests that the policy of multiculturalism as a way of management has been successful and needs further enhancement in order to reinforce its original intention: to forge and keep Canada together.

The provisions of the Canadian Multiculturalism Act are preceded by a lengthy preamble that explicates the circumstances of and reasons for the legislation. Although it is not a legally binding part of the legislative act, the preamble contextualizes it and alludes to underpinning political principles. Hence it assists a proper interpretation and application of the act. The preamble consists of eight "whereas-clauses," the first three of which cite the constitution of Canada as authority for the existence of the act. The fourth clause cites

the constitution and the Official Languages Act; the fifth to seventh clauses refer to the Citizenship Act, the Canadian Human Rights Act, and the International Convention on the Elimination of All Forms of Racial Discrimination as well as the International Covenant on Civil and Political Rights. Having established the act in a context of domestic constitutional and statute law and international law, in the eighth whereas-clause the government of Canada announces its commitment to diversity and its aim to "achieve the equality of all Canadians in the economic, social, cultural and political life of Canada."

The Canadian Multiculturalism Act is individualist above all. It is based on the tenet specified in its first whereas-clause that "every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination [. . .]." This fundamental belief in the equality of individuals and their universal human rights is supplemented but not modified by constitutional references to the recognition of the multicultural heritage of Canadians and the rights of the Aboriginal peoples of Canada in the following whereas-clauses. The preamble reproduces the structure of the constitution, in which the Canadian Charter of Rights and Freedoms (Part I) and the Rights of the Aboriginal Peoples of Canada (Part II) constitute subsequent and supplementary parts. What is meant by the multicultural heritage of Canadians is not clear from the preamble, however, most probably because section 27 of the constitution (Charter) does not specify it. A demand to elaborate on this lapse in the constitutional interpretative clause initiated further legislation and culminated in drafting the Canadian Multiculturalism Act.

The three major parts of the act are "Interpretation" (s.2), "Multiculturalism Policy of Canada" (s.3), and "Implementation of the Multiculturalism Policy of Canada" (s.4-7). The description of the policy contains a definition of multiculturalism in sections 3.(1)(*a*) and (*b*):

> (*a*) [. . .] multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;
>
> (*b*) [. . .] multiculturalism is a fundamental characteristic of the Canadian heritage and identity and [. . .] it provides an invaluable resource in the shaping of Canada's future.

The first part of the definition declares that multiculturalism protects Canada's present ethnocultural diversity on the basis of its descent from history, whereas the second part

projects multiculturalism as an ideal for the future. The further text of the act suggests that all ethnocultural groups, including the English and French charter groups, Aboriginal peoples and immigrant groups, are equally covered by the policy. Section 3.(1)(*c*) declares it to be the policy of the government of Canada to "promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation." This declared attempt at all-inclusiveness is ambiguous, however, because in the constitution "multicultural heritage" and "rights of the aboriginal peoples" are treated separately, and because sections 2.(*c*) and (*d*) exempt non-provincial (territorial, Indian band or other aboriginal) government bodies from obligations towards fulfilling the provisions of the act as major document of Canada's multiculturalism policy. No such exemption is awarded to the Québécois national minority, whose distinct culture does not receive any recognition apart from references to the official languages in the preamble and in sections 3.(1)(*i*) and (*j*).

The Canadian Multiculturalism Act continues the heritage of the Charter of Rights and Freedoms and legislates for a Canadian identity where all individuals are treated as equal members of humankind and full bearers of universal human rights. Individuals' right to access their culture is acknowledged and encouraged because cultural diversity is regarded as beneficial for the whole society. Nevertheless, no culture is treated as exceptional, distinct, or privileged in any ways or on any premises, unless the constitution had already entrenched such a provision. Provided that such a vision of Canadian identity is acceptable for the whole society, multiculturalism should work. However, it seems from the failure of the Meech Lake constitutional negotiations that considerable sections of Canada's population, namely groups belonging to national minorities, desire a Canada that is able to accommodate distinct societies within its universalist citizenship. The French charter group and Aboriginal peoples, generally, do not support multiculturalism as a management policy. Summing up this widely shared opinion, Augie Fleras declares that

> Indigenous peoples are not multicultural minorities [. . .] First Nations see themselves as a people, [. . .] and their aspirations and demands for recognition as the "nations within" are more closely aligned with the demands of political sovereignty and cultural nationalism than with theoretical frameworks associated with race, class, or gender. (219)

Moreover, other literature (Kymlicka, "American"; Webber) argues that Quebec itself is a post-ethnic society with its own policy of diversity management called "interculturalism," even if it is placed in a nationalist framework. Thus, national minorities are not against the principles of multiculturalism within a social unit, but rather they believe that it diminishes their distinct role and identity within the Canadian confederation. As it has become increasingly obvious through the course of the crisis of Trudeau's vision, it was a mistake to apply an American model of multiculturalism[17] to the Canadian multinational and polyethnic society without considerable modifications in the federal system.

Underlying Principles

The very basic principle underlying the policy of multiculturalism in Canada is liberal egalitarianism, with a belief in the universality of human rights, the equality of all individuals without discrimination, and the equality of communities without privileges. This ideological platform has a longstanding history in the country, which always parallelled biculturalism and bilingualism promoted by the charter groups. Such a commitment to universalism and equality has been visible in the subtle resistance of the (western) provinces to codify "distinct society" for Quebec during the Meech Lake constitutional negotiations. They perceive Quebec as one of their equals, who may be distinctive but certainly not privileged to make a point of it, especially not at the potential cost of other minorities' equality rights. The egalitarian ethos is also visible in the legal documents that accompanied the negotiations, where any allusion to anybody's special status is always followed by awarding an implied right to all the others to follow up.[18]

An emphasis on equality is not only one of the fundamental tenets of liberal democracy, but also a successful application of population management to the Canadian reality. After all, instead of emphasizing British superiority and justifying it as being the result of historical conquest, an equality based approach to population management silently

[17] The most prevalent version of multiculturalism in America can be described as the "cosmopolitan" model, explicated in David Hollinger's *Postethnic America*, which purports shifting group boundaries, multiple affiliations, and hybrid identities, based on individual rights. Hollinger, however, acknowledges that minority nationalisms (which are undesirable anyway) cannot be managed within this model, unless their group boundaries are diluted. Prevalent American multiculturalism and Hollinger's theory in particular is discussed in Kymlicka, "American" 216-21.

[18] See my comparative argument about the text of the Meech Lake Accord after the Langevin compromise and the legal draft of the 1987 Constitutional Amendment in subchapter 2.2 "Immigration and Ethnic Groups in the Constitution."

shifts power to the masses who are, nevertheless, predominantly English in their language and in their primary or secondary cultural affiliations. However diverse the ethnocultural origin of these people may be, they can become holders of power under a liberal democratic electoral system. So that the "multicultural" individual would not get lost in the mass, individual rights are fortified by constitutional protection in the Charter of Rights and Freedoms. Thus, the first whereas-clause in the preamble to the Canadian Multiculturalism Act reproduces the equality rights (s.15), fundamental freedoms (s.2), and rights guaranteed equally to both sexes (s.28) sections of the Charter.

Multiculturalism is an anti-discriminatory policy, which follows directly from the equality rights provisions of the Charter. Any support given to any groups of society by multicultural services is justified by its anti-discriminatory intention. Equity is fostered through positive interference, as quoted in s.3.(1)(*c*) earlier, by "promot[ing] policies, programs and practices that enhance the ability of individuals and communities of all origins to contribute to the continuing evolution of Canada" [s.3.(2)(*b*)]. Besides dealing with ethnocultural diversity, through its anti-discriminatory approach the policy of multiculturalism may extend to the management of all sorts of minorities—religious, gender, disabled, sexual orientation, and so forth.

Ultimately, the policy aims at incorporating newcomers into Canadian society in a productive way. Section 5.(1)(*d*) in the implementation part of the act is especially telling in this respect: it empowers the minister [of multiculturalism and citizenship] to "encourage and assist the business community, labour organizations, voluntary and other private organizations, as well as public institutions, in ensuring full participation in Canadian society, including the social and economic aspects, of individuals of all origins and their communities [. . .]." In other words, this section declares that the policy of multiculturalism empowers the minister to interfere with the economy in the interest of promoting the multicultural reality of Canada. Thus, when the act enforces such a connection between social and economic management, it recognizes a beneficial influence of multiculturalism in the development of the economy. Unless this was especially important for the "multicultural reality of Canada," the preceding section 5.(1)(*a*) would have sufficed, which empowers the minister to "encourage and assist individuals, organizations and institutions to project the multicultural reality of Canada in their activities in Canada and abroad."

Fleras and Elliott's argument that a "multicultural philosophy is informed by the principles of cultural relativism" (*Multiculturalism* 57) is certainly justifiable on the basis of the text of the act. Nevertheless, it is dubious whether Canadian multiculturalism can consistently carry out a theory that resides to an overarching equality of cultures in order to remain independent of value-judgments. Thus, while the federal Canadian Multiculturalism Act acknowledges the existence of societal cultures (national minorities) in Canada, they seem to be exempted from the real provisions of the act: it is indefinite about whether multiculturalism in practice includes Aboriginal and Quebecois cultures at all. Most people seem to agree that multiculturalism refers only to the "rest of Canada," where ethnic groups are treated as "distinctive" but not as "distinct," in the sense of special or privileged. Also, cultural relativism is allowed to exist only as long as it does not interfere with universal human rights and liberal equality.[19]

Multiculturalism as a process of management deals with distinctive ethnic groups centrally to incorporate them into a superior societal unity called Canada. The Canadian identity forged in this way will not be homogeneous, but it is supposed to be enriched by the variety of experience borrowed from a multiplicity of contributors. A new concept of Canadian citizenship is being developed, which is multilayered because, although it presupposes prior commitment to the state, it also allows for secondary ethnic affiliations: it regards one's culture as an inseparable part of one's identity. Nevertheless, public rhetoric is still searching for a Canadian national identity and is complaining about "it" being threatened by unwanted influences from alien cultures. As a consequence, a new discourse of citizenship with theories of identity and the post-ethnic state has been developing to define what it means to be a Canadian citizen.[20] The policy of multiculturalism has necessitated a redefinition of citizenship, as is shown by the establishment of a shared federal department for multiculturalism and citizenship in 1990. Minister of Multiculturalism and Citizenship Gerry Weiner summarized the connection succinctly, arguing that the "department is for all Canadians, given its commitment to promote Canadian values, enhance public awareness of citizenship benefits and obligations, and stress the concept of community, equality, and participation as the corner-stones of Canadian society" (qtd. in Fleras and Elliott, *Multiculturalism* 79).

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[19] Women's groups' major objection to the Meech Lake Accord was based on this premise: they objected to the distinct-society clause fearing that their "equality rights were negatively affected" (Monahan 141).
[20] See, for example, Faulks; Cairns; Tully; and Kymlicka, *Multicultural*.

Federal and Identity Crisis

To sum up briefly the arguments throughout this chapter, I will need to explain what I regard as federal crisis and identity crisis in Canada, why I do not think that the policy of multiculturalism is the ultimate solution to problems inherent in the structure of the confederation, and, all in all, why Meech Lake failed.

Throughout the chapter I have referred to a federal crisis consequent to the failure of the Meech Lake Accord. Four reasons underpin my using such a strong expression: (1) that it was impossible to get a constitutional amendment unanimously passed within three years because the institutional framework of federation proved to be too rigid; (2) that a supposedly flexible federal framework could become so rigid due to conflicting political interests of the participants; (3) that political interests backed up by identity politics could motivate separatist forces; and (4) that societal sections could become isolated and uninterested in other co-partners' interests within the same system of federation.

By identity crisis I mean that the vision one societal group nurtures about Canada's past, present, and future would not match the vision another societal group has about the same. As there are at least four sources of a vision of what Canada should be like (a Canadian identity), it is obvious that the process of nation-building becomes endangered. These sources differ in their comprehensiveness (whether they have a vision for the whole of Canada or only their own societal group) and in their assessment of the composition and values Canada should have. These very diverse and distinct four groups are the Aboriginal peoples, Québécois, English Canadians, and ethnic Canadians.

Multiculturalism is only one (so far the most successful) attempt to create social harmony and promote a particular vision of Canada's future. However, it seems to silence and ignore the inherent cleavages in the country's identity. This creates opposition especially in Aboriginal peoples and Québécois, who have difficulty fighting off levelling tendencies. Multicultural rhetoric has been so successful over the years that by now it has become impossible to push through any nationalist argument because liberal egalitarianism seems to have won. Nevertheless, as continuing clashes prove, "particularist" forces that split the country's unity cannot be silenced, as they can solicit international legal and political assistance or resort to separatism if necessary. Unless multiculturalism learns how to accommodate justified nationalist interests, it will always remain a partial solution to a population management problem. If it realizes, however, that its underlying principles can

be reconciled with those of the enclosed societal cultures, a new Canadian national identity can be forged. For this, the concepts of federalism, nation, nationalism, rights and obligations have to be revisited, and a new notion of citizenship needs to be explored.

Concluding Note: Inherent Cleavages

In this chapter I have examined the essential distinct society debate at Meech Lake, the constitutional position of First Nations, the rights discourse of ethnic minorities, and the provisions of the Multiculturalism Act pertaining to national minorities and ethnic groups.

I conclude that the failure of the Meech Lake Accord pushed the country towards a federal and identity crisis inasmuch as it failed to reconcile the interests of national minorities with the interest of the nation as a whole within one legal framework. The leveling tendencies of the ideology of multiculturalism antagonized Aboriginal peoples and Québécois because over the years it has become impossible to push nationalist arguments through the wall of liberal egalitarianism. Continuing clashes over the constitution show, however, that inherent cleavages in the body politic have survived, so multiculturalism has only been a partial solution to a population management problem.

3. IDENTITY AND NATIONAL PRIORITIES IN AUSTRALIA

> "This is not a debate about symbols alone, however; at its heart it reveals important differences in understanding what membership of Australian society means, the status of different cultures and groups, and how Australian identity is to be defined." (Ozolins 212)

Land of Myths—"Lucky Country" and Terra Nullius

Arising from its geographical position, Australia has become a mythic land. The last "discovered" continent carries several geographical peculiarities, however, myths surrounded speculations about the land before it even "existed": a *terra australis incognita* was presumed to be as fertile and rich in minerals as South America, and it was thought to be located in the temperate zone of the southern hemisphere to counterbalance the superiority of the northern continents of the globe.[21] This, of course, is true only from a European perspective. Frank Clarke argues that when Europeans (mostly British, but the theory is plausible in a wider sense, meaning those non-indigenous new arrivals who were brought up on the Western heritage) arrived, their "cultural luggage" contained a set of expectations and social/behavioral patterns that defined their relationship to each other, to the land, and to the indigenous inhabitants. This cultural luggage contained unforgoable notions about the fertility, cultivability, and value of the land, and about the superiority of the white race (Clarke, "European").

The myth of Australia being a lucky country draws heavily on this heritage. It is a relatively recent myth amalgamated by the 1970s to strengthen the more "national" elements of the country's history. Interestingly enough, "lucky country" has worked as a catchphrase to popularize the country for newcomers in the post-WWII period of mass-migration: to make it an attractive destination and to make believe that its century-old luckiness will continue to bring better life for the new Australians, whatever origin they might come from. The optimism of the "lucky country" derives from various—equally mythical—sources. *Terra australis incognita*; the pioneer and bushman legend[22]

[21] Some of these presumptions originated from Greek philosophers and fostered expeditions during and after the great discoveries. The land of Australia was reached by the Dutch, British, Spanish, French, until eventually James Cook claimed the eastern coast (New South Wales) for the British Empire in 1770.
[22] More about these can be read in Russell, *Australian* and Caroll, ed., *Intruders*.

expressing white/British superiority and the practical simplicity and survival skills of colonial Australians; and the ANZAC legend devoted to courage, mateship, and loyalty for the empire all constitute a well-constructed luckiness: not for luck's sake (although Australian's bet excessively) but because their history destines them to fulfill the Australian dream.

The Lucky Country, written by Donald Horne in 1964 became a seminal work on Australian national identity known by most people for its title but read only by the more liberal-minded, philosophically-oriented academics for its critical content. It is quite ironic that it was not Horne's critical use of the expression that the "lucky country" became famous for and what the term means today.[23] Actually, Horne's purpose in creating the term was to sound warnings about the future of Australia: "it was essential to accept the challenges of where Australia is on the map [in the Asia-Pacific region], the need for a revolution in economic priorities [to meet new technologies], and the need for a bold redefinition of what the whole place adds up to now [that Australia should/would become a republic]" (Horne xxvii-xix). In the introduction to the 5th edition of the book (1998) he admits that his intention, which backfired, was to criticize Australian society and not to assist in involuntary mythmaking. He says:

> The long misuse of the phrase 'the lucky country', as if it were praise for Australia rather than warning, has been a tribute to the empty-mindedness of a mob of assorted public wafflers. [. . .] Twisting it around over the years to mean the opposite of what was intended has silenced the three loud warnings sounded in the book about the future of Australia. (Horne xvii)

Indeed, the components of the myth of the lucky country (that is, *terra australis*, the pioneer and bushman legend, and the ANZAC legend—the heritage on which the myth of the lucky country could be created in the popular mind) are in sharp contrast with Horne's three warnings. Moreover, he makes these warnings to see an Australia that is not merely lucky in spite of its heritage and current position but is willing to become a conscious creator of its future. Lucky is not a word of appraisal for him.

---

[23] To my request to list stereotypical images of Australia at a seminar, a student came up with "the lucky country." She had previously spent 6 months in Melbourne visiting her migrant relatives and doing occasional studies. Her understanding of the term was in its pure positive sense, implying that the citizens of the country are lucky to live there too. (Images of Australia AN421b. Seminar. North American Department, University of Debrecen, 2000.)

a "lucky country"		*The Lucky Country*
terra australis incognita: rich and fertile land to be taken by a superior white/British race	⟷	need to accept the challenges of Asia-Pacific location: not fertile land, not superior race (not even British any longer)
pioneer and bushman legend: practical simplicity and survival skills in the bush	⟷	need for a revolution in economic priorities to meet new technologies: invest in education for a highly urbanized country
ANZAC legend: courage, mateship and loyalty for the Empire	⟷	need to become a republic: the Empire ceased to exist, the monarchy is irrelevant; trading, strategic and demographic links with Asia

Another fundamental myth of Australian history—not part of the "lucky country" but precondition of its existence—is *terra nullius*. Less legally-oriented people gained popular understanding of this doctrine of international law from the works of Henry Reynolds, a historian and public intellectual,[24] whose career between the late 1960s and 1992[25] was devoted to proving that the myth of *terra nullius* is historically false.

The doctrine of *terra nullius* [no one's land] was used by British colonial politicians to justify the occupation of the southern continent. Two meanings of the one term were often blurred both in past practice and later interpretation. According to the first meaning, *terra nullius* is a land or country which does not have a system of authority recognized by European powers. In the legal practice of European powers, any country that had no political organization, a recognizable administrative system, or legislation could be rightfully annexed, in which case the annexing power provided the missing structure. However, there was a difference between (existing or missing) authority over a land or its ownership. Annexation of a country generally provides a sovereign governing structure but it does not upset ownership of property. Colonization in North America followed this practice: Aboriginal ownership of the land was generally recognized, annexation proceeded after purchase of the land or a peace treaty. The second meaning says that *terra*

[24] Public intellectuals are academics whose work goes outside the framework of their teaching and research, and whose results are broadcast towards the wider community with the intention of supporting a public cause. Often they become community spokespersons, write books also for a non-professional audience, air their views in the media, and may become political advisors. An Australian network of such people is the Australian Public Intellectual Network (see <www.api-network.com>).

[25] In 1992 the High Court of Australia declared the legal doctrine of *terra nullius* false and recognised Indigenous Australians as first owners of the land.

nullius is a land owned and populated by no one. To suppose that annexation in Australia followed from this meaning of *terra nullius* can, with all due respect, be called insensible, because it was well known from the earliest explorers that the continent was populated.[26] In no sense of the term can the annexation of Australia to the British Crown be justified, as both English common law and international law did recognize landownership by natural peoples. However, this principle was not applied to Indigenous Australians in spite of their connection to the land fulfilling legal conditions both in the material and in the spiritual sense.[27]

Reynolds, of course, was not alone to undermine old concepts of history. A new paradigm has emerged in Australian historiography by 1992, and the process of transformation started in the early seventies.[28] Since the turn of the 1960s/70s—mostly under the effect of social movements—ideologies of nation-formation have come under criticism by leftish/liberal academics, whose role in opinion-forming has become apparent in nation-politics, ideology, historiography, and law by the turn of the 1980s/90s.

[26] For example, the first British explorer to set foot on the continent (William Dampier, 1688) wrote in his diary, *A New Voyage Round the World*: "The Inhabitants of this Country are the miserablest People in the World . . . [They] have no Houses, and skin Garments, Sheep, Poultry, and Fruits of the Earth . . ." (qtd. in Reynolds, *Dispossession* 97).
[27] I have elaborated this argument in "Az ausztrál őslakók földjogai [Aboriginal Land Rights]."
[28] For further significant new historians, see subchapter 5.1 "A Historical Paradigm-Shift."

3.1. The Bicentenary

> Nationalism in the traditional sense of the word does not exist in Australia. If it does, as evidently there is a sense of belonging, then it needs to be based on new principles, not those of common culture, language, and history.
> (Castles, et al. 1-13)

While Canadians tried unsuccessfully to bring the country together through the hardships of the Meech Lake constitutional negotiations, Australia celebrated its 200th anniversary with delight. 1988 was the year of belonging together: a nation could celebrate its unity and begin accepting other national groups previously restricted from access to the community. The nation-forming policy of multiculturalism received bipartisan support in 1988, and governmental ears finally heard Aboriginal grievances and demands, summarized in the Barunga Statement. The heritage of the past 200 years obliged Australian people to forge a real unity during the decade between the Bicentenary (1988) and the Centenary of Federation (2001), so that the 100th anniversary of the birth of the Commonwealth of Australia (1901)—the real birth of the nation?—could be celebrated becomingly. To achieve this, however, the process of reconciliation between Indigenous and non-Indigenous citizens had to be launched, and the policy of multiculturalism had to be actively supported—to recognize that Australia is a receptive country whose future depends on a harmonious and mutually advantageous coexistence of the receiver and the received.

The Bicentenary actually celebrated the foundation of the colony of New South Wales on 26 January 1788, when the First Fleet landed at Sydney Cove. All celebrations of the day 200 years later centered upon the arrival of a fleet (or at least a boat, where larger vessels were not available) and a re-enacting of the first encounter of the governor and his white people with Aborigines. Of course, the most monumental show was put up in Sydney, for which the summer heat and the four-day-long weekend[29] assisted beautifully. An official party including the Anglican Archbishop of Sydney, Barrie Unsworth (Labor Premier of NSW), Bob Hawke (Prime Minister), and Charles (Prince of Wales) greeted the replica of the First Fleet, which journalists aptly nicked “two hundred Tall Ships.”

[29] 26 January 1988 fell on a Tuesday.

Speeches followed as: a prayer for the nation (Anglican), prayer for NSW (Catholic), the Bicentennial hymn "Lord of Earth and all Creation" by the Sydney Symphony Orchestra, the national anthem,[30] and speeches by the Premier, the Prime Minister, and the Prince of Wales. Among the distinguished office-holders, only his Majesty spoke sympathetically about the issue of Aboriginal Australians.

Not to be ignored are two controversies that overshadowed the celebrations. On the one hand, 26 January 1788 was a jubilee date for NSW only, whereas the rest of the colonies were founded on various days well into the 1830s, with much of their early history having little to do with Sydney. Much of the celebrations was, therefore, artificial history-making to create a sense of belonging based on common heritage. This motif was confirmed in the Prime Minister's Australia Day address, in which he discussed what it meant to be an Australian:

> What is it that links us, in our generation, with the generations which have gone before?
>
> It is not only the fact that, for the past 200 years, and to this day, we have been a nation of immigrants.
>
> It is not only the fact that we share together this vast continent as our homeland.
>
> It is not only the shared inheritance of all that has been built here, and achieved here, over the past 200 years.
>
> And it is not only the common bond of institutions, standards, language and culture.
>
> Indeed, in today's Australia, our very diversity is an ever growing source of the richness, vitality and strength of our community.
>
> It is true that all these things I have mentioned go to shape the Australian character and define the Australian identity.
>
> Yet beyond them, there remains one vital factor in the answer to the question: Who is an Australian?
>
> And that factor is: A commitment to Australia and its future.
>
> It is that common commitment which binds the Australian-born of seventh or eighth generation and all those of their fellow Australians born in any of the 130 countries from which our people are drawn.

[30] "Advance Australia Fair" is said to rise to the status of a real national anthem at this time (Bolton 286).

> In Australia, there is no hierarchy of descent; there must be no privilege of origin.
>
> The commitment is all. (Austral. OMA, *Multicultural* 43)

On the other hand, the size of Aboriginal demonstration against the day pointed out that for Indigenous Australians 26 January is a day of mourning rather than laudation. "In the days before the Bicentenary celebration expatriate Australians overseas and the ABC [Australian Broadcasting Corporation] at home had taken some pains to publicize the wrongs suffered by Australia's original inhabitants by the coming of European settlement" (Bolton 287), but local protest excelled in counterpointing celebratory tones and gathered even more media attention. An estimated 20-40000 Australians marched from Redfern along the city to Mrs Macquarie's Chair[31] and camped at an annoyingly short distance from the official party at the Opera House (Bennelong Point) across the bay. They marched under the black, scarlet, and gold Aboriginal flag to express their protest. In spite of its size and significance, the protest remained remarkably peaceful. Protesters irrespective of their color of skin remained together to listen to rock bands well into the night, thereby founding the tradition of yearly "Survival Day" celebrations. Artificial silencing of the Aboriginal side of history and role in the life of the country was thus overruled.

Consequent from the accompanying controversies around the Bicentenary, its significance was also dual: On the one hand, it created national collaboration in the name of the nation's interest, focusing on tradition-building and heritage protection (emphasizing a national history). To support this cause, the new Parliament House was opened in Canberra that year. A multivolume national history (Gilbert) was commissioned and produced in honor of the anniversary. The Australian Bicentennial Authority was formed to control and oversee events and projects, and the Bicentennial Roads Project was run to upgrade several major highways (Bolton 282). Enthusiastic local groups also created numerous parks and playgrounds to commemorate. On the other hand, media highlights shifted the situation of Aboriginal Australians into the foreground, even more so because the focus was on history. Dissenting versions and opinions received media publicity, which opened forum for discussions about a common future: "The Australia day editorial of the *Sydney Morning Herald* [. . .] wrote about the 'great unsettled issue[: . . .] Australia [. . .] has yet to make peace with itself" (Bolton 286-87).

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[31] Redfern is a suburb lived mostly by Aborigines, Mrs Macquarie's Chair is at Mrs Macquarie's Point, facing Bennelong Point, where the historical first encounter took place.

Australian Nationalism and a Rhetoric of Identity

In *Contemporary Nationalism: Civic, Ethnocultural and Multicultural Politics*, David Brown attempts to disentangle notions of nationalism defined in various—often contradictory—ways in scholarship. He maps three approaches to this political phenomenon (figure 1), which can serve as our guide in the maze of discourse, both historically and synchronically:

> The first story explains such politics as the assertion of the natural *primordial* rights of ethnic nations against contemporary multi-ethnic states; the second sees contemporary nations as in the process of being transformed by *situational* changes in the structure of the global economy; and the third sees assertions of nationalism as arising out of the search for new myths of certainty, *constructed* to resolve the insecurities and anxieties engendered by modernisation and globalisation.
>
> These three languages [. . .] see nationalism as, respectively, an instinct (primordialism), an interest (situationalism) and an ideology (constructivism), [. . .]. (4-5)

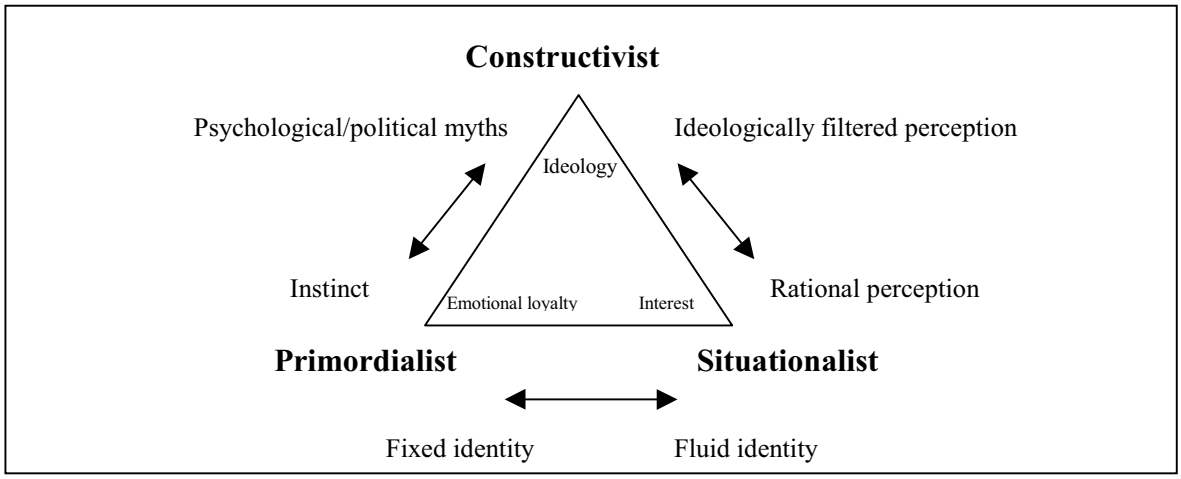

Figure 1. National identity—the three conceptual languages (Brown 5).

I examine nationalism from a constructivist approach, believing that leadership has primary responsibility in supporting national myths based on an ideology, thus gradually developing emotional loyalty (which over the time becomes primordial) and employing interest-based arguments when necessary. Although I support the constructivist approach which "den[ies] that nations are real substantive entities, and suggest[s] that the perception

by those involved that they *are* real should be understood as a form of ideological consciousness which filters reality, rather than reflects it" (Brown 20), in my opinion reality—even if it is "filtered"—cannot be abandoned altogether. Kymlicka's definition of the nation (a widely accepted definition in which the criteria are neither mutually exclusive, nor all necessary) is based on "realities":

> One source of cultural diversity is the coexistence within a given state of more than one nation, where 'nation' means a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture. (*Multicultural* 11)

If we define nationalism as thinking about one's nation in cultural, social, political, and economic terms, then Kymlicka's definition of "nation" does not disagree with Brown's constructivist approach.[32] At least three, if not all of the five factors of national identity (history, institutions, and culture) tend to be influenced by psychological and political myths, while none of them are separable from reality.

As regards contemporary forms of nationalism, Brown's scheme of competing nationalist visions (figure 2) depicts tensions hardly reconcilable. He argues that:

> the emergence of multiculturalism [. . .] challenges both the civic idea that the nation is a community of equal individual citizens whose distinct ethnic attributes ought to be politically irrelevant, and the ethnocultural idea that the nation is a community whose members ought to be culturally assimilating. In some cases, multiculturalism has become sufficiently well articulated to offer a new vision of a social justice community — a society united by its commitment to the equal rights of each component ethnic minority. (Brown 126)

[32] Similarly to Kymlicka (3), Brown uses the concepts "nationalism," "nation," "culture," "belonging," "politics," "citizenship," and "rights" quite interchangeably. For Kymlicka, this shows a socio-cultural approach; for Brown, it arises from an overview treatment of multiple approaches.

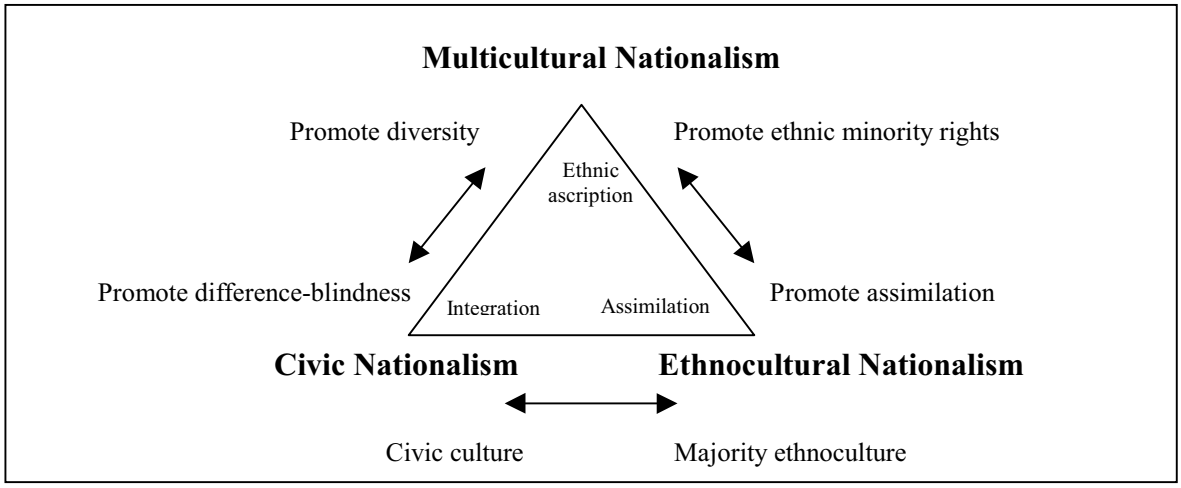

Figure 2. The competing nationalist[33] visions (Brown 127).

Indirectly, such a positioning of multiculturalism as clearly distinct from civic nationalism and ethnocultural nationalism supports Kymlicka's theory, which—by essentialized oversimplification—would give the formula:

multicultural = polyethnic + multinational.

The significance of Kymlicka's theory is that he reasons that it is possible to bring together polyethnic (as in civic nationalism) and multinational (as in ethnocultural nationalisms) claims under the one framework of multiculturalism while not transgressing liberal principles. Thus, he dissolves the tensions of competing visions still inherent in Brown's scheme. However, as both of their arguments point in the same direction, I propose to bring the two theories into a common language, in a common figure (figure 3):

[33] Brown uses "nationalism" in a "thinking about one's nation" sense, in a neutral way, where any ideological attributes or attached values in the various ways of thinking about one's nation are carried by the adjectives attached to the word, such as in civil/ethnocultural/multicultural/cultural/economic/etc. nationalism.

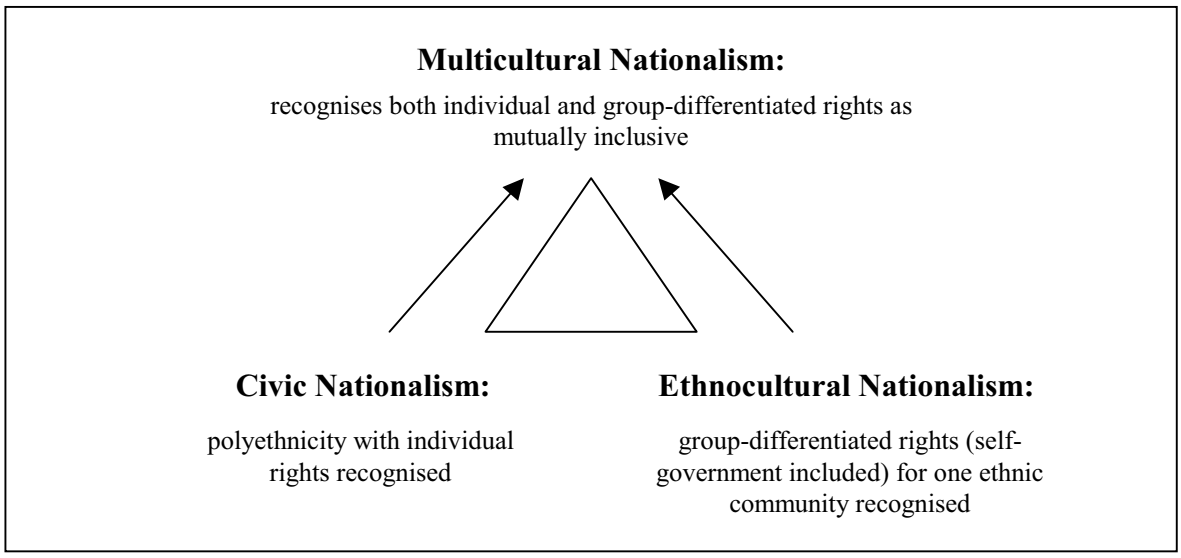

Figure 3. Inclusive multiculturalism.

Bearing this theory in mind, it is relatively easy to locate Australian nationalism in the scheme. In *Australian Nationalism: A Documentary History*, Stephen Alomes and Catherine Jones describe four manifestations of nationalism: cultural nationalism, social nationalism, political nationalism, and economic nationalism. They use the word "nationalism" in its "patriotism" meaning, although they are aware of its other contrastive meanings as in nationalism vs. patriotism, nationalism vs. internationalism, nationalism vs. chauvinism (3). Such contrasts follow from different stances on Brown's first and second triangles (see figures 1 and 2). The contrasts show that one-word "nationalism" carries different values in each pair, where the contrasted pair defines the meaning of the word. I would like to add that such a contrast is possible to be made between nationalism and multiculturalism, as is often done in recent right-wing political rhetoric that often employs the technique of contrasting identifications (negative definitions) instead of inherent ones. However, in a constructivist usage, multiculturalism and nationalism become inclusive concepts. In my understanding (concurrent with Brown and Kymlicka), multiculturalism is not a nation-dissolving factor. To the contrary, it is a policy directed to form a new kind of national identity, while also describing a social/demographic phenomenon. In a 1972 policy speech Gough Whitlam, Prime Minister of the Labor Government (1972-75) that announced multiculturalism as official policy in 1973, said:

> It's time for a new team, a new program, a new drive for equality of opportunities; it's time to create new opportunities for Australians, time for

> a new vision of what we can achieve in this generation for our nation and the region in which we live. [. . .]
> [. . .] We will revive in this nation the spirit of national co-operation and national self-respect, mutual respect between government and people. [. . .]
> Our program has three great aims. They are:
> — to promote equality
> — to involve the people of Australia in the decision-making processes of our land
> — and to liberate the talents and uplift the horizons of the Australian people. (Australian Labor Party Policy Speech, 13 Nov. 1972, qtd. in Alomes and Jones 351-53)

In the context of such a party and national interest, multiculturalism was clearly intended as a nation-forming device, necessitated by a radically changed social composition, which could not be assimilated by any other outdated methods (such as extermination, separation, or assimilation). Multicultural Australia was a new experiment.

What is "Australian nationalism" then? I would argue that the adjective Australian has been added (similarly to the later construction "Australian multiculturalism") to define local content and to name the nation about which thinking is done. Australia as a geographic location is a non-contested terrain from civic, ethnic, or multiculturalist perspectives. By shifting the emphasis on "Australian" (that is, special to the place) instead of "nationalism" with its contested meanings and inherent tensions, the expression would be capable of forming a united sense of belonging. Under the cover of Australian nationalism we can survey all manifestations of nationalist feeling during the country's history, as Alomes and Jones do, and interpret them in a constructivist manner, agreeing with Geoffrey Bolton that "from the shared experiences of the Australian-born, coming as they did from an increasingly mixed ancestry, there might in time arise a decent self-confidence in national identity" (291).

Bolton differentiates between two main trends of thinking about the Australian national character:

a) Geoffrey Blainey[34] and the Australian Chamber of Commerce "seemed to think that the national character had been decisively moulded in the nineteenth century, or at latest by Gallipoli, and that later comers could be expected to assimilate to this model" (288).

b) “Others followed Donald Horne in rejoicing that the British and Irish domination over Australian folk-ways had at last been overthrown in favour of a receptive pluralism” (Bolton 288).

These two groups/approaches correspond to Brown’s distinction between the primordialist and the situationalist approach (figure 1), or, in the other scheme, to ethnocultural nationalism and civic nationalism (figure 2). Bolton does not seem to be very much aware in 1990[35] that an alternative, constructivist approach (of which he is part) has been emerging in the form of multicultural nationalism. This David Brown is able to map and describe by 2000.[36]

Arguably, the Bicentennial celebrations reflect the duality depicted by Bolton: the official celebrations were imbued with manifestations of ethnocultural nationalism, whereas indigenous and multicultural perspectives of the country’s past and present were largely ignored. Educated on “lucky country” and *terra nullius*, the poet Les Murray’s complaint against the Australia Council in 1996 reflects the strength of this sentiment. It is a good example of a rhetoric of anxiety: ethnocultural nationalism (primordialism) in defense:

> They are creating an Australia that is exclusive. Multicultural, they call it. But they are discriminatory, they exclude. ‘They’ are not just the Australia Council; they are the ruling elite of today’s Australia: the cultural bureaucrats, the academics, the intellectuals [. . .] They are excluding people like me from their Australia—the country people, the rednecks, the Anglo-Celts, the farming people— they have turned their backs on us. They act as though they despise us [. . .] We Old Australians, not always Anglo but having no other country but this one, are now mostly caught and silenced between the indigenous and the multicultural. (qtd. in Sheenan 141)

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[34] Formidable conservative historian. I will discuss more of his work in subchapter 5.1.

[35] First publication year of his volume *The Middle Way 1942-1995*, vol. 5 of *The Oxford History of Australia*.

[36] Publication date of his *Contemporary Nationalism: Civic, Ethnocultural and Multicultural Politics*.

3.2. Alternative History and Politics in the Barunga Statement

"Our vision is of Aboriginal and Torres Strait Islander peoples and communities freely exercising their legal, economic, social, cultural and political rights."
(Austral. ATSIC, Service Charter)

In June 1988 the Indigenous peoples of Australia submitted a petition, known as the Barunga Statement, to the Australian government:

THE BARUNGA STATEMENT

We, the indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights:

- To self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development;
- To permanent control and enjoyment of our ancestral lands
- To compensation for the loss of use of our lands, there having been no extinction of original title;
- To protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art;
- To the return of the remains of our ancestors for burial in accordance with our traditions;
- To respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history;
- In accordance with the universal declaration of human rights, the international covenant on civil and political rights, and the international convention on the elimination of all forms of racial discrimination, rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights.

We call on the Commonwealth to pass laws providing:

> • a national elected Aboriginal and Islander Organisation to oversee Aboriginal and Islander affairs;
> • a national system of land rights;
> • a police and judicial system which recognises our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interferes with our freedom of expression or association, or otherwise prevents our full enjoyment and exercise of universally recognised human rights and fundamental freedoms.
>
> We call on the Australian Government to support Aborigines in the development of an international declaration of principles for Indigenous rights, leading to an international covenant.
>
> And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom. (rpt. in Mudrooroo 215-16)

The Barunga Statement presented an interpretation of history that was quite different from the version celebrated at the Bicentenary. For the about 10000 participants at the Northern Territory Barunga Festival (in addition to the 30000 protesters in Sydney in January) the petition meant a call to account with the consequences of a different history. In their opinion invasion, taking of lands, dispossessing natural resources, stealing cultural artifacts, and genocide were all illegal: these actions the other side perceived as peaceful settlement under colonization, distribution of land to satisfy the hunger for it, anthropological interest and protection of museal values, and protection of children living in miserable conditions.

The Barunga Statement does not call to dissolve obvious discrepancies within the Australian welfare state. It does not deal with the urge to improve third world conditions, in which any comparison with figures describing non-Indigenous living standards would demonstrate strikingly high medical condition, mortality, alcohol and drug abuse, and incarceration rates.[37] Outrageously bad social statistics are not listed among the grievances,

[37] Statistics provided for the government as part of the reconciliation document in 2000 include comparison ratio between Aboriginal vs. other Australian people for life expectancy (males; females): 0.76 / 0.76; hospital separations (males; females): 1.84 / 1.9; perinatal mortality: 2.24; homicide and purposeful injury: 23.68; imprisonment: 16.24; unemployment: 3.8; housing assistance: 8.47 (Austral. CAR, *Corroboree* app.2).

because their causes lie much deeper. The Barunga Statement accuses the 200 years of cohabitation for Indigenous peoples getting nearly extinguished and losing their spiritual and material properties, and, together with these, their identity and self-preserving abilities. Only after reconstructing historical justice can the social and economic balance of Indigenous society reconstituted, the petition suggests: charitable grants given out of white generosity (whether land grants or social benefits) are worth little and are a waste of money. Indigenous people need to rise on their own, for their own right. Hence the last sentence of the Barunga Statement: "And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom."

Government reaction to the petition reads as follows:

> 1. The Government affirms that it is committed to work for a negotiated treaty with Aboriginal People.
>
> 2. The Government sees the next step as Aborigines deciding what they believe should be in the Treaty.
>
> 3. The Government will provide the necessary support for Aboriginal people to carry out their own consultations and negotiations: this could include the formation of a Committee of seven senior Aborigines to oversee the process and to call an Australia-wide meeting convention.
>
> 4. When the Aborigines present their proposals the Government stands ready to negotiate about them.
>
> 5. The Government hopes that these negotiations can commence before the end of 1988 and will lead to an agreed treaty in the life of this Parliament. (qtd. in Mudrooroo 216-17)

Prime Minister Bob Hawke promised to fulfil these claims, in other words, he promised a treaty. However, through the course of time, "treaty"—which is a legal term with serious implications, one of which is that treaties are made between "sovereign nations"—was modified into a "Reconciliation movement." On the national level, I would argue, the aim of the policy of reconciliation is the same as that of multiculturalism: to create a national community. As the "Australian Declaration Towards Reconciliation" proclaimed in 2000:

> Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.
>
> Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories. [. . .]
>
> And so, we pledge ourselves to [. . .] respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.
>
> Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all. (Austral. CAR, *Corroboree*)

But, whereas multiculturalism in its 1970s-80s manifestation[38] was washing off any differentiation between any minorities (indigenous or non-indigenous ethnic), treating them as Australian individuals, not as communities; in the policy and movement of Reconciliation Indigenous peoples stand as recognized distinct groups with group-differentiated rights, which amounts to recognizing that Australia is a multinational as well as polyethnic society.

The government appointed the Council for Aboriginal Reconciliation in 1991 with a 10-year mission to bring Indigenous and non-Indigenous Australians together, so that Australia can truly celebrate the centenary of its nationhood in 2001. Major themes of the Council's 1997 Convention were: reconciliation in the community (schools, institutions, business, industry, government, land ownership); human rights; documents of reconciliation and the constitution; and the "renewal of the nation" (citizenship in Australia) (Austral. CAR, *Weaving* 38). The Council for Aboriginal Reconciliation Act 1991 required the Council "to promote by leadership, education and discussion, a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders and of the need to redress that disadvantage" (qtd. in Austral. CAR, *Weaving* 2). The Council also stressed that Reconciliation needs to be a people's movement because:

> True reconciliation has to come from the hearts and minds of the Australian people, expressed in their attitudes, their recognition of the common destiny

[38] See Hollinger's "cosmopolitan" multiculturalism in subchapter 2.3, and Brown's "civic nationalism" in subchapter 3.1.

> we share together as Australians, and in practical outcomes which overcome the disadvantages suffered by indigenous people, build better relationships between indigenous people and the wider community, and improve the quality of life for all Australians. (CAR, *Weaving* 3)

However, the original treaty demanded in the Barunga Statement has not been made so far. Instead, recognition of indigenous custodianship and ownership of the land came with the *Mabo* decision of the High Court of Australia (1992) and the Native Title Act (1993). The *Mabo* decision was probably the biggest and most radical step on the road towards reconciliation, because it declared the doctrine of *terra nullius*, on which the European occupation of the continent was based, untenable. *Mabo* resulted as much from a paradigm-shift in Australian historiography, as from an alternative interpretation of law.[39] The Document of Reconciliation—consisting of the "Australian Declaration Towards Reconciliation" and the "Roadmap for Reconciliation" (Austral. CAR, *Corroboree*)—is another outcome of the original demands: not a treaty, but a summary of the achievements of the ten years of CAR in office. It concludes that full reconciliation has not been achieved, and there is still a lot to do especially against racial discrimination and social disadvantages that indigenous people have to face. The closing document was submitted to Parliament in December 2000.

In spite of the expectations, 2000/2001 did not become a seminal year in the history of Australia. The country could not become a republic at its 100th anniversary of nationhood (because the motion failed at referendum in 1999), the Constitution could not be modified to include a preamble recognizing Indigenous peoples, and reconciliation was declared unfinished by the Council for Aboriginal Reconciliation. Fortunately, the Reconciliation movement survives in the form of "The Coalition of Peoples," organizing Survival Days, community occasions, Seas of Hands,[40] bridge walks, and voluntary legal and health services, and lobbying the government through the Aboriginal and Torres Strait Islander Commission.[41] Historical injustices have largely been discovered and remedies are being searched for. Some major outcomes of this search in law and politics were the

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[39] More about this in Chapter 5: "*Mabo* and the Native Title Legislation." On the paradigm-shift in Australian historiography see Espák, "Mabo".

[40] Hand stencils on colored paper glued on a stick and stuck in the ground, signed by participants who sympathize with the cause of reconciliation. Thousands of such "hands" organized in colorful formations can be very very moving, as well as spectacular.

[41] Created in 1989, ATSIC became the supreme self-governing, elected body of Indeigenous Australians within the federal administration.

Mabo decision, the Native Title Act, the *Wik* decision (1996), and the Stolen Generation issue (1998). The Australian Law Reform Commission is searching for ways in which Australian and the Indigenous law can exist side by side. Notwithstanding these efforts, Indigenous peoples still have the most inferior standard of living among all minority groups in society, with highest unemployment, imprisonment, medical condition, alcohol, and substance abuse rates. Such social differences can only partly be explained by history: as Noel Pearson puts it, we cannot blame everything on 1788 ("Editorial"). Yet silencing—the solution applied in the past, hoping that it would lead either to extinction or full assimilation—no longer works in today's open society where domestic and international bodies guard human and indigenous rights.

Treaty, Self-Determination, Self-Management

Equal treatment is but one way to establish a solid legal and economic foundation for the coexistence of Indigenous and non-Indigenous peoples within one country. In 1967 the Referendum to repeal section 127 and change section 51(xxvi) of the Australian Constitution was carried with 90.77% support (Lippmann 30), thereby for the first time Aborigines became constitutionally equal, undifferentiated citizens. The changes voted for in the 1967 Referendum were passed in the Constitution Alteration Act 1967. The texts deleted from sections 51(xxvi) and 127 are printed here in italics:

> CHAPTER I. THE PARLIAMENT
>
> PART V. – POWERS OF THE PARLIAMENT
>
> Legislative powers of the Parliament
>
> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:–
>
> [. . .]
>
> (xxvi.) The people of any race*, other than the aboriginal race in any State,* for whom it is deemed necessary to make special laws:
>
> [. . .]
>
> CHAPTER VII.
>
> MISCELLANEOUS.

> [. . .]
>
> 127. *In reckoning the numbers of the people of the commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.*
>
> (Wicks 66-67)

The deleted sections had exempted people of Aboriginal descent from federal legislation, rendering the right to legislate for them to the state and local governments. No federal protection or account before 1967 was accorded to people of the "aboriginal race" (section 127), neither were they included in the census [section 51(xxvi)]: they were regarded as non-entities in the Australian nation. After 1967, however, racial differentiation disappeared from the Constitution, and with it did Aboriginal Australians, who became entitled to the same rights, freedoms, privileges, and obligations as other "ordinary Australians."

Yet, "the Aboriginal problem" did not cease to exist. What had been rendered to the margins before 1967 came to the center afterwards: both Indigenous and non-Indigenous voices began to talk about past injustices and present experiences. Gradually, especially with the rise of the tourism industry, Aboriginality became recognized and fashionable. Accordingly, the Barunga Statement does not claim equality (the word itself never appears in the text). Although equality has been achieved constitutionally, the Statement claims that there is still need for:

> • a police and judicial system which [. . .] frees us from discrimination and any activity which may threaten our identity or security, interferes with our freedom of expression or association, or otherwise prevents our full enjoyment and exercise of universally recognised human rights and fundamental freedoms. (Barunga Statement)

This section implies a claim for equity: equality in outcome. In order to achieve this, Aboriginal identity must be preserved as distinct in "economic, social, religious and cultural development" (Barunga Statement). Moreover, by demanding self-determination and self-management, and a treaty between their distinct group and the government, Indigenous peoples strive to be recognized as politically and historically distinct, too.

Although the recognition of Aboriginal equality in 1967 was inevitably a necessary step in the fight against discrimination within society, it went without a constitutional and legal recognition of a distinct (or distinctive) Aboriginal identity. This eventually resulted

in a backlash in society against both the indigenous and the multicultural,[42] because the imposition of equal rights brought heavy reliance on social welfare benefits—the poorest layer of society quickly became dependent on welfare. (In economic and social terms, equality did not improve the position of Indigenous peoples: equality of opportunity did not yield equality of outcome.) Aboriginal spokespersons, Noel Pearson being one of their highly acclaimed representatives, seem to have already overtaken the "welfare and historical injustices" agenda for a more active agency in their peoples' future. He argues that academics (by 2001) should stop blaming 1788 only for the current living standard of Aboriginal Australians. Too much has been blamed on historical injustices, he says, which has become a cheap excuse. His people were quick to give up self-dependence for easily accessible welfare reliance after 1967, which is a fact worthy of closer examination ("Editorial"). Indeed, the point made in the Barunga Statement was the same: self-determination and self-management were demanded (instead of welfare dependence), which necessarily involved claiming access to traditional territories that form the basis of Aboriginal spirituality. Claiming land rights, however, went against the (pre-1992) official history of Australia that had been based on the dispossession of Aborigines. This major obstacle—that is, rewriting Australian history—was not overcome until the 1992 *Mabo* decision.

Although the reverse order of the claims in the text of the Barunga Statement might suggest otherwise, the elders' primary demand when they submitted the petition was to negotiate a treaty. The claim for a treaty is placed at the possibly most emphatic position in the text: in the closing sentence, which functions as summing up the essence of the whole document. Moreover, the treaty is to be made in the Commonwealth Parliament, the legislative body of the country, so the implication is that the treaty is to become statute law upon which all future governments act. A treaty negotiated this way would codify the principle of self-determination, which would go into practice as self-management. The priority of a treaty implies two independent cultures, which are to live in a peaceful, productive symbiosis. Only after a treaty is made can self-management happen in truly indigenous terms, with no Australian administrative structure superimposed.

In his reply, Prime Minister Bob Hawke promised to negotiate a treaty based on Aboriginal proposals, to commence the process in 1988, and to conclude it by 1990. He declared that "there shall be a Treaty or Compact negotiated between Aboriginal people

[42] See, for example, Les Murray's comment in the previous subchapter.

and the people of Australia and you the Aboriginal people will decide."[43] Although this declaration certainly rose to the occasion, it surprised the prime ministerial entourage, and it lacked bipartisan support. However short the sentence is, it contains several new political elements that went under debate immediately:

1. "There shall be a treaty or Compact"
   - → a. never before has a treaty or compact been promised
   - → b. treaties and compacts are made between recognized political entities (not individuals)
   - → c. treaties are recognizable in international law, which may move the issue out of the domestic sphere
2. "negotiated"
   - → a. decision-making by superordained bodies instead of negotiation has been the accepted method of controlling Aboriginal life for two centuries
   - → b. negotiation involves recognized interests on both sides
3. "Aboriginal people"
   - → a. people (not in the plural, "peoples") means (1) Indigenous Australians as one societal culture, where "Aboriginal" is an artificial term for a perceived unity;

     (2) a group of individuals connected by their Aboriginality, where Aboriginality is equivalent to the recent and more politically correct Indigeneity. Treating them as a collectivity of individuals is more acceptable for the Australian state because it does not raise issues of sovereignty. So it is more advantageous for the liberal state because it was not until the most

[43] Robert Hawke, "A time for reconciliation." in *A Treaty with Aborigines?*, Institute of Public Affairs, Policy Issues no. 7, 1988, 4-5; qtd. in Lippmann 77.

		recent years that liberal thinking,[44] at least in some recent theories, became compatible with group-differentiated rights.
4. "between Aboriginal people and the people of Australia"	→ a.	a co-ordinate syntagmatic relation points at partners of the same rank
	→ b.	it also sets up a binary opposition, in which the two groups are mutually exclusive
5. "the Aboriginal people will decide"	→ a.	the right of making decisions is conferred to the group that was previously excluded from decision-making. Decision-making is the privilege of those in power, so the Aboriginal people are being empowered.

The Prime Minister's declaration seems to confirm that he (and consequently the body that he represents) genuinely supported the issue of a treaty between Indigenous and non-Indigenous Australians. Only one element in his sentence made it possible for him later to soften his initial tendency to support the "radical approach" (that is, a treaty), but as we could see in my analysis at 3.a(2) above, even this was only a question of interpretation: the same clause and other semantic aspects underline a strong support for a treaty. (Nevertheless, the sentence shows that public speech is often inculcated with legal terms which make interpretation difficult and meanings unclear in a potentially non-legal context.)

No treaty, in the originally intended form has been concluded until the time of writing of this dissertation (2002): the issue was cancelled from the agenda of consequent governments. Indigenous and non-Indigenous sources equally notice the changing political rhetoric of self-determination in Australia, following the development of the term through such stages as self-determination, self-management, treaty, makarrata, self-determination (again), accord, compact, self-government, reconciliation, social justice (Mudrooroo 217; Gardiner-Garden,"Dispossession" 7-41). "Self-determination" and "self-management"

[44] In a sense, all Western democracies (Australia included) are liberal democracies, irrespective of the party-orientation of their governments. Even though Hawke's was a Labor government, it never crossed liberal principles (which came into public use in the 19th century). See Brett, Gillespie, and Goot, eds. *Developments in Australian Politics*.

keep recurring in post-Barunga government statements (as they did before 1988 [Lippmann 77]), but the term "treaty" is carefully avoided:

Name of body and document, date	Reference to treaty?
1. Department of Prime Minister and Cabinet, Office of Multicultural Affairs. *National Agenda for a Multicultural Australia. ... Sharing Our Future*. July 1989.	no mentioning of a treaty or any form of document for reconciliation
2. ---. *Multicultural Policies and Programs: An Overview.* May 1990.	proposes a Multiculturalism Act which could include "acknowledgment of the special status of Aboriginals and Torres Strait Islanders in Australian life" (7)
3. Council for Aboriginal Reconciliation. *Going Forward: Social Justice for the First Australians*. 1995.	discusses the "Treaty Debate" referring to a formal document of reconciliation, self-determination, and sovereignty: The "Treaty Debate" – Towards a Document or Documents of Reconciliation *Continuing the Treaty Debate* 12. The Council recommends that all political parties acknowledge the value of one or more documents to formalise the position of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. 13. The Council recommends that Australians be made more aware that Aboriginal and Torres Strait Islander peoples aspire to self-determination. 14. The Council recommends that the wider community recognise that Aboriginal and Torres Strait Islander peoples, by working within existing national structures, do not abandon their views on or right to advocate separate indigenous sovereignty. (3-4)

4. National Multicultural Advisory Council. *Multicultural Australia: The Next Steps Towards and Beyond 2000*. vol.1. 1995.	no mentioning of a treaty, recognizes that "indigenous peoples are a unique group in Australian society and their needs and interests warrant special consideration, especially in view of the application of principles of self-determination" (vii)
5. Council for Aboriginal Reconciliation. *Weaving the Threads: Progress towards Reconciliation*. November 1997.	no mentioning of a treaty, outlines the proposed content of a national document of reconciliation, *inter alia* to "acknowledge the special place of indigenous peoples within Australia's social and political structures" (20)
6. National Multicultural Advisory Council. *Multicultural Australia: The Way Forward.* December 1997.	no mentioning of a treaty, reaffirms commitment to the process of reconciliation (11)
7. ---. *Australian Multiculturalism for a New Century: Towards Inclusiveness.* April 1999.	no mentioning of a treaty, stresses the "imperative nature and urgency of reconciliation between our indigenous people and all other Australians" (12)

An explanation to the changing reaction to the claim for a treaty can be found in the definitions of three terms: treaty, self-determination, self-management.

A treaty is a legal contract (document) made between two or more sovereign entities (nations, peoples) and as such it is internationally recognized.[45] The problem here is with "sovereignty": by its implication a treaty is capable of disrupting the unity of power

[45] The *Declaration of Principles* adopted by the Indigenous Peoples Preparatory Meeting (Geneva, 27-31 July 1987) includes that:
16. Treaties and other agreements freely made with indigenous nations or peoples shall be recognised and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States. (UN Doc E/CN 4/Sub 2/1987/22, Annex V., qtd. in Djerrkura)

within a country. Hence the only document quoted above that touches the sensitive issue of treaty-making carefully inserts a clause to declare that indigenous sovereignty does not threaten the territorial and political integrity of Australia: "The Council recommends that the wider community recognise that Aboriginal and Torres Strait Islander peoples, *by working within existing national structures*, do not abandon their views on or right to advocate separate indigenous sovereignty" (CAR, *Going* 4, my italics).

Self-determination is the right of peoples to define their belonging. This term may still be risky, unless it is prescribed that the peoples in question define their belonging within the framework of the (Australian) state. Respectively, broader and narrower definitions of self-determination may coexist. The Royal Commission into Aboriginal Deaths in Custody also calls attention to the problem of conflicting definitions of self-determination: Chief Commissioner Elliott Johnston points out that the "confusion and uncertainty about the definition of self-determination reflects [. . .] the fact that it is [. . .] an evolving concept, one which encompasses a wide range of ideas; different aspects receiving emphasis at different times" (qtd. in Chesterman and Galligan 268). He compares definitions of self-determination by the bipartisan House of Representatives Standing Committee on Aboriginal Affairs (HRSCAA) and the National Aboriginal and Islanders Legal Services Secretariat (NAILSS), and concludes that the two definitions share three core elements, of which only one differs slightly due to it being an "evolving concept." Semantic analysis of the definitions results in the following formulas (based on text of definitions qtd. in Chesterman and Galligan 268-69):

HRSCAA:

Aboriginal selfdetermination =

[Aboriginal control over (decisionmaking process + decisions) +
development {political/economic/social/cultural}] Australia

NAILSS:

Aboriginal selfdetermination =

Aboriginal (decision on definition + choice between options {from statehood to integration} + decision on international relations + economic base)

Figure 4 offers a more visual presentation of the analysis of the differing concepts of self-determination:

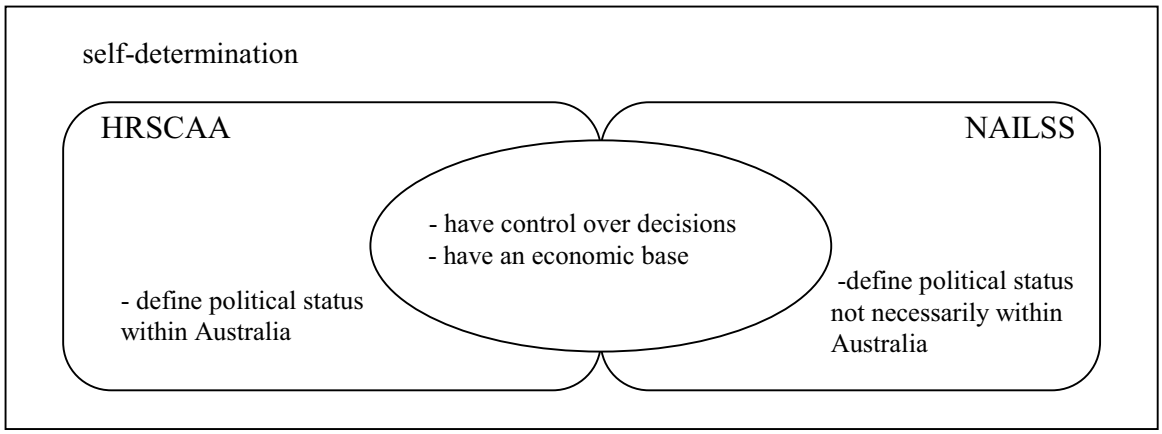

Figure 4. Differing concepts of self-determination.

I would argue that self-determination is more than an evolving concept that involves a wide range of ideas as Commissioner Johnston stated: its definition depends on the perceived national interest. The only element under debate in the definition is that of political status: the parliamentary committee (HRSCAA) relegates it within the legal structure of Australia, whereas the Aboriginal advisory body (NAILSS) opens a range of options ("from statehood to integration") to include possibilities outside Australia. It cannot possibly serve the interest of a legislative body to shake the political and legal structure of the country by a broad definition of Aboriginal self-determination, even if an Aboriginal societal culture outside Australia is only one option Aboriginal peoples might opt for. This option is excluded from the right to self-determination.

My argument is further supported by the seven documents examined above. One of them, *Weaving the Thread* by the Council for Aboriginal Reconciliation (1995) supported a treaty and sovereignty, whereas government multicultural policy papers were either silent about the issue or referred to special status (1990), unique group and self-determination (1995), and reconciliation (1997, 1999). Even the Council's 1997 document dropped serious legal language (including the use of "treaty" and "sovereignty"): Pat Dodson, the first chair of the Council (1990-95) resigned exactly because his broad treatment of self-determination was objectionable in government circles. In order to curb further right-wing attacks against Aboriginal rights (which came anyway with the 1996 change of government), claims to self-determination had to be dressed into more acceptable language so that the "national interest" would not feel threatened.

A similar opinion about the definitive role of the interest of the Australian state is expressed by David Roberts, who compares Australian and international definitions of

self-government. Quoting Lois O'Donoghue, chairwoman of ATSIC, he writes that the "Government has defined self-determination as 'Aboriginal communities deciding the pace and nature of their future development as significant components within a diverse Australia' " (Roberts 259); and concludes that "[s]uccessive Australian governments have rejected the view that self-determination includes the right of Aboriginal and Torres Strait Islander people to decide their political status and the exploration of political options such as self-government and sovereignty" (259). Such a conclusion is misleading, I believe, or at least it depends on what is meant by "political status." As I have shown above, the parliamentary committee in 1989 and the various successive government documents did not reject the view that self-determination includes the right to decide about political status, but they limited such a decision to within the framework of Australia's current legal and political structure. To shake this framework with the "exploration of political options such as self-government and sovereignty" would not serve the national interest. So it is not the right of Aboriginal self-determination (including decision about political status) that is questioned ultimately, but the effect to which the exercise of such a right would amount to. This is, at least, a common denominator on which negotiations can proceed.

Finally, self-management describes that the economic and cultural life of Aboriginal people should flow under Aboriginal leadership. In fact, this is the "control over the decision-making process" element of self-determination. Since the late 1960s, when patronizing and assimilating policies were finally discarded, self-management has become an accepted policy because it was not threatening the power structure of the state. To the contrary, it relieves the state from the responsibility of taking care of one of its constituents. Self-management is sustainable only if there is economic foundation for it, which for most Aboriginal communities is connected to the land: when the land was taken, life was taken. Since the High Court's decision in *Mabo v. Queensland* and the subsequent Commonwealth Native Title Act 1993, there is a chance in court to reclaim lost territories; however, the chances of winning are poor.

Royal Commission into Aboriginal Deaths in Custody

In the following, more descriptive than argumentative section I will briefly sum up the process and conclusions of investigations carried out by the Royal Commission into Aboriginal Deaths in Custody (1989). The RCADC cannot be bypassed because it was the

largest-scale, highest-rank non-political research since the Aborigines Project of the Social Sciences Research Council of Australia (1964-67). I also wish to deal with the concluding recommendations of the Commission because its independent conclusions provide powerful additional support for the argument about self-determination.

The Royal Commission into Aboriginal Deaths in Custody began its investigations in 1987, following a call from the Committee to Defend Black Rights, the Human Rights and Equal Opportunity Commission, and the United Nations Working Party on Indigenous People[46] to look into possible causes of the extreme proportion of deaths in custody among criminals of Aboriginal descent. The RCADC was one in a series of investigations into the conditions of Indigenous Australians—the first of them in 1837—which, as Lorna Lippmann observes, all revealed discriminatory situation but led to minimal charges (100-1).

In 1986 Aboriginal people constituted 1.46% of Australia's total population,[47] whereas their ratio in the prison population was 14.7%.[48] The same data for 1998-99 showed a 16.24% ratio for Aborigines among all imprisoned.[49] Not only are Aborigines incarcerated more often for break and enter and justice procedures (but less often for white-collar crimes and premeditated murder), but they are more likely to be kept in police custody, usually for public drunkenness. Once in custody, figures show that they are about 40 times more likely to die there than non-Aborigines (Lippmann 123-24). Initially, the RCADC scheduled 23 cases of deaths to investigate, but as investigations proceeded deadlines had to be extended because more and more cases were revealed. By 1991 the RCADC investigated 115 cases and made 339 recommendations to avoid such cases in the future. Nevertheless, retribution of police and prison forces for alleged cases of brutality did not happen, nor were (most of) the recommendations put into practice. Lippmann reproduces a report on deaths occurring after 1989 (the closing date of RCADC): until 1994 further 55 Aboriginal deaths in custody happened.

Still, the RCADC could become the most comprehensive sociological survey of the dark side of Aboriginal life in white Australia because—upon demands by Aboriginal people who felt dismayed by the lack of retributive recommendations against police

[46] Now called United Nations Working Group on Indigenous Populations.
[47] Census data cited in Lippmann 124.
[48] National prison census of 1987, cited in Lippmann 124.
[49] Data from the Steering Committee for the Review of Commonwealth/State Service Provision, *Report on Government Services 2000*, Canberra: Ausinfo, 2000, 776, cited in Austral. CAR, *Corroboree* app.2.

violence—the commission extended its area of research beyond the mere investigation of deaths in prison or police custody. In May 1988 the terms of reference for the Committee were extended to social, cultural, and legal factors, as acknowledged background of the deaths, and three new commissioners were also appointed.

The RCADC published two national reports: the *Interim Report* signed by Justice Muirhead came out in late 1988, and the five-volume *National Report* of Elliott Johnston came out in 1991. One of the major conclusions among the 56 recommendations of the *Interim Report* argues that "justice would be achieved only when Aborigines 'are able to play an important part in the decisions which influence their daily lives, when they have opportunities to attain their own economic base and when they can play a role in dealing with their immense social disadvantages' " (Austral. RCADC, *Interim* 65, qtd. in Lippmann 115). In other words, this statement reveals the Commission's belief that Aboriginal self-management ("to play an important part in the decisions which influence their daily lives") leads to justice,[50] and that the two crucial components of self-management are decision-making and an economic base. (Self-determination in a broader sense, inclusive of a discussion of political status is not mentioned in the *Interim Report* because an investigation into such a background was not part of the Commission's terms of references.)

The *National Report* singles out alcoholism as the most frequent cause of Aboriginal deaths in custody (or rather, of getting into custody, where the cause of death is often careless treatment and police brutality). Reasons for the outstanding ratio of alcoholism are established in (1) a lack of self-determination; (2) white teachers having no special training in the local culture or language; (3) special needs not recognized; and (4) landlessness and powerlessness. As to the last point, the Northern Territory Central Land Council in its submission to the Commission observes that "in the Territory, those who had land rights had some feeling of social and economic security. On the other hand, mortality and morbidity rates were high among those who were without land and without self-determination" (qtd. in Lippmann 109). This explains that although incarceration for drunkenness in the Northern Territory is about 100 times more frequent then elsewhere in Australia, deaths in custody rarely happen. At the time of the RCADC the Northern

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[50] In the land of the "fair go," this word means equality under the rule of law and anti-discrimination in all fields of life.

Territory was the only part of Australia where land rights and self-management had been granted, by the force of the 1976 Northern Territory Land Rights Act.

All in all, the investigations of the Royal Commission into Aboriginal Deaths in Custody have established causal connection between the lack of Aboriginal self-determination and self-management (with corresponding economic base and access to traditional territories) and consequent social deterioration manifest partly but not exclusively in outstanding rates of incarceration and deaths in custody.

3.3. *National Agenda for a Multicultural Australia*

> "The importance of 'race' in the global community and
> market makes Australia's commitment to equality of
> treatment and abhorrence of racial discrimination
> fundamental to our future."
> (Nick Bolkus, Shadow Attorney General,
> qtd. in Cope and Kalantzis, back cover)

In this subchapter I will examine the Australian multicultural policy to see how it relates to the social composition of the country. I will argue that the triple aims expressed in the *National Agenda* highlight the nation-building purpose of the policy, which has enjoyed bipartisan support since 1989, unlike matters of indigenous concern.

The *National Agenda for a Multicultural Australia* came out in July 1989, published as a government policy document by the Office of Multicultural Affairs. In it, a previously agreed definition of multiculturalism was put down, its objectives defined, limits sketched, and projects outlined. Bipartisan agreement about the Agenda had been reached in March 1988, which was then formalized in the *National Agenda* booklet, which became Australia's supreme guide in the field of multiculturalism and has lived through three revised editions (1995, 1997, 1999). An Australian multiculturalism act has not been passed yet: motions to legislate for one failed by 1996, when the Office of Multicultural Affairs was dismantled and reorganized by a conservative turn in government. The issue has not been raised again.

All approaches to multiculturalism (whether as a government policy, an aesthetic principle, a target of social justice, or a description of social composition) root in the undeniable fact that Australian society is not homogenous: it is multiracial, multiethnic, multilingual and, arguably, multinational. Moreover, ethnic and linguistic belonging, which are more apparent in the case of first and second generation immigrants, are further diversified by the more constant factor of religious belonging: as Ian H. Burnley points out, a descriptive survey of multicultural diversity needs to consider religion in addition to birthplace and language when ethnocultural belonging is examined (42).

A sudden increase in the complexity of social composition took place after 1973, when a liberalized immigration policy ceased to select migrants according to their race and

ethnicity. Instead, since then a new points system has evaluated applicants according to their age, occupational skill, and education, aiming more at reducing unemployment in Australia (Burnley 34) than at harvesting humanitarian appraisal. In "the new age of migration" population movements into Australia have been caused or motivated by (1) changes in the international division of labor (such as 'career-cycle' migration, international business ties and social networks); (2) a revival of old migration chains (such as family reunions or a successful settled ethnicity attracting those who remained home); (3) refugee movements; and (4) business and tourist visits. Since the end of WWII the population of Australia has more than doubled (from about 8 million to over 18 million), with the source of increase being mostly migrant intake rather than natural growth. After 1947 masses of displaced persons (DPs) arrived from Central-Eastern and Southern Europe, then after 1966 the repeal of the White Australia Policy opened the door for masses of migrants and refugees from the Middle-East, South-east Asia and South America. Australia is at the receptive end of global population movements: a quarter of its population is first generation migrants from diverse backgrounds in about 150 countries all over the world (see figure 5 for regional distribution). 44% of all Australians covered by the 1996 census are first or second generation newcomers, who do not necessarily define themselves as "Australians" yet but rather in terms of their ethnic background.[51]

[51] I have taken data for this paragraph from Burnley, *The Impact of Immigration on Australia: A Demographic Approach* (2001).

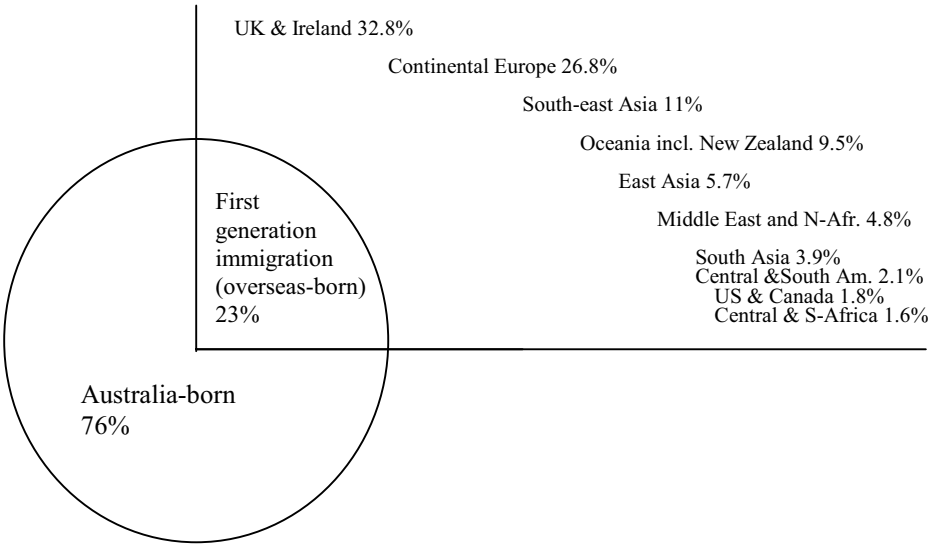

Figure 5. Composition of Australian population according to birthplace.[52]

However inseparable the links appear between immigration as a source of diversity and multiculturalism as management of diversity, the *National Agenda* is quick to declare in its definition section "What Is Multiculturalism?" that "[a]s a public policy multiculturalism [. . .] plays no part in migrant selection. It is a policy for managing the consequences of cultural diversity in the interests of the individual and society as a whole" (Austral. OMA, *National* vii). On the one hand, this statement confirms a continuing pledge to the non-discriminatory immigration policy introduced in the early 1970s, because multiculturalism as a public policy is understood to be viable only if the society itself is multicultural in a descriptive sense. On the other hand, it distinguishes issues of immigration from issues multicultural, thereby saving the latter from attacks or changes that might affect the former.

The three dimensions of multiculturalism identified in the *National Agenda* are:

- cultural identity: the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion

[52] 1996 census data (total of stated birthplace: 17,285,163); diagram based on data in tables 3.1 and 3.2 of Burnley 38-39: "Major birthplace groups in Australia, 1996" and "Major regions of origin of the overseas-born population in Australia, 1996."

- social justice: the right of all Australians to equality of treatment and opportunity, and the removal of the barriers of race, ethnicity, culture, religion, language, gender or place of birth
- economic efficiency: the need to maintain, develop and utilize effectively the skills and talents of all Australians, regardless of background. (vii)

A closer look at these three dimensions reveals that the first two (cultural identity and social justice) are "rights" that individuals possess *a priori* and in their societal interactions. The third dimension (economic efficiency) is worded as a "need" that the state suffers, which, when satisfied, may be beneficial for the individuals whose skills and talents are utilized. National priority (that is, economic prosperity) and individual welfare (both cultural and social) are carefully balanced in the three dimensions, which I take to be a sign of recognition on behalf of the state that there is no economic prosperity without the cultural and social welfare of its citizens.

"All Australians" implies that Australia is one nation whose citizenship is Australian, and the policy applies to each and every individual who makes up the nation, without discrimination: "They apply equally to all Australians, whether Aboriginal, Anglo-Celtic or non-English speaking background; and whether they were born in Australia or overseas" (Austral. OMA, *National* vii). Thus, all constituents as individuals, are equally and non-discriminately (without the "barriers of race, ethnicity, culture, religion, language, gender or place of birth") Australians. "Aboriginal Australians" (not "Australian Aborigines"!) have as much right as "Anglo-Celtic" ones (an awkward term!), and Anglo-Celts are just another tile in the mosaic besides the many ethnies. Their only privilege might be that the use of English as national language limits the use of other languages in public services. This model of society-building agrees with Richard J. F. Day's constrained emergence theory:[53] "an approach to Canadian [and Australian] identity that a unity of higher types will emerge through the preservation and tolerance of limited forms of difference" (149).

"Within carefully defined limits": this limiting clause is part of the first (cultural identity) dimension of multiculturalism only. Triple limits are later specified as follows:

[53] Day defines this theory as "an approach to Canadian identity" (149), but it is equally applicable to the development of Australian multiculturalism.

- multicultural policies are based upon the premise that all Australians should have an overriding and unifying commitment to Australia, to its interests and future first and foremost;
- multicultural policies require all Australians to accept the basic structures and principles of Australian society—the Constitution and the rule of law, tolerance and equality, Parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes; and
- multicultural policies impose obligations as well as conferring rights: the right to express one's own culture and beliefs involves a reciprocal responsibility to accept the right of others to express their views and values. (Austral. OMA, *National* vii)

In my opinion, the connection between the second of these limits ("acceptance of basic structures and principles") and the first dimension of multiculturalism ("right to cultural identity") is that only with reference to the cultural dimension might the basic structures be transgressed. For example, claims of self-determination in the name of cultural identity might potentially endanger the "national" framework, especially because cultural identity is defined as a right. Therefore, with a unified and indivisible British Australian society premised, political manifestations of cultures become strictly limited: "the basic structures and principles of Australian society" are unquestionable. Consequently, this limit protects the policy from accusations of it being a nation-dissolving force that works against social cohesion. In this respect, multiculturalism is a coherent and consistent policy. (However, I take it a major problem that it is not applicable if Indigenous peoples are regarded as sovereign societal cultures, in which case indigenous policy and multicultural policy will become incompatible.) Therefore, Aboriginal claims for full self-determination—manifest in their sovereignty, recognised in domestic and international forums, and put down in a treaty or treaties—are doomed to failure. Any changes in the Australian Constitution that would point in this direction are also doomed to failure simply because—considering the numerical inferiority of the indigenous population[54] and its low contribution to the national economy—they are highly unlikely to get the necessary support in legislation and at a referendum.

[54] 2.4% of the population declared Aboriginal descent in the 1996 census. (Approximate figure based on Australian Bureau of Statistics data compiled in Sullivan 3-5).

The *National Agenda* recognizes that language and religion are separable from one's cultural identity only with difficulty, and so includes them emphatically into the right to cultural identity (dimension 1). The use of one's language as part of his/her identity, however, is limited by the declaration of "English as the national language" (limit 2): this is for practical reasons of manageable governance. The second limit on the three dimensions of multiculturalism also includes the phrase "tolerance and equality." "Tolerance" has been championed as major achievement of the recent decades, but this term can also be controversial. At the National Diversity Conference in Sydney, 2000, an Indigenous activist spoke up strongly against the notion. "I don't want to be tolerated!" she said, and what she meant was that tolerance may not involve a mutual relationship and partnership but rather neglect and isolation in society. In spite of using "tolerance," I suggest that the *National Agenda* promotes its more benevolent and less superficial synonyms. In the scale of social relationships ranging from recognition (Taylor) through tolerance to understanding and sharing, Australian multiculturalism prescribes understanding and sharing as advisable behavior for citizens. Accordingly, the third limit confers "a reciprocal responsibility to accept the right of others to express their views and values" (in other words, tolerance), and then four pages later the underlying principles described in eight goals already show a commitment to understanding and sharing:

> Why Do We Need a National Agenda?
>
> [. . .]
>
> 6. All Australians should have the opportunity to acquire and develop proficiency in English and languages other than English, and to develop cross-cultural understanding.
> 7. All Australians should be able to develop and share their cultural heritage.
> 8. Australian institutions should acknowledge, reflect and respond to the cultural diversity of the Australian community. (Austral. OMA, *National* xi)

At several places in the *National Agenda* there is a recognition that Australia is a multicultural society, but the terms "polyethnic" or "multinational" are not introduced to specify further what multicultural covers in the descriptive sense. Judging from the definition and description of multiculturalism as a public policy, a multicultural Australia means a polyethnic Australia: "In a descriptive sense multicultural is simply a term which

describes the cultural and ethnic diversity of contemporary Australia" (vii). Everywhere in the text, measures, goals, definitions, and principles refer to individuals (for example, "individual cultural heritage" in dimension 1), and no mention is made of possible societal cultures within the context of the Australian nation. "Nation" and "ethnicity" are avoided: if they are used at all then nation/national refers to the whole of the Australian community (for example, "national language" [vii], "saw ourselves as a nation" and "our nation" [ix], "for the national good" and "our national interests" [xi]); whereas ethnicity/ethnic is used for all groups sorted according to ethnocultural belonging (for example, "ethnic diversity" [vii], "ethnic composition of the Australian people" and "ethnic origin" comprised of Aboriginal, Anglo-Celt, Other European, Asian, Other [table 1.1 on page 2]).

Considering its ideological basis, Australian multiculturalism is a liberal policy that is based on the supreme recognition of individuals' rights as opposed to any allowances for group-differentiated demands. It is not by accident that societal cultures are not discussed and provided for in this multiculturalist model, which relies on "cultural diversity" but does not allow "structural diversity." This accords with such governmental politics that would not allow indigenous demands to push for a change in their political status (that is, self-determination in culture and economy is encouraged, but not regarding political status).

For the same reason the policy of multiculturalism (in the 1989-1996 period) enjoyed wide bipartisan support. A negative change in the attitude of the Liberal/National Coalition came only after indigenous demands gained ground (after 1992) and immigration issues got more grave.[55] The former of these problems has always been troubling policy-makers, who fell into their own pit when they included Indigenous peoples—who have protested—into the Australian mosaic. The latter has never been subject of the policy of multiculturalism, as it is declared in the *National Agenda* that "[multiculturalism] plays no part in migrant selection. It is a policy for managing the consequences of cultural diversity in the interests of the individual and society as a whole" (vii). Therefore, it is a false accusation to associate stricter immigration control under Howard's government with the fall of multiculturalism: there should not necessarily be a causal relation between the two.

[55] Unfortunately, I cannot enter into discussions of the troubled position of asylum seekers and queue jumpers within the scope of the present study. More about these recent immigration issues can be read in Don McMaster, *Asylum Seekers: Australia's Response to Refugees*.

From an ethnocultural perspective, indigeneity constitutes a buffer zone for Australian multiculturalism: Indigenous Australians, generally speaking, do not want to be just one of the mosaics.[56] Since the advancement of the reconciliation process, networking attempts such as conferences and a shared fight against discrimination and for social justice have brought Indigenous activists and ethnic organizations closer together. In the long run, however, these sections of society seem to have ultimately different aims: uncompromised self-determination on the one hand (which Ann Curthoys would see as completion of the decolonization process), and equity-based integration on the other. For the former, even the political will is absent; whereas for the latter, the weakening economic output of the country seems to cause existential worries, which surface in social disturbance and slogans of a threatened national identity.

A Vision of Society for the Future

The vision of society provided by the Royal Commission into Aboriginal Deaths in Custody differs from that of the *National Agenda* in many respects, not only because their focus of investigation was different. The RCADC presents a society sick in race relations, whose current structure shows a dualist dichotomy: it is divided along the us–them, white–black (non-Indigenous–Indigenous) line. The *National Agenda* presents a healthy multicultural society, whose current and future structure is characterized by diversity and equality. Race relations are handled at the level of the individual in the *Agenda*; in other words, it is not an issue unless an individual is racially discriminated against. Ethnic groups (made up of individuals) form equal-rank partnerships with each other and the Australian state. The social justice objectives of the *National Agenda* highlight this arrangement:

> In terms of social justice, the overall objective of the Government's multicultural policies is to ensure that all Australians — no matter what their first language, birthplace, religion, race or cultural heritage — enjoy the same rights and opportunities. Ultimately, this should be reflected in similar group outcomes. In terms of the services provided by government itself — a major vehicle for promoting equality — it means designing and

[56] Ann Curthoys calls attention to this uneasy relationship in her "An Uneasy Conversation."

> delivering those programs in ways which reflect the needs, characteristics and circumstances of their intended clients, so that equal access and equitable entitlements are assured. (21)

The policy of multiculturalism has often been criticized for encouraging culture wars between ethnocultural groups in the name of supporting their cultural identity, which is eventually counterproductive of rather than strengthening a uniform national identity. "National identity" has found many defenders—more and more since 1996: it was a major motif of the Bicentenary celebrations, John Howard's[57] favorite pet in 1988, and an ace in the strengthening right-wing/liberal/nationalist/populist discourse. One of the representatives of this tendency, journalist Paul Sheenan observes:

> The central fantasy of the multicultural industry is that Australia should be a cultural federation. But Australia has a distinct, dominant, cohesive, assimilative, blended culture that has been painstakingly built through trial an error. There is an enormous difference between the self-evident diversity of Australia's multiracial society and the big protective tent under which this diversity is thriving. Take away that big tent—Australian culture—and this diversity curdles into state-sponsored tribal animosities. (138)

Actually, Sheenan tries to force an open door in the name of a national identity: this problem has been solved by the three limits of multiculturalism (especially the second one) in the *National Agenda*. It must have been difficult to market the *Agenda* in this respect, because playing for the covert assimilationist gallery could have turned the multiculturalist audience out of the house.

Opposition Leader John Howard lost leadership of the Liberal Party in 1989 mostly due to his anti-immigration and anti-indigenous statements. It may not be accidental that his infamous 1988 speech at a party meeting in Esperanza, Western Australia, does not feature at any Liberal Party or prime ministerial websites. Elsewhere in 1988 he wrote:

> The Liberal and National Parties remain committed to achieving policies which bring Aboriginal people into the mainstream of Australian society and give them equal opportunity to share fully in a common future with all other Australians. Consequently we are utterly opposed to the idea of an

[57] Opposition Leader (1985-1989 and 1995-today) and Prime Minister since 1996, currently serving his third term. He lost leadership of the then-Opposition Liberal Party in 1989 for his restrictive views on immigration.

> Aboriginal treaty [. . .] it is an absurd proposition that a nation should make a treaty with some of its own citizens. It also denies the fact that Aboriginal people have full citizenship rights now. (qtd. in Djerrkura)[58]

The above statement is not anti-multicultural but it is certainly anti-treaty. The *National Agenda* enjoyed bipartisan support between 1988-1996: the Liberal/National Coalition in opposition supported the Hawke and Keating Labor governments, especially after Howard was replaced by the more flexible Andrew Peacock, who was followed by several others.[59] The underlying principles of multiculturalism are in accordance with the basic tenets of classic liberalism: the universality of human rights, the equality of all individuals without discrimination, and the equality of communities without privileges—these the Coalition has always been supportive of. However, when it comes to a full recognition of cultural identity manifested in political demands especially on behalf of Indigenous peoples (for example, in the form of demanding a treaty), both major parties retreat. Generally regarded as more approachable and committed to the Aboriginal cause, Labor has proved just as reluctant to move into the political battlefield of treaty-making (where mines of "sovereignty" and "self-determination" may explode), because that would cause the national interest to suffer.

A major motivation to expand Australia's multicultural policy[60] into an economy-boosting direction could be that in the late-1980s Australia entered a period of economic recession. In 1986 "a leading New York financial house whose word was venerated in such matters reduced Australia's credit rating from the highest level of good standing to the next rank" (Bolton *Middle* 278). Signs for worries about the economy rising to prior status could be observed around the Bicentenary: national celebrations were used to develop or redevelop infrastructure, for example, the Bicentennial roads project was launched to upgrade many major highways. When the tallest of the 200 tall ships, *Soren Larsen* floated into Darling Harbour on Australia Day, carrying the Coca-Cola ensign on its mast, she caused much comment and may have generated more commitment to the cause of protecting a national identity. Labor's reaction to the recession has been to increase assistance to immigration, open towards Asian markets, and develop

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[58] John Howard, "Treaty Is a Recipe for Separatism", in *A Treaty with the Aborigines?* Ed. K. Baker. Institute of Public Affairs, Policy Issues No 7, 1988, 6-7, qtd. in Djerrkura n.pag.

[59] The Opposition between 1989-1995 had five leaders: John Howard, Andrew Peacock, John Hewson, Alexander Downer, then Howard again.

multiculturalism. The Liberal/National alternative has preferred protectionism of local goods, jobs, and people against forces of globalization, which has from time to time bounced into displeased international opinion,[61] in spite of Bolton's (278) and Clarke's (*Australia*) warning that in a globalized world economy neither strategies of social policy nor of economic policy can be formed without acknowledging opinions abroad. Nevertheless, because of the strong economic focus of the *National Agenda* (contrary to preceding versions of the policy that mostly focussed on cultural pluralism and welfare[62]), the Coalition could find this new multiculturalism supportable.

The *National Agenda* gives away worries about the state of economy already in the first paragraph of its Foreword.

> Australia has changed dramatically in the last generation. Our strategic relationships, trading network and investment patterns have become far more enmeshed in the Asia Pacific region *[motivation]*; and our immigration policy has been progressively liberalised.
>
> [. . .]
>
> The Agenda has been developed within the context of economic restraint *[context]* that is the hallmark of my Government. It expresses the goals, priorities and strategies that the Government considers necessary in order to promote respect for individual identity, to ensure social cohesion and to enhance social justice. It addresses not only issues of equity but also of economic efficiency *[target]*. (Austral. OMA, *National* v; my emphasis and additions)

Economic factors are listed as formative changes of recent times (motivation), and they are addressed in the policy in a "within the context of-clause" (context) and in an "in order to-clause" (target). In the latter respect, issues of economic efficiency rise to the same rank as issues of equity: the foreword names the double targets of equity and economic efficiency (v), whereas the definition of multiculturalism on the following page identifies triple dimensions: cultural identity, social justice, and economic efficiency (vii). This slight

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[60] Multiculturalism in Australia began in 1973, when Minister for Immigration Al Grassby declared it official government policy.

[61] Annual UN human rights reports since 1996 have condemned Australia for her stance in immigration and indigenous policies, especially concerning asylum seekers and mandatory sentencing (UN HRC, *Concluding Observations*). Examples of international reaction will be provided in subchapter 5.2.

difference in the background of the policy suggests that economic priorities carry major emphasis in population management (that is, they are a national priority), and any discussion of identity, whether an all-Australian one or a recognition of a multiplicity of cultural varieties of individuals, is only a wrapping to make the policy more desirable.

Media highlights around the Bicentenary did not leave issues of immigration and multiculturalism untouched. One of the most formidable Indigenous leaders, Charles Perkins also contributed to the debate by "launch[ing] an attack on the admission of Asian migrants to Australia, claiming that too many were arriving for easy absorption" (Bolton 287). His attack directs attention to many interrelated points of conflict between indigenous and ethnic interests, which were supposed to be equally served by multiculturalism. I will briefly address them partly to consolidate arguments of the present chapter, and partly to further discussion towards issues in chapter 5.

1. Immigration. Immigration has been the source of Australia's ethnocultural diversity but not of its Indigenous population. The more immigration is encouraged, the lower the indigenous percentage in population becomes, without the chance of regeneration from an outside source. More population from overseas will be more likely to be ignorant of the country's unique indigenous heritage.

2. Multiculturalism. Indigenous peoples are not just one (or in a more enlightened approach: several) ethnic group. However small, many of them still have land-based, unscattered societal cultures, which ethnic groups—whether integrated into an Australian identity or just arrived—cannot claim. The structure of society envisioned in the policy of multiculturalism does not acknowledge this difference.

3. Sovereignty. The issue of Aboriginal sovereignty that Indigenous peoples might claim may disrupt Australia's current federal structure: a commonwealth of six states and two territories, none of them organized along ethnocultural lines. A separate election system already exists for ATSIC, but there are no designated indigenous or ethnic seats in the Commonwealth Parliament.

4. Apology. Indigenous peoples have been dispossessed during the past 200 years of coexistence with non-Indigenes in the continent. To what extent are migrants other than

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[62] For a typology and history of multicultural ideology (the early phases), see Mark Lopez, *The Origins of Multiculturalism in Australian Politics 1945-1975*, which differentiates between cultural pluralism, welfare multiculturalism, ethnic structural pluralism, and ethnic rights multiculturalism.

British ("Anglo-Celt") "responsible" for what happened? Who should wear the burden of compensation?

5. Native title. Indigenous land claims after the Native Title Act 1993 might affect properties or economic interests belonging to people having other than British ("Anglo-Celt") heritage who might be directly blamed for the past. What would the attitude of immigrants (often dispossessed in other countries before coming to Australia) be concerning this special right given to an exclusive group of society?

6. Reconciliation. Would the half of society that arrived in Australia after WWII feel an urge to reconcile with Indigenous peoples, considering that they are not part of the British-Aboriginal dichotomy? How much sympathy is there in society and how much common interest can be motivated?

Concluding Note: Contested Nationhood

In this chapter I have critically surveyed the debate about Australianness at and around the time of the Bicentenary, analyzed the Barunga Statement as an expression of an alternative indigenous history and politics, considered its underlying motif of self-determination, and examined whether provisions of the *National Agenda* accommodate indigenous and ethnic minorities.

I conclude that the Bicentenary reinforced the nation-building myths of white Australia's past 200 years, while simultaneously opening a forum for discussing the nation's future. In the early 1970s a new (non-nationalist) politics of identity emerged, and through the next decades it gave growing intellectual and political support for the Aboriginal land rights movement (as well as other social movements), cherishing inclusive multiculturalism. The Barunga Statement and the findings of the Royal Commission into Aboriginal Deaths in Custody put morally and politically binding obligations on the government of the day by bringing historical and social wrongs to light. Whereas the claims in the Barunga Statement were endorsed only by the governing party because of its implied differentiation between groups of society, the *National Agenda for a Multicultural Australia* enjoyed bipartisan support primarily because its central notion was equality for all Australians (and because it promised to improve economic efficiency). In the absence of legal recognition of enclosed societal cultures in Australia until 1992, governmental obligations were embedded in the language of moral justice and liberal equality instead of

treaties and self-government rights. For this reason, the *National Agenda* seemed a sound nation-building document to lead the country into a new century.

4. THE CHARLOTTETOWN ACCORD

> "While the range of theoretical possibilities is virtually limitless, the practical possibilities are fairly limited and can be identified in relatively precise terms." (Monahan 13)

Its Story and Model of Government

After Meech Lake failed, a general "give-it-another-go" feeling took possession of Canada, however much the positions of power at the bargaining table changed. Positing the unity of the country as the ultimate political goal and primary interest for continued economic welfare, the federal government reopened the constitutional process and tried to achieve a much wider basis for consensus than in the previous round. The stakes rose higher: not only did Quebec still rage about the rest of Canada having refused to recognize its distinct society, but Aboriginal peoples, Atlantic and Western provinces equally showed that there was no federal peace without all their grievances satisfied. Ultimately, in the newly proceeding series of negotiations the federal leadership aimed at keeping Canada together through satisfying the demands, hence the name for the 1991-92 constitutional negotiations: the Canada-round. The government tabled its *Shaping Canada's Future Together* proposals on 24 September 1991 with the highest aspirations:

> The challenge that faces us all, as Canadians, is to build a better federation for the 21st century. It will need to be a federation that reinforces and expresses the many-sided character of Canada itself: a homeland of many peoples including the First Peoples, a land of two linguistic majorities, a land of diverse regions, a free and democratic society, a land which is respectful of differences, a strong economic union, a sharing community providing equality of opportunity and economic security for all its people, an important player on the international stage. [. . .]
>
> This is Canada's round. We must complete the process begun with the 1982 amendments to the Constitution, and prepare for the 21st century, building a framework that responds to the aspirations of all Canadians. The foundation is there. Together, we can build a better Canada. (Canada, *Shaping* 5-6)

In this subchapter I will highlight aspects of the federal proposal that have not received enough attention to date, although its openness and readiness for compromises, and above all, its new notion of citizenship would entitle the proposal for much more attention. Understandably, however, most writings in the Charlottetown constitutional bibliography concern issues of minute legal analysis (legislature and judicature), accompanied by an abundance of political papers. Many articles were conceived before the Charlottetown Accord (during the negotiations) to analyze and evaluate the legal consequences of various bargaining positions.[63] In the aftermath, texts predominantly by political scientists began to contrast the differing points of view and gave broad sketches of alternatives for the future.[64] The original federal proposal, *Shaping Canada's Future Together*, features in these articles in just a few sentences, despite its significance that amounts to more than being the first discussion paper to start the negotiations with.

From *Shaping Canada's Future Together* we learn that the country's highest political power changed its philosophy. It proposes to attempt successfully to satisfy all demands, because its new notion of citizenship has been deprived of a major bone of content: the new definition of citizenship (that is, belonging together) is based on shared values rather than ethnocultural notions.

> *Canadian citizenship is an emotional tie, a sense of shared values and commitments to our country.* [. . .]
>
> Being Canadian does not require that we all be alike. Around a core set of shared values, Canadian citizenship accommodates a respect of diversity that enriches us all. Many Canadians have deep loyalties to their own communities — to a language, to a region, to an aboriginal group, to a distinct culture, to Quebec as distinct society, or to ethnic roots. We may have other ways of defining ourselves — by gender, occupation, religion or political party. But woven through all these is the sense of good fortune which comes from knowing we belong to a great country, from being Canadians. (Canada, *Shaping* 6-7, emphasis mine)

Living with such citizenship, it does not really matter whose ethnic identity is more distinct, *ergo* all demands for rights and powers can be reasonably satisfied, because they are given to distinctive equals who share certain predefined values. None of these values,

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[63] Sigurdson; Hiebert; Jhappan; legal proposals and draft texts.
[64] Woehrling; Russell; Thomas; *The Parlamentarian;* Williams.

as put together by the Citizens' Forum, contain ethnoculture-specific notions. They believe in

> the need for equality and fairness as guiding principles for our society, a belief in consultation and peaceful dialogue, the importance of accommodation and tolerance, a respect for diversity, the need for compassion and generosity, the value of Canada's natural beauty, and the importance of a national conscience that spurs us to make our contribution to global peace and development. (Canada, *Shaping* 7)

In addition, the text emphasizes that federalism as a governing form is especially suitable for such an organization of coexistence, because it provides a framework for multiple identities:

> Federalism is the only political system that will respect these characteristics, all of which are embedded in our history and our consciousness. Federalism has important advantages over alternative forms of political union or association. [. . .]
>
> We can adapt and even, in some fundamental ways, redesign our federal system. We owe it to ourselves and to our children to surmount our present difficulties by reconciling our unity and diversity in a creative and imaginative way. (Canada, *Shaping* 5-6)

The federal government was not alone to emphasize creativity and imagination as the means to find solution to the crisis in a text which for a cynical reader (at least in its preface and introduction) might be little more than ear-catching public relations bla-bla. Several political scientists also failed to offer answers other than those soliciting good will and creative imagination.[65] Therefore, the method chosen to reach indispensable compromises involved far-reaching public debates. "These proposals were referred to a Special Joint Committee of the House of Commons and the Senate [the Beaudoin-Edwards Committee] which traveled across Canada seeking views on the proposals. The Committee received 3,000 submissions and listened to testimony from 700 individuals" (Canada, *Consensus* 4). In addition, provincial and territorial forums for public consultation also assisted their governments' work. The media that had complained about being locked out of information in the Quebec-round could now televize six national conferences of experts, advocacy groups, and citizens. "Aboriginal peoples were consulted

[65] Cairns; Oliver; Thomas; Monahan; Beaudoin 228.

by national and regional Aboriginal organizations" (Canada, *Consensus* 4). Only after the report of the second Special Joint Committee [the Beaudoin-Dobbie Committee] did a more closeted form of negotiations begin, with the federal Minister of Constitutional Affairs chairing the table. In the sixteen meetings that followed between 12 March and 28 August, representatives of the provinces and territories and Aboriginal leaders participated. The last four of these meetings were First Ministers' Conferences with the Government of Quebec as full participant.[66]

Such a method of negotiations withstood previous criticism of the Meech Lake process. The Canada-round did not have to deal with ultimata. Instead, there were many meetings and hearings and much openness. In the end, failure was achieved in a similarly democratic way: the Charlottetown Accord did not pass the referendum. At 75% participation rate, 55% to 45% answered "No" (Molnár 143) to the question "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached at the Charlottetown on August 28, 1992?" (Russell 47).

Still, in my opinion, *Shaping Canada's Future Together* made a major step forward by introducing its new concept of citizenship. As this set of proposals formed the basis of the Charlottetown Accord, through it we can study a new attitude of the federal government to the negotiations and to the organization of Canadian federalism. The conception of constitutional amendments born after a longish negotiating process received the name of the place of the final conference: Charlottetown Accord.[67] Its two major documents are the *Consensus Report on the Constitution*, which was published immediately after agreement had been achieved, and the *Draft Legal Text,* which contained the amendments as converted into legal language. In case of a successful referendum this latter document would have been entrenched in the constitution. The legal draft was published very late, only two weeks before the referendum,[68] which may have also contributed to the negative outcome (Molnár 140). Undeniably, the openness and democracy that characterized the beginning of the 1991-92 amending process began to fade away towards the end: on the one hand, the legal draft could no longer be subjected to debates and, on the other hand, the very strict amending clauses of the 1982 constitution (s.38-41) limited the scope of flexibility once agreement was reached. Too many

[66] Premier Bourassa refused to participate in the Canada-round until the final month, when agreement seemed likely. Before August 1992, Quebec only acted as observer at the meetings.
[67] It is also referred to as Charlottetown Agreement.
[68] *Consensus Report* (Charlottetown Accord): 28 August; *Draft Legal Text*: 9 October; Referendum: 26 October.

bargaining positions had to be harmonized, so the more the number of participants in the final round (at the executive level) could be reduced, the more likely they could come to agreement. The pressure to negotiate behind closed doors, like in the Meech Lake process, did not actually ease in the Canada round.[69] To counterbalance this pressure, the referendum entered customary law. I would argue that the explanation for this is not only that Quebec prescribed a constitutional referendum for 26 October 1992, which for the rest of Canada entailed an equal right to have their opinions recorded in referendum too. Rather, in accordance with my argument above, the principle of referendum counterbalances the inescapably (and arguably) elitist nature of the final executive negotiations. After a referendum, legislative ratification would not proceed because eleven (otherwise democratically elected) premiers decided so, but because the people agreed. By this time "macro constitutional frustration" (Russell 41) and "Constitution-fatique" (Oliver 327) had become widespread national diseases with so much symptomatic distrust in politicians that holding a referendum could become a question of principles. Ironically, the referendum had one drawback: it added one more criterion to the troublesome task of amending a constitution that requires an extreme high level of legislative unanimity anyway.[70] This the Charlottetown Accord could not satisfy.

The proposed new concept of citizenship found expression in the Canada-clause:

> 1. Canada Clause
>
> A new clause should be included as section 2 of the Constitution Act, 1867 that would express fundamental Canadian values. The Canada Clause would guide the courts in the future interpretation of the entire Constitution, including the Canadian Charter of Rights and Freedoms.
>
> The Constitution Act, 1867 is amended by adding hereto, immediately after section 1 thereof, the following section:
>
> "2. (1) The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following characteristics:
>
> (*a*) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

[69] Preston Manning, leader of the Reform Party (popular mostly in the Western provinces) called the Accord a Mulroney-deal (Molnár 138).

[70] In fact, the amendments of the Charlottetown Accord required full unanimity in both chambers of all the provinces and the federal parliament; no dissent was allowed.

(*b*) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada;
(*c*) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
(*d*) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
(*e*) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
(*f*) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
(*g*) Canadians are committed to the equality of female and male persons; and
(*h*) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language and, for greater certainty, nothing in this section derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada." (Canada, *Consensus* 6-7)

The triple objectives of the Canada-clause will come under highlight if we read it in the context of the *Shaping Canada's Future Together* proposal. These objectives, I suggest, are as follows: (1) to introduce a new, value-oriented concept of citizenship; (2) to reform federalism with the aim of keeping it together at all costs; and (3) to recognize aboriginal self-government. Compared to the Meech Lake constitutional amendments, in

the Charlottetown Accord the distinct-society clause was displaced by the Canada-clause. Instead of a separately standing distinct-society clause, provisions integrated in the Canada-clause as sections 2.(1)(*c*) and 2.(2) entrench Quebec's distinct identity within Canada. To what extent the clause aims at forming a Canadian identity will be seen in its earlier version in *Shaping Canada's Future Together*:[71]

> 7. A Canada clause in the Constitution. The Government of Canada proposes that a "Canada clause" that acknowledges who we are as a people, and who we aspire to be, be entrenched in section 2 of the Constitution Act, 1867. The Government of Canada believes that it would be appropriate for the following characteristics and values to be reflected in such a statement:
>
> a federation whose identity encompasses the
>
> [. . . (a long list follows with basically the same content as that of the Canada clause in the Charlottetown Accord)]. (Canada, *Shaping* 17, my emphasis)

An attentive observer will quickly point out that the words "values" and "identity," which introduce the text of the clause in the proposal above, are absent from the text of the Charlottetown Accord. Two explanations can be offered for this: first, the Canada-clause is one of the few sections of the Accord that is already a legal draft. As "values" and "identity" are difficult to interpret legally (being much contested words in humanities anyway), it may have seemed safer to avoid their use, especially as their content is listed (*a*)-(*h*) in the clause. Secondly, the usual introductory words for an interpretive clause are "[. . .] shall be interpreted in a manner consistent with [. . .]," which usage the Canada-clause adheres to. Although restrictions of the constitutional language barred these concepts from explicit appearance in the text, I would argue that their implied meaning is there, with the intention to raise awareness of the common values that Canadian citizenship involves. Hence, commitments are emphasized in an unusually subjective way, through the repetitive use of "Canadians are committed to," for example in "Canadians are committed to a respect for individual and collective human rights and freedoms of all people" [section 2.(1)(*f*)], instead of a more officious "Individual and collective human rights and freedoms of all people are to be respected."

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[71] The *Shaping Canada's Future Together* proposal did contain a separate distinct-society clause, but the Charlottetown Accord no longer does: both in its language and form it proposes a fully unified citizenship, exempt from forces pulling apart. Distinctive manifestations of citizenship, such as that of Aboriginal peoples and Quebec—as long as they are incorporated in the all-inclusive notion of Canadianness—do not count as forces pulling apart. At least, that is what the new notion of citizenship makes us believe.

Through its Canada-clause, the Charlottetown Accord fills in a void so deeply felt in the Quebec-round: it symbolically expresses Canada's unity in diversity. It incorporates all cultures existent in Canada and recognizes people's individuality and collectivity, and—because it is an interpretive clause—it interprets the Constitution and the Charter accordingly. Such recognition of belonging together (indeed, the purpose of federalism as a governing form) was absent from the Meech Lake Accord.[72]

Part I.B: "Canada's Social and Economic Union" of the Charlottetown Accord works towards a united Canada in more practical (less symbolic) fields. The range of this proposed clause is wide (from a "comprehensive health care system" to a "reasonable standard of living") with enormous potential political carrying force:

> 4. The Social and Economic Union
>
> A new provision should be added to the constitution describing the commitment of the governments, Parliament and the legislatures within the federation to the principle of the preservation and development of Canada's social and economic union. The new provision, entitled the Social and Economic Union, should be drafted to set out a series of policy objectives underlying the social and the economic union, respectively. The provision should not be justiciable.
>
> - providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible;
> - providing adequate social services and benefice to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;
> - providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post secondary education;
> - protecting the rights of workers to organize and bargain collectively; and,
> - protecting, preserving and sustaining the integrity of the environment for present and future generations.

[72] Even if the purpose of the Quebec-round had been to heal Quebec's wounds, most critics point out that Canada's unity would have needed just as much healing. Yet, for example, the linguistic duality factor of the distinct-society clause had rarely been emphasized as something that keeps Canada together rather than pulls it apart.

> The policy objectives set out in the provision on the economic union should include, but not be limited to:
>
> - working together to strengthen the Canadian economic union;
> - the free movement of persons, goods, services and capital;
> - the goal of full employment;
> - ensuring that all Canadians have a reasonable standard of living; and
> - ensuring sustainable and equitable development.
>
> [. . .] (Canada, *Consensus* 7)

Economic welfare was likely to concern people most in their everyday life, so in Canada's changed constitutional culture it seemed to be a point of consensus that was worth entrenching in the constitution. The Charlottetown Accord did not contain a parallel legal draft wording of the same a clause but neither were dissenting opinions recorded. "The provision should not be justiciable" (Canada, *Consensus* 7) means that, besides the Canada-clause, this is yet another place where values and commitments ("of the governments, Parliament and the legislatures") were recorded for the sake of keeping Canada together.

Some might say that Quebec was a gross loser in the Canada-round because its distinct society was subordinated to the Canada-clause. However, Quebec did not actually lose anything with this, because it did not aim at obtaining new powers but at having its distinct society recognized, which the Canada-clause fulfilled. What is more, it defined the content of Quebec's distinct society and affirmed Quebec's power to preserve and promote it. (That the federal government did not intend to encroach upon Quebec's rights in the name of a unified Canada is proved by the *Shaping Canada's Future Together* proposal, which contains both an embedded and a separate distinct-society clause in more loquacious wording.)

In the rest of the Accord all bargaining partners became winners. Radical redistribution of the federal–provincial powers satisfied provincial (both Western and Atlantic) demands. (Among others, the strong decentralization of federal powers in the Charlottetown Accord necessitated the emphatic Canada-clause and social-economic unity-clause described above.) Provinces received much more independence—what Quebec had demanded was granted to all: exclusive provincial jurisdiction was granted in labor market development and training, culture, forestry, mining, tourism, housing, recreation, municipal and urban affairs; and separate agreements could be negotiated in

immigration and telecommunications. The notwithstanding-clause (s.33) was also retained in the constitution so that provinces could opt out even of federal programs with compensation, provided they offered services of the same standard.

Institutions were also reformed to reflect the population distribution of the country better, yet—to recognize Quebec's distinct culture—Quebec received the power of double majority and other privileges that were considered necessary to preserve and promote its distinct society. Aboriginal peoples received privileges based on their collective (group-differentiated) identity, which I shall discuss in the next subchapter. The Canada-clause made all these possible, because its section 2.(1)(*b*) recognizes first peoples' "right to promote their languages, cultures and traditions and to ensure the integrity of their societies," and section 2.(1)(*f*) respects collective human rights.[73]

The most "creatively imaginative" deed of the Charlottetown Accord was to reform the structure of federalism by introducing a third (Indigenous) order of government. Because of the low percentage of indigenous population, this structural change would probably have little effect on the practical working of the governing machinery. Nevertheless, its significance in the world of ideas is enormous. The third order generates from the inherent self-government of First Nations:

> 2.(1)(*b*) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada; (Canada *Consensus* 6)
>
> 41. The Inherent Right of Self-Government
>
> The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the Constitution Act, 1982, section 35.1(1).

[73] Instead of "collective," "group-differentiated" would be a more exact and less controversial term. However, the Accord uses the former term, so I need to compromise my preferred usage in this context. I have discussed implications of these terms earlier in subchapter 2.1.

> The recognition of the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada. (Canada, *Consensus* 17)

According to the Charlottetown Accord, the Canadian governing system consisting of the federal and the provincial orders would have received an additional (third) order which, concerning its mandates, would have taken over tasks from all the governing levels (federal, provincial, municipal), thus forming its own system. Such a radical change could take place because due to Quebec's demands the federal-provincial balance had to be broken (especially as the principle of provincial equality dictated that anything "granted" to Quebec should also be granted to all the others). The governing power of the third order was construed as non-debatable because of its inherence, and it got protection in the constitution as a right of self-government. Thus, Radha Jhappan points out, the third order of indigenous self-government received stronger protection in the proposed constitutional accord than either federal or provincial powers, neither of which were expressed as rights to govern (237-38).

Although the proposed change was radical, it was not final. The third order would have been justiciable only after a five-year delay, and the Charlottetown Accord reported that most issues around amendments that involve aboriginal peoples still needed to be further negotiated. The Accord was far from being a final document that proposed to close the constitutional rounds.[74] It was rather a beginning—upon a consensus to keep the country together—of other rounds, until something final is achieved in some distant future. Few things remained unchanged in the federal system during the Charlottetown process, two of which however are cornerstones of the Canadian federation: provincial/regional equality [Canada clause 2.(1)(*h*)] and the equality of individuals [2.(1)(*e,f,g*)]. The Charter has remained a sacred document often cited in the hottest constitutional debates. As Stephen McBride points out, decentralization to the provinces accords with the interests of a liberal political economy, but it is contrary to the power of the federal government to build a strong national identity. Yet, the Canada-clause and the *Shaping Canada's Future Together* proposal demonstrate that the federal government tried the best.

[74] In twenty-nine issues the Accord proposed further negotiations (Molnár 133). See also Russell 47.

Inherent Right to Self-Government

Issues that are useful for our discussion in this subchapter have been introduced in previous sections of this dissertation. I have touched upon the concept of inherence in subchapter 2.1 "Indigenous Peoples and the Constitution" and its first subsection "Aboriginal Rights in the Constitution." In subsection "National Minorities and Group-Differentiated Rights," I have discussed the theoretical foundation for claims made by societal cultures within a larger polity. I subchapter 3.2, in the section entitled "Treaty, Self-Determination, Self-Management" I have differentiated between the concepts of self-government and self-determination. I would like to summarize briefly what conclusions I have drawn. They will serve as premises to continue the discussion.

1. The Meech Lake Accord did not recognize inherence as the origin of aboriginal rights. The federal structure that the accord proposed excluded the notion of Aboriginal peoples as an independent and distinct societal body.
2. Advocates of inherence were vocal among Aboriginal spokespersons and in academic writing even before Meech. They argue that inherence as a legal term was recognized by early contracts (such as the Royal Proclamation of 1763 and the Treaty of Niagara 1764) that need to be considered as foundation stones of the Canadian constitution.
3. The right to self-government is the political manifestation of peoples' universal, internationally recognized right to self-determination. Self-determination is not fully achieved without self-government, however, federal governments generally seek to keep self-determination within the framework of the state, even if this might result in limitations imposed on that right. This is carried out in the interest of the nation, especially because maintaining economic stability and prosperity is considered paramount. To ensure that, they keep programs for establishing a national identity firmly in hand and attempt to establish an all-Australian, all-Canadian sense of citizenship.

Many critics argue that the federal government in the Charlottetown Accord did not actually break with its previous stance in the Quebec-round. Both the arguments and the pratice of negotiations remained the same (Molnár 128; *Charter*). Although it may be so in the Canada-Quebec relations that most analyses focus on, it is certainly a false proposition if we consider the relationship of Canada and the First Nations. Compared to the federal point of view in the Meech Lake Agreement, a most radical change was agreed

to: the Charlottetown Accord acknowledges the inherent aboriginal right of self-government. This is not to say that such a recognition came unexpected or without precedents. It had been demanded in vain in the Quebec-round, and only after Elijah Harper expressed his opinion in a non-orthodox way did the federal government realize that Aboriginal power had become a voting power in Canadian constitutional life. A direct result of this is the recognition of the right to inherent self-government in the Charlottetown Accord. As an initial step in the Canada-round, the *Shaping Canada's Future Together* federal proposal ventured to recognize self-government as an aboriginal right, without specifying the origin of that right, that is, declaring whether it is inherent to the Indigenous peoples or derivative from the constitution or common law. Such an omission is quite understandable if we know that between 1983-87 four constitutional conferences on aboriginal rights failed to agree on their content, and so self-government, let alone inherence as a maximal demand, could not find its way into the constitution.

The series of general debates, hearings, and negotiations that followed the federal proposal made it obvious that the four Aboriginal organizations participating in the bargaining (AFN, NCC, ITC, MNC)[75] would not sacrifice their minimal demand to constitutionalize inherent right of self-government based on prior occupation. Their position gained wide public support. Such a constitutional recognition would have been equal to acknowledging that at the time of the arrival of the Europeans, First Nations had already lived in well-organized sovereign nations. Allowing for such a recognition in the constitutional accord was not simply a twist of law but acceptance of the change in historical discourse (Jhappan 230-33, Cairns ch.5), which, according to Cairns, signifies a political change from assimilation to parallelism.

Political and constitutional sanctification of the notion of inherence (which was widely accepted in historiography as well as academic legal[76] and political studies) raised further concerns about the scope and exclusivity of such a right.[77] The Charlottetown Accord maintains an inherent right of self-government as limited by the fiduciary relationship between the First Nations and Canada. Items relevant to this in the accord are:

41. The Inherent Right of Self-Government

[75] The four major Aboriginal organizations recognized for the purposes of constitutional bargaining were the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Inuit Tapirisat of Canada (ITC), and the Métis National Council (MNC).
[76] The Supreme Court of Canada in *Sparrow* 1990 also ruled for inherence based on the prior sovereignty of Indigenous peoples.
[77] See also subchapter 2.1.

> The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the Constitution Act, 1982, section 35.1(1).
>
> The recognition of the inherent right of self-government should be interpreted in the light of the recognition of Aboriginal governments as one of the three orders of government in Canada.[78] (Canada, *Consensus* 17)

The second paragraph of the above item 41 of the Charlottetown Accord places inherence within the context of Canada ("as one of the three orders of Canada's government"), thereby placing a limit on self-government. From the point of view of the confederation, such a limit serves the same purpose as the Canada-clause: to keep the country together while simultaneously allowing for as much diversity as possible. Eventually, then, the Charlottetown Accord finds a compromise "in the great debate between Aboriginal self-government and the demands of Canadian federalism" (Olive Patricia Dickason[79] qtd. in Cairns, back cover). It expresses that "we are all citizens together in the Canadian federation, differences and all. Oddly this fits in with what the elders teach about the interconnectedness of the natural world" (Dickason qtd. in Cairns, back cover).

Concerning the exclusivity of the inherent right of self-government, the Charlottetown Accord does not give a final say whether Indigenous self-government (that is, the third order) is supreme or subordinate to provincial power. Certainly, Aboriginal self-governments gain powers that were previously practised by federal, provincial, or municipal levels,[80] and so they make up their own, independent system. Also, the Charter applies directly to aboriginal governments, rather than through a provincial or federal

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[78] A contextual explanation is also attached, which was heretoforth missing from the constitution:

> The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:
>
> (*a*) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
>
> (*b*) to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.
>
> Before making any final determination of an issue arising from the inherent right of self-government, a court or tribunal should take into account the contextual statement referred to above, should enquire into the efforts that have been made to resolve the issue through negotiations and should be empowered to order the parties to take such steps as are appropriate in the circumstances to effect a negotiated resolution. (Canada, *Consensus* 18)

[79] She is professor emerita of history at the University of Alberta, and a recipient of the Lifetime Achievement Award from the National Aboriginal Achievement Foundation.

[80] See the contextual statement quoted in footnote 78 above.

mediator. Similarly to the provinces, aboriginal self-governments are ensured access to the much disgraced use of the notwithstanding-clause (s.33 of the Charter):

> 43. Charter Issues
>
> The Canadian Charter of Rights and Freedoms should apply immediately to governments of Aboriginal peoples.
>
> [. . .]
>
> The legislative bodies of Aboriginal peoples should have access to section 33 of the Constitution Act, 1982 (the notwithstanding clause) under conditions that are appropriate to the circumstances of Aboriginal peoples and their legislative bodies. (Canada, *Consensus* 18)

The Charlottetown Accord deals with First Peoples in a separate part IV, devoted to "A. The Inherent Right of Self-Government," "B. Method of Exercise of the Right," and "C. Issues Related to the Exercise of the Right." Besides this, provisions for the Senate (Part II.A), the Supreme Court (Part II.B), and the House of Commons (Part II.C) all contain an item on Aboriginal peoples' role in that institution.[81] Especially illustrative of such a separate treatment is item 40 of the Accord:

> 40. Aboriginal Peoples' Protection Mechanism
>
> There should be a general non-derogation clause to ensure that division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples.

This item is especially illustrative because it closes the part of the accord that deals with the redistribution of federal and provincial powers, and relegates a whole range of powers (listed in the previous section of this chapter)—among them culture—exclusively under provincial legislation. The above item explicitly exempts aboriginal rights including those arising from inherent self-government from provincial powers, and subordinates them only to the federal fiduciary responsibility for Aboriginal peoples, expressed elsewhere in the accord:

> 29. Culture
>
> [. . .] These changes should not alter the federal fiduciary responsibility for Aboriginal people. The non-derogation provisions for Aboriginal peoples

[81] Item 9: Aboriginal Peoples' Representation in the Senate (*)
Item 20: Aboriginal Peoples' Role (*) [Supreme Court]
Item 22: Aboriginal Peoples' Representation (*) [House of Commons]

> set out in item 40 of this document will apply to culture. (Canada, *Consensus* 15)

Inasmuch as this argument is valid, the exclusivity of the inherent right to self-government can be considered supreme (to provincial government).

The text of the Accord, however, also shows that achieving a supreme self-government right is far from an unanimous victory. An asterisk at the end of all items[82] dealing with Aboriginal role in major institutions of democracy—which would empower them with governing share based on their inherent right to self-government—signifies much context and therefore further negotiations: victories unwon. If realized, several proposals would have promoted a subordinate self-government right rather than a supreme one. I will quote a few items to illustrate my point:

> 9. Aboriginal Peoples' Representation in the Senate
>
> [. . .]
>
> Aboriginal Senators should have the same role and powers as other Senators, plus a possible double majority power in relation to certain matters materially affecting Aboriginal people. These issues and other details relating to Aboriginal representation in the Senate (numbers, distribution, method of selection) will be discussed further by governments and the representatives of the Aboriginal peoples in the early autumn of 1992. (*)
>
> 20. Aboriginal Peoples' Role
>
> The structure of the Supreme Court should not be modified in this round of constitutional discussions. The role of Aboriginal peoples in relation to the Supreme Court should be recorded in a political accord and should not be on the agenda of a future First Ministers' Conference of Aboriginal issues.(*)
>
> Provincial and territorial governments should develop a reasonable process for consulting representatives of the Aboriginal peoples of Canada in the preparation of lists of candidates to fill vacancies of the Supreme Court.(*)

[82] Asterisks "indicate areas where the consensus is to proceed with a political accord" (Canada, *Consensus* 6).

> Aboriginal groups should retain the right to make representations to the federal government respecting candidates to fill vacancies on the Supreme Court.(*)
>
> The federal government should examine in consultation with Aboriginal groups, the proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers Aboriginal issues.(*)
>
> 22. Aboriginal Peoples' Representation
>
> The issue of Aboriginal representation in the House of Commons should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it has received the final report of the House of Commons Committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing.(*)

Item 60 of the Accord about Aboriginal consent—even if it is not asterisked—also shows that the only consensus achieved was that there was need for further discussions. Under the pressure of the vital importance of Aboriginal consent to constitutional amendments, the text expresses the urgency to come to consensus before late October 1992:

> 60. Aboriginal Consent
>
> There should be Aboriginal consent to future constitutional amendments that directly refer to the Aboriginal peoples. Discussions are continuing on a mechanism by which this consent would be expressed with a view to agreeing on a mechanism prior to the introduction in Parliament of formal resolutions amending the Constitution. (Canada, *Consensus* 23)

Based on the analysis above, it can be concluded that debated areas in the Accord only occur where the exclusivity of self-government is touched upon, which means that legislators tried to avoid recognizing it as a supreme right. Proposing constitutional recognition for an inherent and limited Aboriginal self-government was a radical step enough. Defining the other touchy issue—the content of aboriginal rights—was also left out of the constitution. It was left to the courts to define them on a case-to-case basis, judging treaty-by-treaty and nation-by-nation. The contextual statement proposed by the Charlottetown Accord in item 41 was intended to assist their work. Also for this purpose

and in order to give time both to provinces and aboriginal self-governments to set up governing infrastructure or reshuffle powers, the Accord proposes to delay justiciability of the inherent right of self-government for a five-year period (item 42). It almost goes without saying that this provision is also an asterisked one.

A most interesting point of discussion is the relationship of the inherent right of self-government to distinct society. Unless Quebec had demanded overview of the constitution to have it recognize Quebec's distinct society, Indigenous peoples may not have hoped for constitutional recognition of their rights until the unforeseeable future. The slogan said, "If anyone is more distinct, sure it is the peoples of the First Nations" (Georges Erasmus). Yet the Charlottetown Accord does not contain the concept of an aboriginal distinct society. I can offer the following explanations for that: (1) I argue that an inherent aboriginal right to self-government (as a third order of government) already implies and contains distinctness. That is because—indirectly—if it were not so, then Aboriginal peoples would not have received the right to separate government. (2) Entrenching the concept of Aboriginal peoples' distinct society *per se* would have raised millions of problems because, first of all, the diversity of Aboriginal nations that amounts to more than "Indians, Inuits, and Metis" would have necessitated usage in the plural ("distinct societies"), and it would have been a vain effort to define the concept and what it entails this way. (Similarly, definition of Quebec's distinct society remained an unresolved problem in the Meech Lake process: the concept remained undefined and consequently debatable and open to attacks. The Charlottetown Accord resolved this problem, as I will explain in the following section of the chapter.)

We cannot discuss the inherent right of self-government without clarifying how its recognition fits into a system of liberal principles of equality. As we may recall, section 2.(1)(*f*) of the Canada-clause ensures respect (that is, constitutional protection) to both individual and collective rights. This is based on the fundamental liberal notion of equality. How come, then, that a societal group can be awarded a special right (self-government) based on their Aboriginality? How come that this special right may entitle them to evade individuals' human rights so thoroughly protected by the Charter? Aboriginal women (represented by the Native Women's Association of Canada [NWAC]) attacked the Charlottetown Accord most ardently because, although they welcomed indigenous self-government, they felt their gender equality rights (Charter s.28) endangered. They argued that if the constitution recognizes indigenous self-government, then the federal government will lose power to enforce the equality of male and female

persons in traditionally patriarchal aboriginal societies (Vickars 265). The problem of representation also surfaced during the negotiations, because Aboriginal women defending their charter rights doubted whether the four officially recognized aboriginal organizations, predominantly under male leadership represented them adequately. The outcome of this debate is aptly summarized by Radha Jhappan:

> As a result of NWAC's publicity campaign, the court challenges, and the support of groups such as the National Action Committee on the Status of Women, the final legal text of the Charlottetown Accord was amended to include the kind of guarantee that NWAC had been demanding. Section 35.7 (replacing the old s. 35[4]) provided that "Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this part are guaranteed equally to male and female persons." Although it still did not specify that gender equality would apply to the legislative actions of Aboriginal governments, many of the provincial native women's organizations began to formally endorse the Accord after the legal text was released. Thus, s. 35.7 represented a partial victory for NWAC, without whose efforts it would not have been included. (Jhappan 252)

If we raise these arguments to theoretical level, the problem of potentially conflicting gender equality and aboriginal rights addresses a crucial unresolved issue of liberalism: the frontier between individual and group-differentiated rights.[83] To address this issue, Kymlicka uses the terms "external protections" and "internal restrictions," and he opines, on the one hand, that in order to achieve the ultimate good of sustaining peoples' cultural identity, tenets of liberalism can and need to be compromised with external protections. On the other hand, internal restrictions can only be tolerated unless they collide with individual human rights. In our Canadian case the inherent right of self-government, which is explicitly and emphatically protected by the Canada-clause and is not subordinated to Charter individual rights, would provide external protection to Indigenous societal cultures. Moreover, Aboriginal governments founded on the basis of an inherent aboriginal self-government right would eventually constitute the third order of

[83] Quite consciously I try to avoid using "collective rights," even if many legal texts still operate with this term. Although section 2.(1)(*f*) in the Canada-clause also refers to "individual and collective rights," I think it is more fortunate—and both legally and theoretically more exact—to use "group-differentiated rights" instead, as I have explicated in subchapter 2.1.

Canadian government. Simultaneously, in order to avoid the real danger of internal restrictions, a proposed constitutional amendment was, at a late stage, entered into the legal draft of the Accord to protect gender equality rights. Hardly could federal executives and legislators do any more against possible internal restrictions within Indigenous cultures, unless they wanted to hinder prematurely the development of self-governing societies that did not opt for the liberal way. That is even more so because until after the five years' delay aboriginal self-governments stand up, such a development was not to exist legally and could not form a precedent. Yet, unverbalized "internal restrictions" may lead to future legal debates about the constitution, often on a case-to-case basis, which might increase the prominence of courts (especially the Supreme Court) in policy making, or so many people argue. I will analyze such a role played by jurisprudence in chapter 5, in an Australian context.

Biculturalism, Multiculturalism, and Group-Differentiated Rights

In the previous subchapter I have argued that the Charlottetown Accord introduced a fundamentally new vision of the confederacy by instituting inherent indigenous self-government as the third order of the state. In order to understand how new and radical the change that occurred in the federal vision was, it is advisable to look into the other two available options still on the political agenda: biculturalism and multiculturalism. I will argue that the Charlottetown Accord dismissed the two-legged (bicultural) and multi-legged (multicultural) pan-Canadian sociocultural stances, as well as Trudeau's multiculturalism in bilingual context that was born out of the marriage of these two. In advance, I need to say that I will not write about the structure of government and politics but rather about visions that manage the cultural/national identity inculcating that structure. Then I will draw the conclusion that in the case of such a diverse society an application of group-differentiated rights/citizenship besides individual rights gains extraordinary importance. Similarly to these sociocultural models, "group-differentiated rights" is a collective term too, which covers various legal constructions depending on the model implied. If they were not used, Canada would lose its distinctive and definitive characteristics, (top politics could rightfully be charged by making the country similar to the predominantly individualist USA), and many decades of biculturalism or multiculturalism in bilingual context policy would go to waste.

The heroic modern age of biculturalism lasted until the early 1970s. Public hearings and published reports of the Royal Commission on Bilingualism and Biculturalism 1963-1970 commanded much media publicity, and "much of the influence of the Commission on public consciousness—on the way people defined and debated French-English and other cultural and linguistic problems—came from these meetings and media reports on them" (Oliver 315-16). The Commission was appointed "to document the sources of the crisis and to suggest paths to a federal future of equality between 'the two founding races' " (McNaught 307). Consequently, substantial research focused on the federal crisis, and it also may have surfaced a discourse of Canadian identity, to which it gave special emphasis. Besides diagnosing, it may have strengthened the identity crisis, simply by talking about it. Some of the Commission's achievements are the Official Languages Act, 1969; the decision of New Brunswick to turn into an officially bilingual province; radio and television in both languages, transformation of language learning patterns by flourishing French immersion courses; and the quickly-spread use of "Anglophone" and "Francophone," which shifted the focus of attention from ethnic/national identity to language (Oliver 316).

The mainspring of the Commission was "equal partnership between the two founding races" (Oliver 317). The propagated notion of equal partnership was based on the historical ground that the English and the French were founding peoples of Canada. However, the "full concept of equal partnership and its implications for Canadian federalism were [. . .] never truly explicated" (Oliver 320), because individual-based interpretations and community-based interpretations could not agree. The English side tended to emphasize individually chosen cultural affiliation as a basis of partnership, whereas the French-Québécois side emphasized the historical rights of a community to be equal partner in the confederacy. Kenneth McNaught makes a similar observation:

> In general the Report also endorses the concept of *deux nations* (in a sociological sense) as the basis of the Canadian federal state, but stops short of basic constitutional changes that would make Quebec *the* nation-state of the French Canadians. Rather, it underwrites the proposition that the English-speaking nation and the French-speaking nation should co-exist on an equal footing everywhere in Canada, while recognising that this ideal will be achieved much more slowly in the west than in the east. (308)

However, a shift towards a more deeply engraved 'nationhood' occurred in Quebec first during the fight for constitutional acknowledgment of their "distinct society," then in even

stronger separatist attempts (which are far from being over). This vision regained impetus after the failure of the Meech Lake Accord, when "the rest of Canada rejected Quebec"—or so they thought. Quebec seemed to act as if the rest of Canada had been a separate country. Separate parliamentary committees were set up to investigate about the way to lead into the future. In Quebec it was the Bélanger-Campeau Commission and the Allaire Committee, in Canada the Beaudoin-Edwards and the Beaudoin-Dobbie Special Joint Committees. Referenda were only held in the rest of Canada after Quebec had decided to have one of its own.

Nevertheless, the Charlottetown Accord apparently dismissed the bicultural model. It did not even enter an independent distinct society-clause,[84] other than the one incorporated in the Canada-clause. (Interestingly, the original *Shaping Canada's Future Together* proposal had contained a separately standing section about Quebec's distinct society with a contextual statement about its content, but during the hearings, parliamentary committees, and negotiations they amalgamated into the Canada-clause.) Such a structuring of the Accord signaled formally that although Quebec's distinct society is fully acknowledged in the constitution, it is only yet another component of the confederacy. In the interpretive clause, the unity in diversity principle seems more fundamental than the distinct identity of a particle of the unity, although the existence of that distinct particle deserves special protection because it makes the whole of Canada distinctive as a federation that has "a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition" [Canada, *Consensus* 6, item 1, section 2.(1)(*c*)]. Although the Canada-clause affirms the "role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec" [section 2.(2)], the implied bilingual nature of the country is not specifically described in the Canada-clause because unity in diversity is more important.[85] Quebec's distinctness is acknowledged, but nowhere in the Accord is it mentioned that this might entitle Quebec to a different or separate kind of self-government from those of the other provinces. This is opposite to the tendency of measures regarding Canada's First Peoples, who get a separate part in the Accord (Part IV: First Peoples), besides being mentioned in the Canada-clause and elsewhere in items about relevant governing institutions.

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[84] A major difference since the version of the Meech Lake Accord is that the Charlottetown version defines the content of the distinct-society clause: "2.(1)(*c*) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition."

[85] The Charter, which was not modified in the Canada round, already contains the protection of official bilingualism.

There are, however, certain signs in the Accord that biculturalism has not been fully abandoned: Quebec has more weight in governing institutions than if it were just another province. These are (1) that Quebec holds the right to double majority voting in Senate about "bills that materially affect French language culture" (item 12); (2) that of the nine members of the Supreme Court "three must have been admitted to the bar of Quebec" (item 18); and (3) "a guarantee that Quebec would be assigned no fewer than 25% of the seats in the House of Commons" (item 21). These allowances were designed to satisfy Quebec's minimal demands (the five-point list of the Meech Lake Accord) that had been kept on the agenda since 1985.

By the mid-1970s, federal Canada has diverged from biculturalism towards multiculturalism, and as a compromise of transition Prime Minister Trudeau introduced the policy as "multiculturalism in bilingual context." Kenneth McNaught offers a credible interpretation of Trudeau's motivation:

> Trudeau and Pelletier[86] explained their decision on the ground that it was absolutely essential to prove to Quebec that the aspirations of French Canada could find clear and influential expression not only in Quebec City but also in Ottawa. Trudeau especially feared that Quebec *nationalisme* was driving in racist direction which would not only sunder the Canadian federal state but would also lead the province into a humiliating introversion and semi-fascism. The remedy, he thought, was to reassert Canadianism for which Laurier and Bourassa had once stood [. . .]. (310-11)

A wish to prevent Quebec from a potentially racist nationalism explains the introduction of multicultural policies better than mere humanitarian goodwill (which rarely works in high politics). It also explains why Trudeau once poses in the role of a nationalist, other times in the role of a liberal in the literature.

Although Trudeau's vision of Canada included aboriginal people [*sic*], their struggle to separate from the multicultural model has been successful: they won major battles in this fight physically at Oka,[87] and in principle by rejecting the Meech Lake Accord. Illustrated in figure 6 below, the model offered by the Charlottetown Accord

[86] Gérard Pelletier, editor of the large Montreal daily, *La Presse*; Trudeau's close friend.

[87] In July 1990 Mohawks at Kahnesatake near Oka, Quebec, barricaded the construction of a golf course at a field that was under land claim as their ancestral burial site. The blockade could only be dissolved two and a half months later. The event which is widely known as the Oka crisis involved gun fights between Mohawk warriors and the Quebec provincial police, and the Canadian army was eventually called in.

stands closer to “multiculturalism in bilingual context” than to “biculturalism”, but only if we ignore the indigenous element. (This I dare say because the distinct-society clause is subordinated to the Canada-clause.)

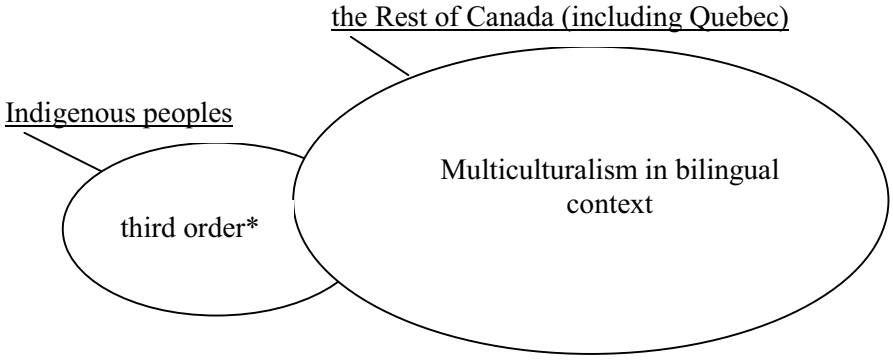

Figure 6. Cultural model in the Charlottetown Accord.

Indigenous self-governments are to develop their own cultural model, because as third order they are responsible for their own cultural identity. This is explicated in the contextual statement of item 41 of the Charlottetown Accord:

> The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:
>
> (*a*) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
>
> (*b*) to develop, maintain and strengthen their relationship with their lands, waters and environment
>
> so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.

Any limits on this responsibility are denied in item 40, the non-derogation clause:

> 40. Aboriginal Peoples’ Protection Mechanism
>
> There should be a general non-derogation clause to ensure that division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples.

Nevertheless, there are also some awkward issues around the model of multiculturalism in bilingual context. For one, the term “multiculturalism” does not even occur in the Accord. Some degree of beating about the bush is being done instead, most probably so that Quebec would not be frightened off. The Canada-clause, which—in

theory—is intended to describe Canada's society, avoids using the unpopular term and substitutes a longish circumnavigation, which points at a descriptive meaning rather than the policy itself. In this way, sociological reality is not directly connected to government policy:

> 2.(1)(*e*) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity[.] (Canada, *Consensus* 6)

The relegation of culture exclusively into provincial hands even questions the strength of the position of the federal Multiculturalism Act. Item 29 of the Accord says:

> 29. Culture
>
> Provinces should have exclusive jurisdiction over cultural matters within the provinces. This should be recognized through an explicit constitutional amendment that also recognizes the continuing responsibility of the federal government in Canadian cultural matters. The federal government should retain responsibility for national cultural institutions. The Government of Canada commits to negotiate cultural agreements with provinces in recognition of their lead responsibility for cultural matters within the province and to ensure that the federal government and the province work in harmony. [. . .] (Canada, *Consensus* 15)

The Canadian Multiculturalism Act on the other hand gives a wide range of powers (recognition, promotion, encouragement, and assistance) to federal institutions and the minister, which in many fields may clash with the exclusive provincial power. For example, to "encourage and assist the business community, labour organizations, as well as public institutions, in ensuring full participation in Canadian society, including the social and economic aspects [. . .]" [section 5.(1)(*d*)], or to "facilitate the acquisition, retention and use of all languages that contribute to the multicultural heritage of Canada" [s.5.(1)(*f*)] might not be welcome all around the country. This may be so especially because the federal government also gave up its position in labor market and training by relegating them into exclusive provincial jurisdiction in item 28 of the Accord, which is an important area of incorporating new migrants into the community. To let sleeping (ethnic) dogs lie multiculturalism still enjoys protection in the Charter, but the implementation of the policy might run into difficulties because of rearranged federal-provincial jurisdictions.

However radically new and welcome the proposal of an Indigenous third order (self-government) in the Charlottetown Accord was, the texture of the document remained rather uneven. It could not take sides with any clearcut cultural model (as I have shown, even its indigenous provisions were asterisked), and yet it turned this drawback to advantage: an accord could be achieved. In "Canada's interest" the text tried to satisfy all parties (including Indigenous peoples), but at the same time it ignored that "Canada's interest" was no longer unanimously interpretable.[88] That is especially because although all the major partners (federal, Quebec, Atlantic and Western provinces, Indigenous peoples) shared a common understanding of Canada's supreme sovereignty and the importance of an all-Canadian identity, they disagreed about the content that describes it. For this reason the Charlottetown Accord carried the fingerprints of all cultural models (figure 7), which opened it to attacks for being a badly construed construction:

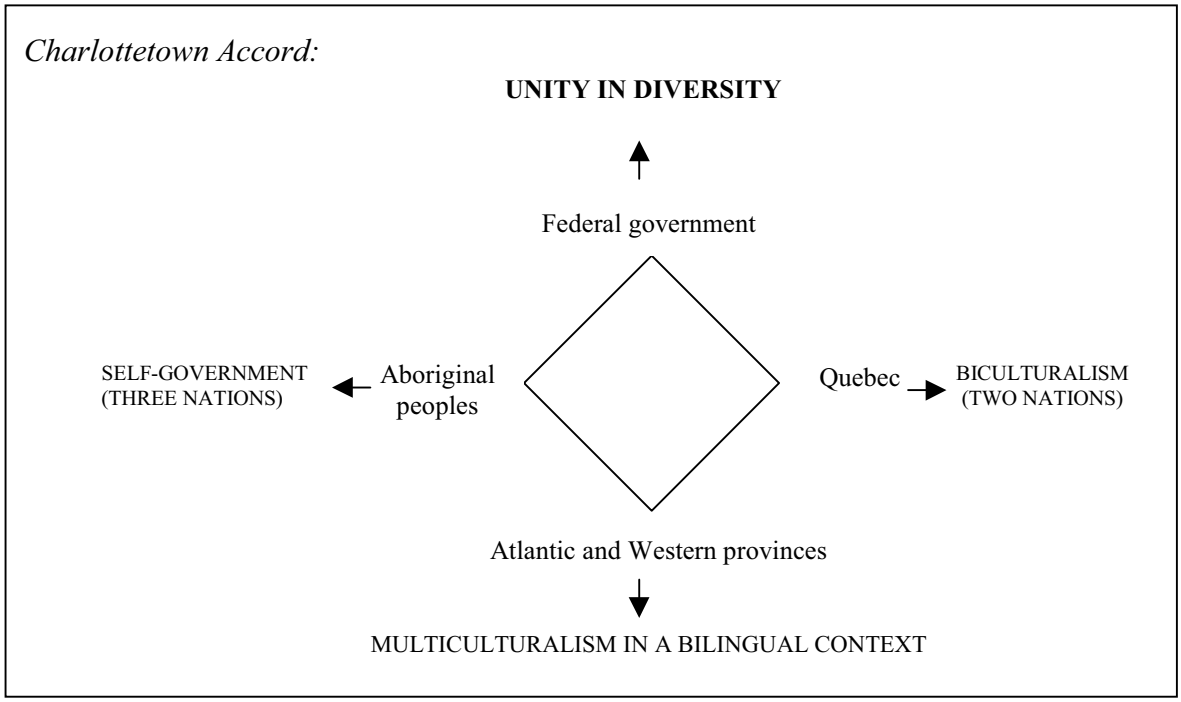

Figure 7. Attempted cultural models during the Canada round.

The disheveled nature of the Accord and the failure of the attempts directed at getting it accepted (that is, the unsuccessful referenda) steered Canada towards parallelism. The Charlottetown Accord, however, offers a reading that leads to an altogether different conclusion. The Accord can be regarded as Kymlicka's theory about

[88] The referenda on the Charlottetown Accord produced majority "No" votes in Quebec and the Western provinces (55% of all Canadians), and majority "Yes" votes in Ontario, the Atlantic provinces, and the Northwest Territories (45% of all Canadians) (Molnár 143).

minority rights being realized. If we consider the triple usage of Kymlicka's group-differentiated rights (self-government rights, polyethnic rights, special representation rights), it turns out that each societal culture in the Charlottetown Accord (as a result of many years' struggle) gained exactly what their national or ethnic identity in the confederacy entitled them to. If the federal government as director of the negotiations had been able to carry out the theory consistently in the Accord (by omitting the asterisks, for example), then a more enlightened healing could have started. At this point, however, we encounter another problem: to what extent should an academic elite be allowed to influence policymaking? Ironically, however much the need for leadership was emphasized, those who took up the role could easily find themselves labeled "elitist, anti-democratic bunglers." Trudeau criticized political and academic actors in the constitutional drama as such, both at the Meech and Charlottetown stages. There might be some truth in his publicly aired and widely shared opinion if we consider, as Richard Mulgan points out, that willingness to take on some imagined guilt for past injustices is restricted to a limited section of society for moralistic reasons: "Moralising liberals are particularly prone to take on moral responsibility for the sufferings of others and are very comfortable with feelings of 'collective self-reproach'" (185). In chapter 5 I will address the issue of new factors in public opinion formation outside politics: courts and the intelligentsia.

4.1. Advancing Parallelism

> "We can never achieve the goal of peaceful coexistence as long as we continue to accept the classic notion of sovereignty as the framework for discussions of political relations." (Alfred 53)

In this subchapter I will survey directions of Quebec and First Nations politics that strengthened after the failure of the Charlottetown Accord. The federal government will eventually have to face these tendencies by either allowing or repressing parallelism. Solutions which, previously, were to be avoided at all costs in "Canada's interest" moved to the foreground after the construction built in the Canada-round had been irrevocably ruined. Quebec and First Nations—the two major sources of conflict—both had plans to upset the current model of state.

Secession

Quebec's secession from Canada came to the foreground because the degree of constitutional asymmetry achieved in the Charlottetown Accord was far from satisfactory for Quebec sovereigntists. Underlying principles for the assertion of sovereignty included sociocultural, historical, political, economic, and legal arguments. (1) Awareness of being different and distinct served as sociocultural foundation for secession; and (2) a national history provided its historical basis. (3) In politics, the referendum about secession in 1980 and Canada rejecting Quebec since then provided precedent; (4) in economics, the wish to improve weak economic performance; and (5) in law, international acknowledgement of peoples' right to self-determination opened possibilities. However strong the intent to secede after Charlottetown was, all these five basic arguments induce considerable reserves.

(1) *Quebec is a distinct society*: Quebec's constituting a distinct society has hardly been seriously disputed. Conflicts originated, however, from the attempts to constitutionalize the concept as such and to gain distinct legal and political rights based on it. In a country that is more closely committed to equality in its fundamental ideology than to special rights, the realization of such demands met inevitable obstacles.

(2) *Quebec's national history proves and demands sovereignty*: Although repercussions of historicism in political discourse often sound rather obsolete, federalism and party politics may well be able to entertain alternative national histories. Differing interpretations of history within broad academic frameworks should be welcome for cultural enrichment. However, to base legal and political arguments on interpretations uncritically might shake those arguments. A constructivist approach to political issues would be more progressive than a primordialist one.

(3) *Since the Quiet Revolution a majority political will to assert sovereignty has developed in Quebec because of its treatment by the rest of Canada*: Although the Quebec referendum in 1980 demonstrated considerable political and public will to declare sovereignty and secede from Canada, eventually the motion did not carry: the majority of people in Quebec did not authorize their government to proceed with separatist politics. From the rest of Canada's perspective, attempted solutions to the crisis of the constitution since 1980 revolved around the incentive to strengthen and unify Canada. After this attempt backfired in 1982, all further efforts and compromises were made "to bring Quebec back into the constitution" and not to frighten it away.

(4) *Economic performance would improve in a sovereign Quebec*: Geopolitical fundamentals make it highly predictable that a Quebec outside Canada would not fare more advantageously in market relations. Moreover, it would resign from the benefits of regional transfer payments from the federal budget (Young 9-13). Robert A. Young's extensive analysis shows that the economic effects of Quebec's secession on Quebec and the Rest of Canada (ROC) would be detrimental to both sides; definitely so in the short term. In the long run the degree of recession would mostly vary upon the degree of economic integration agreed on. Options for this range from full economic union to common market to customs union to multilateral treaties to zero relations (like between any two sovereign states). To take the best option, if economic union was chosen, then economic welfare would still depend at least on the nature of the separation process and the degree of political integration opted for, and economic performance would certainly not improve until political stability is achieved (Young 29-47).

(5) *All peoples have the right to self-determination*: Peoples' right to self-determination is recognized in international law, but no international forum would interfere with the domestic affairs of a country (Canada), unless a military situation developed. Because the Canadian constitution requires unanimity in issues that a secession would alter, it would be highly difficult but not altogether impossible to manage the

process constitutionally: all efforts will have to be made to proceed constitutionally (Young 245-54).

Much was at stake, but despite the obvious public sentiment the federal government continued to act on the "don't cross the bridge until you come to it" principle and, for strategic reasons, did not seem to prepare for the occasion when Quebec actually decides to secede. Academics seemed to speculate more; Alan C. Cairns, for example, opined that

> [i]n Canada-without-Quebec, the federal government loses territory, citizens, a historic identity, some of its bureaucracy, and many of the political responsibilities that flowed from its former management of a linguistically dual people. Little preparation by the federal government for such an unsought goal is likely. (qtd. in Young 181)

Analyzing the coolheaded federalist behavior that did not start preliminary negotiations about the terms of secession, Arthur Tremblay pointed emphatically at the role of economic interests in the game: "such a dismantling of the common market and monetary union would clearly be a case of shooting oneself in the foot!" (qtd. in Young, fn.40 to ch.12). Retrospectively, we know that federal strategy went home but only marginally as the 1995 Quebec referendum failed. How permanent this "success" of federal Canada proves to be will depend on further explications of the economic interest highlighted by Tremblay, which clearly is a factor that keeps the country together. The political integration of a country, however, is determined by less objective factors than the financial good. As Peter Young demonstrates, it is possible to live in an economic union without a high degree of political integration; however, he also states that the higher the level of economic integration, the better it is for economic performance. It would, then, be possible for a Canada to remain a major actor among welfare states even after Quebec's secession provides a different form of political structure (a kind of sovereignty-association) for the country or countries. Still, this new political integration will need to be glued together by subjective factors like citizens' sense of belonging to a common national identity (or supra-national identity, if primary affiliations already exist). So, in the interim "pre-secession vacuum" the federal government had no other choice but to continue to try and accommodate subjective interests, to articulate a national identity and a common sense of belonging so as to strengthen its virtual position as the glue that keeps itself together.

Two-Row Wampum

Of the 376 pages of Young's extensive analysis of the secession of Quebec and the future of Canada, about four pages are devoted to Native peoples' demands and their future within Quebec and ROC. He concludes is that First Nations will be net losers because *realpolitik* will render their demands minimal importance among the many issues that need to settle so that secession could proceed. They would lose to the "interest of Canada" which would maintain that the troublesome operation of Quebec out of the body of Canada should proceed as quickly, as constitutionally, and with as little economic disrupture as possible. Within this framework, there would be neither time nor serious political will to change the status quo regarding Indigenous peoples (because the process would require extensive negotiations according to aboriginal terms of reference), nor would it be possible for them to participate at the constitutional table. The most that they would be able to achieve is that Quebec (in the interest of its good international reputation) would recognize existing indigenous rights and promise no worse treatment to Natives living within Quebec than they had within Canada. No allowance would be made to recognize that their self-government right includes the right to decide to remain in Canada (ROC would not support this either), neither would inherent self-government be on the agenda. That is all to avoid further turmoil: there will be neither time, nor political will to proceed on the road began by the Charlottetown Accord. The Accord would not even be recognized as a precedent and previous achievement to rely on, because it did not actually become a constitutional amendment. Ultimately, in the situation given, Canada's interest would dictate otherwise (Young 223-27).

Provided that before the failure of the Charlottetown Accord Canada's interest had been to achieve political stability through satisfying all constitutional actors including Indigenous peoples, I deeply agree with Young's speculation. After the failure of the accord, Canada's old/new interest was still to achieve political stability, but under the changed circumstances First Nations dropped as constitutional actors because they lacked the necessary economic and political weight to count with. Between 1992 (Charlottetown) and 1995 (the Quebec referendum on secession) a constitutional vacuum developed in federal politics to preserve the status quo and not to make things worse. However justified a separate constitutional package on inherent indigenous self-government would have been, no separate negotiations opened. Even though, retrospectively speaking, Young's analysis entered a dead end street because secession eventually did not happen, he is quite

right to say that Quebec's sovereignty would not serve precedent for having indigenous sovereignty simultaneously recognized. Indeed, after Charlottetown the reverse happened. Indigenous claims received maximal support in the accord because of the threat of Quebec's secession, but after secession became a virtual reality (and no threat any longer) support for indigenous claims waned.

This does not mean, however, that indigenous claims cannot be justified. To the contrary, nationalist voices among indigenous groups[89] have strengthened after the failure of the Accord, and in support of their justice (and not political interest) they rely on the evidence of the two-row wampum, which entitles their societies to sovereign development. Taiaiake Alfred argues that "[l]and, culture, and government are inseparable in traditional philosophies" (2), therefore cultural revitalization alone cannot solve the problems. Historical indigenous sovereignty is expressed by "the Great Belt of the Covenant Chain": the two-row wampum (*Gus-Wen-Tah* or *Kaswentha*), which he interprets in this context:

> In traditional indigenous cultures, access to power is gained through balancing the diverse aspects of our being, harmonization with the natural forces that exist outside us, respect for the integrity of others and the diverse forms of power, and knowledge of ritual.
>
> The Kanien'kehaka *Kaswentha* (Two-Row Wampum) principle embodies this notion of power in the context of relations between nations. Instead of subjugating one to the other, the Kanien'kehaka who opened their territory to Dutch traders in the early seventeenth century negotiated an original and lasting peace based on coexistence of power in a context of respect for the autonomy and distinctive nature of each partner. The metaphor for this relationship — two vessels, each possessing its own

[89] Naturally, it is always a massive overgeneralization to talk about Indigenous peoples as one homogenous group. Based on Jack Forbes's analysis Taiaiake Alfred has made four groups of Indigenous Canadians according to their political behavior. His view is strongly influenced by (predominantly marxist) power theory, yet his grouping orients us in the diversity of political opinion among First Nations people. In his grouping, delegates who negotiated about the constitution would most probably belong to group 2 and 3:

> Adapting Forbes's analysis to the present situation, we can mark four major points along the spectrum of identity: (1) the Traditional Nationalist represents the values, principles, and approaches of an indigenous cultural perspective that accepts no compromise with the colonial structure; (2) the Secular Nationalist represents an incomplete or unfulfilled indigenous perspective, stripped of its spiritual element and oriented almost solely towards confronting colonial structures; (3) the Tribal Pragmatist represents an interest-based calculation, a perspective that merges indigenous and mainstream values towards the integration of Native communities within colonial structures; and (4) the Racial Minority ('of Indian descent') represents Western values — a perspective completely separate from indigenous cultures and supportive of the colonial structures that are the sole source of Native identification. (Alfred 32)

> integrity, travelling the river of time together — was conveyed visually on a wampum belt of two parallel purple lines (representing power) on a background of white beads (representing peace). In this respectful (co-equal) friendship and alliance, any interference with the other partner's autonomy, freedom, or powers was expressly forbidden. So long as these principles were respected, the relationship would be peaceful, harmonious, and just.
>
> It is with indigenous notions of power such as these that contemporary Native nationalism seeks to replace the dividing, alienating, and exploitative notions, based on fear, that drive politics inside and outside Native communities today. (52-53)

However, the two-row wampum carries not only power-related but empirical evidences of indigenous sovereignty, when it is read together with other items of law. It is an artifact, but it should be interpreted as a legal document of an oral culture. Using the two-row wampum as historical and legal evidence, John Borrows concludes that "First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation [of 1763]" (155). He attempts to rewrite Canadian legal history from First Nations' perspective, and following a delicate historical analysis he gets to the same conclusion as legal scholars Slattery and McNeil (see subchapter 2.1) that the aboriginal right to self-government is inherent.

> [. . .] the Royal Proclamation is part of a treaty between First Nations and the Crown which stands as a positive guarantee of First Nation self-government. The other part of the treaty is contained in an agreement ratified at Niagara in 1764. Within this treaty are found conditions that underpin the Proclamation and that lie outside of the bare language of the document's words. The portion of the treaty confirmed at Niagara has often been overlooked, with the result that the manuscript of the Proclamation has not been integrated with First Nation understandings of this document. A reconstruction of the events and promises of 1763-4, which takes account of the treaty of Niagara, transforms conventional interpretations of colonialism which allow the Crown to ignore First Nations participation. Through this re-evaluation of early Canadian legal history, one is led to the conclusion that the Proclamation cannot be interpreted to undermine First Nations rights. As will be illustrated, Proclamation/Treaty of Niagara rights

> persisted throughout the early colonization of Canada. These Aboriginal rights survived to form and sustain the foundations of the First Nations/Crown relationship, and to inform Canada's subsequent treaty-making history." (Borrows, "Wampum" 155-56).

The two-row wampum was presented to settlers at the Treaty of Niagara as First Nations' document of the peaceful coexistence of two sovereign societies on the same land. Borrows's account about the two-row wampum and the Treaty of Niagara (1764) makes me suggest that the two-row wampum was not used as legal evidence for First Nations' inherent right to self-government and sovereignty, and its evidence was not used as legal precedence because the medium it employs to express legal meaning was regarded as an artifact. It was not comprehensible for written European law. Besides the fact that the content of the Treaty of Niagara offered an interpretation of the Royal Proclamation that was going against the expansive interest of the Crown, the unconventional form of the wampum also contributed to its disregard as a legal document. Had it been used, Borrows's conclusion would be inevitable: "An interpretation of the Proclamation using the Treaty of Niagara discredits the claims of the Crown to exercise sovereignty over First Nations" (Borrows, "Wampum" 164). Convenient lack of understanding of the meaning of the wampum belt together with the conspicuous legal practice of open meanings resulted later in interpretations of the Royal Proclamation in which the preferred meaning, that is extinguished indigenous sovereignty, prevail:

> the wording of the document made it unclear as to whether First Nations would have the political power required to exercise autonomy through their own sovereignty or under British jurisdiction. The document's equivocation between Aboriginal sovereignty and subordination is evidenced in the proclamation's description of "Nations or Tribes with whom we are connected, and who live under our protection." [. . .] Therefore, the Proclamation illustrates the British government's attempt to exercise sovereignty over First Nations while simultaneously trying to convince First Nations that they would remain separate from European settlers and have their jurisdiction preserved. (Borrows, "Wampum" 161)

Borrows highlights the political method of unclarifying legal texts for the purpose of future benefits for one of the drafting parties. The same practice was still employed at Meech Lake, when the text of the distinct-society clause was deliberately left unclear so

that negotiating parties would be satisfied with the interpretations they separately assumed.

Such a misleading intention, however, can easily lead to future injustice, as the history of race relations in Canada since 1763 has proved. After the representatives of settlers and First Nations exchanged documents that recognized interaction and separation of their societies (that is, a manuscript of the Royal Proclamation of 1763 and a two-row wampum), the meeting at Niagara was to be recognized as a Treaty. However, Indigenous peoples and federal governments differed in its interpretation considerably. The former assumed that their sovereignty has never been limited because they never voluntarily resigned from it. To the contrary, the federal government tended to treat them in terms of "welfare-dependency" rather than "rights." Hamar Foster highlights the government practice of emphasizing welfare and dependency instead of rights, because this could displace the question of sovereignty entirely:

> The second aspect of emphasizing welfare and dependency rather than rights that requires mention is to be found in how federal power was interpreted. Ottawa regarded its constitutional authority to make laws with respect to 'Indians, and lands reserved for the Indians' [s.91(24)] not as a mandate to forge relationships with self-governing communities, but as entirely displacing Aboriginal sovereignty — which is certainly not how Indians understood their relationship to Canada or the effect of the treaties they made with Canada. This meant that policy emanated from the centre, and histories of Indian administration must therefore be based largely upon government documents and non-Aboriginal secondary sources. (354)

Concerning the future, the failure of the Charlottetown Accord, the legacy of the two-row wampum, the unconstitutionalized inherent right to self-government, and the existence of Nunavut (1999) point to an important question that has rarely been asked in an indigenous context. Many people have been anxious about the future of Canada and ready to pay highest costs to find the factors that will keep it together. But "[a]lmost no attention has been paid to the [indigenous] end goals of the struggle. What will native governance systems be like after self-government is achieved?" (Alfred 3). It seems that the "Canadian state" is not as unshakeable as Taiaiake Alfred presumes. Both entities are quite fragile in their assumed power positions, yet their future partnership is likely to reside in parallel positions based more on cautious suspicion than on friendly cooperation. Voices dissatisfied with a "third order" type of solution are becoming louder because,

even if the "third order" would mean possible separation, self-government, and international recognition, the range of options it would offer would not be identical with full sovereignty described by the two-row wampum principle. "It would be a tragedy if generations of Native people should have suffered and sacrificed to preserve what is most essential to their nation's survival, only to see it given away in exchange for the status of a third-order government within a European/American economic and political system" (Alfred 3). Yet, realistically, First Nations could not expect more, because constitutional achievements could not be realized, negotiations reached a stalemate, and in the political vacuum preceding Quebec's secession the federal government showed no intention to change the status quo. In spite of strong evidence for indigenous sovereignty in the two-row wampum belt of covenant, which shows two symbolic vessels travelling parallel to but not diverging from each other, in *R. v. Pamajewon* (1996) the Supreme Court of Canada refused to consider broad rights to self-government under section 35(1) of the constitution (Borrows, "Landed" 84, note 20). Courts can only rely on legal evidence (based on precedents), and the two-row wampum along with the Treaty of Niagara, to this date, has not been recognized as such. Of the two avenues—litigation and negotiation—to proceed towards more extensive realizations of indigenous sovereignty (such as inherent self-government irrespective of a superior "Canadian" structure), both have been shortcut by the failure of the Charlottetown Accord.

Concluding Note: Parallel Ventures

In this chapter I have analysed the improved constitutional text of the Charlottetown Accord, the third order model of government and its preceding alternatives, and the directions of Quebec and First Nations politics after repeated constitutional failure.

I conclude that the Charlottetown Accord offered a model acceptable to all parties in the debate because it nearly satisfied both the ideal of national coherence and the demands of First Nations to inherent self-government. All parties had to give up something, though, for a compromise, which resulted in an uneven text that manifests residual moments of biculturalism (two nations), multiculturalism in bilingual context, and self-government (three nations)—all for a national unity. The Accord failed notwithstanding, which cleared the ground for more radical models and increased the likelihood of their prevalence, despite their obvious irreconcilability with the national interest of political and economic integrity.

5. *MABO* AND THE NATIVE TITLE LEGISLATION

"Far from being a radical decision, in this light
Mabo represents a sophisticated defence of liberal
democracy." (Patapan 120)

The Mabo *Decision and Its Legacy*

By raising the indigenous land rights movement out of a matrix of political legerdemain, the High Court's decision in *Mabo v. Queensland (No.2) 1992* introduced a seminal moment in Australian history. In the absence of legal protection of indigenous rights until 1992, nothing but its promises bound the government to satisfy indigenous claims by negotiation beyond its interests. Had claimants opted for litigation, precedents in an incidental case seemed to induce a decision that would have protected the governmental position: radical Aboriginal dispossession under the doctrine of *terra nullius*.[90] Hence federal indigenous policy would not divert from the liberal individualist path tried and proven under the policy of multiculturalism. In this sense, all achievements since 1988—promises of a treaty, launching the process of reconciliation, setting up ATSIC—praise the Hawke and Keating governments' improved sense of justice, but they did not bring progress in principle. Such a change took place only after litigation resulted in "surprise": the High Court overruled the doctrine of *terra nullius* thus avoiding a 200-year-old historical and legal paradigm. To understand the revolutionary significance of the decision, first it seems necessary to open the exploded precedent.

The precedent: In the Gove Peninsula land rights debate mining permission was granted on the territory of an officially proclaimed Aboriginal reserve. The Yirrkala peoples felt their lifestyle and use of land in immediate danger. In 1963 the minister in charge announced to maintain local welfare besides industrial investment: he promised to defend protection of sacred sites but, at the same time, he declared that that the Yirrkala hold no legal rights to the land of the reserve. They then petitioned the House of Representatives and demanded recognition of their land rights. The protest of the Yirrkala achieved public recognition for the land rights of North-east Arnhem Land Aborigines, and measures were taken to locate and protect sacred sites, after a Special Committee of

[90] Indigenous land rights were tested and dismissed at the Federal Court in *Milirrpum v. Nabalco* (popularly known as the *Gove* case). This precedent was relied on in future court decisions and policies until it was ruled over in *Mabo v. Queensland (No.2) 1992*.

the House stated that for the land given to mining lease there should be compensation in the form of land grant, and also there should be compensation in money for losing traditional ownership.[91] Encouraged by the committee's favorable report, three Yirrkala men representing their tribe took the case to court in 1968. They litigated for compensation and a warrant to put an end to mining activities, as well as for recognition of their right as Aboriginal people to own the land without any interference; that is, they demanded recognition of their land rights and native title. In spite of political goodwill, they lost the case on 27 April 1971, after three years of litigation. In *Milirrpum v. Nabalco Pty Ltd and the Commonwealth of Australia* (popularly known as the *Gove* case) Justice Blackburn represented the Northern Territory Supreme Court. He decided that under Australian law the Yirrkala people of the Gove Peninsula do not hold rightful demands to ancestral lands for two insurmountable obstacles: one is traditional society, the other is common law. Blackburn recognized that Yirrkala Aborigines have had certain customary law, but he stated that their relationship to the land was not ownership—they feel responsible for their homeland but that does not amount to proprietary interests. His decision, then, did not recognize aboriginal title to traditional territories. To reach his decision Blackburn used an obligatory precedent decided by the Privy Council in *Cooper v. Stuart* (1889), in which Justice Bench decided that in 1788 East-Australia was a practically uninhabited land without settled inhabitants and no kind of land law or property existed in the colony at the time of annexation.[92]

The *Gove* case represents the power of a more than a century-old jurisprudential doctrine, which had to be overcome in *Mabo v. Queensland*. In this case the Meriam people of the Island of Mer (or Murray) claimed their land back from the Queensland government on the basis ancient and continuous presence. The islands were colonized by the state of Queensland in 1879. The High Court decided that the Meriam people's native title to land was not extinguished in 1879 or later. The court declared the doctrine of *terra nullius* false, and said that the Meriam people as first owners have right to their land. It is not possible to detail all justices' opinions here,[93] but the main line of argument will be reproduced (in moderately legal language) to assist understanding my assessment of the significance of the judgment in subsequent subchapters.

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[91] For a full explication of the *Gove* case see Berndt, "Concept" 34-36.
[92] About the *Gove* case and *Cooper v. Stuart* see Reynolds, "Native" 18-19.
[93] In Australian practice, each justice of the High Court forms opinion separately.

The decision: "In 1982 three Murray Islanders—Eddie Mabo, David Passi and James Rice—brought an action against the State of Queensland in the High Court of Australia. They claimed that the Crown's sovereignty over the Murray Islands was subject to the land rights of the Murray Islanders [. . .] based upon local custom and traditional title" (Butt and Eagleson 8). The three islanders asked the court to declare that: (1) The Meriam people are entitled to the Murray Islands (a) as owners; (b) as possessors; (c) as occupiers; or (d) as persons entitled to use and enjoy the Islands; and (2) the State of Queensland has no power to extinguish the Meriam people's title.

The decision on 3 June 1992 acknowledged the claims under point one as rightful, but it left open the question of certain lands in lease or in administrative usage. The following decision was reached about the second point: "The Queensland Parliament and the Queensland Governor have the power to extinguish the Meriam people's title, as long as they exercise that power validly and in a manner consistent with Commonwealth laws" (Butt and Eagleson 9). Most particularly, such a Commonwealth law referred to in the decision is the Racial Discrimination Act, 1975. Since *Mabo* it has no longer been possible to extinguish native title by an act of state because that would amount to discriminative action against an identifiable racial group (Indigenous peoples) of society, which is an offense under the Racial Discrimination Act.

During the making of the decision the court stated that British common law recognizes native title (that is, Indigenous inhabitants' interests and rights in land), and said that its principles are equally valid to mainland Australia and the Murray Islands. Such native title survives in accordance with Aboriginal peoples' laws and customs where they maintained their connection to the land and their title was not extinguished by the imperial, colonial, state, territorial, or commonwealth government. The full content of native title is defined by the traditional laws and customs of titleholders, but certain common features can be identified as: (1) Native title can be held as community, group, or individual under traditional laws and customs. (2) It is unalienable, except by investing it in the Crown or a claimant under traditional laws and customs. (3) Native title is extinguished if the people holding traditional title lose their connection to the land.

The court rejected the traditional doctrine that Australia at the time of European settlement was *terra nullius*, and that radical ownership of the land moved over to the Crown. Instead, at occupation, native title went under the sovereignty of the Crown but it survived. The court said that the earlier view of British common law could not be further maintained because it was unjust, contradicted the principle of equality of all Australians

under law, and did not fulfill the norms of international human rights. Furthermore, Justices Deane, Gaudron, and Toohey agreed that such a view also contradicted historical reality.

Although gaining sovereignty did not extinguish native title, later legislative or executive measures by imperial, colonial, state, territorial, or commonwealth governments could do it. So the court agreed that granting a valid freehold title extinguishes native title because it is inconsistent with further enjoyment of aboriginal rights. Against freeholds the court did not see a chance of successful native title claims. If the Crown appropriated land for its own use—as roads, railroads, and buildings—native title was also extinguished. In cases other than freeholds (such as pastoral leases) the opinion of the court was not so uniform. As general principle they stated that it needs to be examined whether interests in the land granted by the Crown were consistent with simultaneous enjoyment of native title. If not, then native title was extinguished to the degree of inconsistency. Native title was not extinguished on unused Crown land, or where the use of appropriated land was consistent with native title, for example, in national parks or reserves. Native title survives on lands separated for use by Aboriginal people in land rights legislation (for example in the Northern Territory Land Rights Act, 1976) or given to them as unalienable freehold.[94]

On vacant territories of Crown land and reserves numerous land claims were immediately launched. The responsibility of proof falls on the claimants, who (mostly with the help of anthropologist advisers) need to prove that they did not leave their traditional customs and land, and they can identify the exact location and borders of the area under claim. In spite of the *Mabo* decision and the following Commonwealth Native Title Act 1993 Aboriginal claimants are likely to face problems proving their arguments at court: among others, they need to bridge conceptual differences between the two cultures in the language of European law. To prove a rightful claim, the exact area of the land under debate has to be located. This may be difficult because of the diversity of Aboriginal peoples and their traditional seasonal lifestyle. Custodianship over an area may have shifted from one clan to another because of seasonal migration or virtual[95] or total extinction of a group. Individual cases cannot be solved with a uniform policy (especially because the content of native title differs from group to group), so land claims necessarily

[94] For a searchable full text of the Mabo decision see <http://www.austlii.edu.au/cgi-bin/sinodisp.pl/au/cases/cth/175clr1.html> Mabo and Others v. Queensland (No.2) 1992; further explanations in *Native Title. Native Title Act 1993*. C1-C3.

[95] By forcible removal of people from the area, for example.

generate historical and anthropological research, in which oral evidence carries more importance than written sources. Claims must be submitted to the Native Title Tribunal, which was created by the Native Title Act for the purpose of examining rightful claims, mediating between the parties with the help of experts (anthropologists, historians, and lawyers) and forwarding rightful claims to the Federal Court.

5.1. A Historiographical Paradigm-Shift

> "I learnt, like every Australian that a man called Captain Cook settled this land in 1788, true or false? I thought that it was great to remember the his-torical dates of Australia's settlement. I also learnt the his-tory of the world, his-tory was my best subject. The books were full of words that I sometimes found difficult to understand but I always loved the pictures because they told me more.
>
> Once I asked a teacher, "who is that blak [*sic*] man in the background of those Australian paintings?" He told me that he was a native and that the natives used to live in Australia.
>
> I then asked my mother who he was and she said that he is one of your ancestors. She then told me the story of my family, which was and still is a matriarchal family (pew!!, I was lucky there).
>
> I now had two totally different stories so I was very confused, but I began to realise that I was different, in fact more different than I really wanted to be."[96] (Rea qtd. in Campbell 28)

In this section I attempt to support my claim that a paradigm-shift in historiography prepared the ground for the *Mabo* decision, which actually completed the change. I have proceeded by empirical method to survey history books written in the period of observation. My purpose is to search for a change in the perception of race relations, and to examine what kind of change it was, when it happened, why and with what result.

The late 1960s early 1970s saw the beginning of a paradigm-shift in the field of European–Aboriginal relations in Australian historiography. The change was completed in 1992 by the decision of the High Court of Australia in *Mabo v. Queensland (No.2.)*, which sanctified the findings of new historians and codified—thus completed—the paradigm-shift. The change in historiography was not exclusively a self-generating process but the result of multiple factors: new historical research generated by anthropology, jurisdiction, and politics. As Noel Pearson put it in his opening address at the Mabo Conference in London (1996):

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[96] This quotation is an extract from the artist Rea's commentary to her series of paintings entitled "Ripped into Pieces."

> There are three things which seemed to me to be emerging signs of prospects of reconciliation in Australia. Firstly, there has been the revolution in our understanding of the country's history to which historians such as those who are attending this conference have contributed, as well as numerous indigenous oral historians. Secondly, there has been the decisions of the High Court of Australia in the Mabo Case, and thirdly, there was former Prime Minister Paul Keating's landmark speech at Redfern Park in December 1992, where he admitted the truths of the past on behalf of the Australian government and people. (Pearson, "Land Rights" 6)

Since the early 1970s there has been a movement to deconstruct the colonial vista: the works of conventional historians came under attack, and new historians began to fill in "the great Australian silence"[97] by giving voice to the Aboriginal experience of the past of the continent. Aboriginal "return" was accompanied by a corresponding acknowledgment that they had been prior to the British, and so the event of colonization came to be interpreted as invasion rather than discovery, settlement, or occupation. Overall, the legitimacy of the British claiming the land of Australia was brought into question. The new paradigm represents the coming of the Europeans in terms of dispossession, violence, racial discrimination, destruction, exclusion, exploitation, and extermination. Works with opposing views about European–Aboriginal relations were published side by side in the decades between 1970 and 1990, until finally in the *Mabo* case and the consequent native title legislation the results of historical research found their way into law and politics. The *Mabo* decision crowned the development of Australian historiography in the scientific revolution between 1970 and 1992: a new historical paradigm had emerged.

First published in 1962 and followed by a revised edition in 1970, Thomas S. Kuhn's *The Structure of Scientific Revolutions* introduced the concept of scientific paradigms into contemporary academic life. Although its basic premise is in natural sciences, this historio-philosophical treatise became one of the much discussed and most influential studies in the field of humanities. Without discussing Kuhn's theory, in this section I will apply his terminology of "paradigm," "crisis," "anomaly," "revolution," and "paradigm-shift" to the Australian historiographical revolution in the last three decades. To fulfil this aim, first it will be necessary to describe the concept of "paradigm."

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[97] The expression "the great Australian silence" was created by the eminent Australian anthropologist W. E. H. Stanner in the 1968 ABC Boyer Lectures to describe a lacuna in historical and anthropological discourses.

A paradigm is a framework within which "normal academic research work"[98] takes place, with its own system of methodological norms. The paradigm also works in a sociological way: it organizes the academic world and defines an academic canon. Communities of scientists and scholars maintain and protect the paradigm by following it in their work and prescribing it for future generations of scholars in textbooks, handbooks, and examinations. In Kuhn's words: "These [paradigms] I take to be universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners" (x). When normal science or scholarship loses its way and cannot ignore any longer the anomalies that have disrupted traditional practice, extra-ordinary research begins, which leads either to the adjustment of the paradigm or, if even more anomalies emerge, to a substitute-theory. Extra-ordinary research forces new responsibilities and a new working framework upon the academic world. Kuhn calls such changes in scholarship "scientific revolutions." The new theory is accepted as a new paradigm because it can dissolve anomalies more successfully. The old paradigm as opposed to the new one is not necessarily better or worse in terms of ethical judgement, so colonial views about Australian history that are now stigmatized as conservative and obscurantist could have been considered modern at the time of writing. Therefore, these works should not necessarily be condemned. It is only natural that paradigms compete with each other, during which formerly modern or canonical views become obscurantist, and the provocative is newly accepted as modern.

A great social and political change in the field of Aboriginal affairs took place at the end of the 1960s, after the 1967 referendum eliminated racist clauses from the Commonwealth Constitution and gave power to legislate for Aborigines from the states over to the Commonwealth government. This constitutional change allocated equal political rights to Indigenous people, which nevertheless did not automatically involve equal treatment, end of discrimination, or access to land rights. Even so, the greatest historical significance of the referendum was that it acknowledged the presence and survival of indigenous Australians, and after long decades of protection and assimilation, politically overruled the general assumption that the Aborigine were a dying race. It, however, did not affect the doctrine of *terra nullius*, the foundation stone of Australian law and history.

[98] The term "normal academic research work" is adapted from Kuhn. "Normal" here means "mainstream, canonical."

The referendum was initiated by the Holt government (1966-67) partly under pressures of socio-political realities of Australian life that had piqued the United Nations (Clarke, *Australia* 302-3), and partly as a result of the findings of anthropological research. All these acted as catalysts at the launch of a paradigm-shift in Australian historiography. Prompted by them, new historical research began to excavate the "dark side" of Australia's past to enable contemporary society to answer such crucial questions as: why do Aborigines die in masses in spite of the welfare measures of the patronizing government? Who owns the land the Aborigine live on? Was Australia occupied peacefully or invaded by force?

However, it was not until 1992 with the High Court's decision in *Mabo v. Queensland (No. 2.)* that the findings of the new history went into legal and political acceptance. In this court case three members of the Meriam people (Murray Islanders), Indigenous inhabitants of Mer (Murray Islands) situated in the Torres Strait north of mainland Australia, reclaimed their lands from the Queensland government on the basis of continual and continuous occupation. As an act of colonization, Queensland had claimed sovereignty over the Islands in 1879. The High Court decided that the native title of the Meriam people to their land was not extinguished by this step of the Queensland government nor by any measures executed since 1879. They ruled that the Meriam people possess right to their land, that is, the islands they live on, on the basis of prior occupation. Thus, the *Mabo* decision crowned the paradigm-shift in historiography when the High Court declared the foundation stone of Australia's history false: the doctrine of the continent being *terra nullius* at the time of occupation was eliminated.

A radical reinterpretation of history carried through over the last thirty years provided a critical underpinning for the legal resolution ushered in by *Mabo*. In turn, the judgement itself is also a major contribution to Australian historiography, which will influence the way history is taught and researched in the future. In the *Mabo* judgment, named after the principal plaintiff, Eddie Mabo, the High Court buried the doctrine of *terra nullius*, which in its time held sway over both history and jurisprudence. The preceding *Gove* case of 1971, which was the first major court case about Aboriginal land rights, did not yet recognize native title to land. When in this judgement Justice Blackburn refused Aborigine's native title to land, his legal opinion rested on his interpretation of history including the doctrine of *terra nullius* as much as on his assessment of the law. He ruled that historical revision could not be used to change legal principles that were made at a different point in time. Yet, the High Court's decision in *Mabo v. Queensland* could not

have appeared without a new Australian history.[99] The land rights movement and the corresponding court cases (such as *Gove*) provided an opportunity for the birth and development of a new historical paradigm based on the works of C. D. Rowley, Henry Reynolds, and others, because the number of anomalies discovered by them in the interpretation of Australia's past called for further research. In *Mabo*, however, as Reynolds put it:

> The High Court rejected the concept of *terra nullius* because it was so out of harmony with contemporary opinion and concern for indigenous rights in both international law and the domestic law of comparable countries. [. . .] But the Mabo decision is not just an ending. It is also a beginning. While the abandonment of *terra nullius* has extracted Australian jurisprudence from one set of historico-legal problems, [. . .] it is now in the midst of another one. (Reynolds, *Law* 195-96)

After 3 June 1992 a new paradigm came to be accepted by academics, the law, and politics, therefore it is reasonable to call the period after 1992 the "post-Mabo age."[100] Mabo marks a borderline: a new paradigm has emerged.

The survey of a sample of major history books before and after 1970[101] shows significant differences between the works of "conservatives" (canonized historians unchallenged until the late 60s) and "attackers" (new historians who started to shatter the paradigm in the early 70s).[102] Histories before the 70s tend to be overwhelmed by—in Kuhn's phrasing—the normal academic activity of data collection. Substantial and bulky volumes of complete histories of Australia are published by historians who impose a "span" on the data to emphasize the progress Australia has made, the British legacy,

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[99] I use the word history to refer both to the past of humankind and the discipline studying it.

[100] See "post-Mabo period" and "post-Mabo archeology" in Mudrooroo 219.

[101] The survey of history books on the following pages will attempt to illuminate the process of paradigm-shift in Australian historiography as it is reflected in historical discourse. My aim is not to describe all books written about Australian race relations in the last four decades. Instead, several major works have been chosen as examples, and a number of others were examined and drawn conclusions about, thus facilitating an overall view of the change. Listed as indexed to first publication date, the following books provided a representative sample for my observations (full publication data are given in the works cited list): W. K. Hancock, *Australia* (1930); C. Turnbull, *Black War* (1948); A. G. L. Shaw, *The Story of Australia* (1955); M. Barnard, *A History of Australia* (1962); M. Clark, *A Short History of Australia* (1963); R. Ward, *The Australian Legend* (1958); R. M. Berndt and C. H. Berndt, *The World of the First Australians* (1964); R. Ward, *Australia: A Short History* (1965); R. Ward, *Australia since the Coming of Man* (1965); G. Blainey, *The Tyranny of Distance* (1966); C. D. Rowley, *The Distruction of Aboriginal Society* (1970); K. Maddock, *The Australian Aborigines* (1972); R. Evans, et al., *Exclusion, Exploitation and Extermination* (1975); H. Reynolds, *The Other Side of the Frontier* (1981); T. Gurry, ed., *The European Occupation* (1981); M. Walker, *Australia: A History* (1987).

[102] I adapt the distinction between "conservative" and "attacker" historians from Raymond Evans, et al., *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland.*

geographical determinism, and other overall patterns that regulate the history of Australia. Noticeably, this is done with the help of literary skills or, to the least, very fine stylistic competence. "The author is distinguished in the fields of both history and creative literature," and "the book is based on extensive research and careful analysis," reads the jacket of Marjorie Barnard's *A History of Australia* (1962). A strong commitment to being stylish and writing great is likely to be the legacy of Sir William Keith Hancock, whose *Australia* (1930) must have determined the trend of Australian historiography for more than three decades. It must have been difficult to avoid Hancock's influence also because he wrote a primary school history textbook—*Two Centuries of Change: An Elementary History for Young Australians* (1934)—for a generation of children to grow up with. Regarded by many as "one of Australia's finest ever historians" (Daly 69), he emphasized the need for "span" and ignored occasional slips of facts if they did not support the theme of the book or if they seemed marginal. His basic themes were "change," "progress," and an appraisal of the monarchy. His works allowed hardly any space for Aboriginal prehistory and contemporaneous history, taking for granted the extinction of its practitioners:

> The advance of British civilisation made inevitable "the natural progress of the aboriginal race towards extinction"—it is the soothing phrase of an Australian Governor. In truth, a hunting and a pastoral industry cannot co-exist within the same bounds. [. . .] It might still be possible to save a remnant of the race upon well-policed local reserves in Central and Northern Australia. [. . .] From time to time it [the benevolent Australian democracy] remembers the primitive people whom it has dispossessed, and sheds over their predestined passing an economical tear. (Hancock, *Australia* 33)

The tendency of being theme-oriented at the cost of undesirable facts and details, however, had a dear cost by the 1970s. It led to the suppression of one major fact: that the Aborigines have rights on the continent due to prior occupation, and these rights were taken away from them in government-supported frontier violence. Emerging new histories from the 1970s go back to the archives and to direct fieldwork to rediscover the silenced facts.

Pre-1970 Australian historiography abounds in legendary figures and mythmaking treatises. Another father figure of national history, Manning Clark was also noticed for generously and notoriously ignoring factual mistakes he made in his history. Being a great

teacher and an exceptional character, he took the liberty to ignore petty details for the sake of overall tendencies, just to receive sharp criticism from some contemporaries and the posterity in the mid-1990s for "his cavalier attitude towards his evidence" (Bridge 236). Russel Ward's *The Australian Legend* (1958) has suffered no less severe attacks for dismissing Aborigines and women from his story of the formation of a national identity. Geoffrey Blainey's *The Tyranny of Distance* (1966) rapidly dismissed the question of Aboriginal resistance as a "relatively mild threat" (132), thus taking the side of "occupation" as opposed to "invasion" in the debate. Even in his more recent books and journalism, Blainey has denied the relevance of the colonial Aboriginal past to the present: "My view is that we should be proud of much of the *ancient* Aboriginal history of this land; we should be proud of much of the British history of this land" (qtd. in Attwood, "Mabo" 109). In other words, he is willing to praise Aboriginal history as a separate entity as long as it does not interfere in time, space or events with the Australian past of his traditional narrative, that is, the paradigm of Australian history beginning in 1788. Bain Attwood concludes that

> Blainey's allowance for this pre-colonial past is relatively unimportant, for it is either deemed to be already past or it is assumed that will eventually become so in effect, and so is incommensurate with the British Australian past which, by comparison, is conceived of as part of the ongoing Australian present. ("Mabo" 109)

Certainly no two books of the pre-1970 period are identical and equally ignorant of the central role of race relations in Australia's past. General features, however, are easily deducible from a summative reading of these works. They start the chronology of Australia's history from the European discoverers and the arrival of the First Fleet of convicts in 1788. They devote virtually no place to Aboriginal prehistory, so consequently, there is no place for describing European–Aboriginal relations in colonial times, either. There is no acknowledgement of the conflicts that resulted from the co-existence of black and white races. The settlement of Australia becomes a remarkably peaceful event, devoid of violence on the frontier. Colonizers fight with the land and not its inhabitants. Pioneering settlers conquer large portions of the empty outback, which, in turn, forms the Australian character: the bush becomes the center of the national ethos. Geographical or environmental determinism forms the fate of the white people. From the perspective of a white-centered historiography, the Aboriginal experience of the past can be ignored as insignificant in the progress of the Australian nation. Accordingly, the Aborigine do not

seem to belong to the past of modern Australia. Russel Ward gives voice to this conviction in the preface of his *Australia: A Short History* (first published in 1965): "This book seeks to stress those elements in Australian history which have been most influential in giving the inhabitants of the country a sense of their own distinctive identity, and so in making a new nation" (vii). If the existence of Aboriginal civilization on the continent is dealt with in more than half a page, the emphasis is always on the helplessness of the primitives in the face of the superior British civilization. Aboriginal–white relations surface in central policies only: relations are limited to some description of contact through missions, governmental policies, and protecting institutions. For example, his subchapter entitled "Mild Aborigines" illuminates Ward's conception of a frontier without firearms, where there was no violence between Europeans and Aborigines because of the latter's unwarlike nature: "One difficulty that Australian pioneers [. . .] did not have to contend with was a warlike native race [. . .] men seldom had to go armed on the Australian frontier" (25-26).

Some descriptive features of the general histories before the paradigm-shift include a small-case spelling of the words "aboriginal," "the aborigine," and "natives," because they were not recognized as a people, let alone peoples. Rather, the policies of the protection era (1890s-1940s) preferred segregating them to reserves, so that they could be taken care of as children or wards, for their own good. Neither history, nor the law, nor politics regarded them as a people with cultural, proprietary, or political rights. The assimilation era (1940s-1960s) brought some concern for the plight of the unfortunates in the form of improving social conditions but no reevaluation of their role in the nation's past and present. A telltale conclusive sentence of Barnard's *A History of Australia* created wide uproar in Aboriginal Australia: "Gradually we may become one people. The most practical thing that those who criticise native policy could do would be to marry an aboriginal, bring up their half-caste children to marry white again, and so assist nature's remedy of assimilation" (666).

Book covers also emphasize peaceful and progressive colonization. A common pattern is to represent Sydney Cove and one of the first governors surveying the landscape, with a sailing ship in the background so as to acknowledge and maintain the link with Britain. The powerful symbolism of such an image is even more evident when it comes into confrontation with the silenced undercurrent of Australian history. The front cover of the fifth (1975) edition of Russel Ward's *Australia: A Short History* displays a photograph of Sydney Harbour with the Opera House and an ocean-liner passing by, presumably symbolizing the progress Australia went through in the last two centuries. Definitely not a

larger time-span because Ward does not give voice to the Aboriginal (pre)history of the continent. The titles of his first and second chapters are "Australia today" and "Convicts and currency, 1788-1821," which shows that the first marked date as well as period-start in his Australian history is 1788. The content, thus, is in sharp contrast with the name of the *Walkabout* Pocketbook series and its logo: an Aboriginal X-ray painting. Even the titles of the chapters are underlined with a symbolic snake figure, as an obvious reference to Aboriginal culture and art. The publisher's attempt to include Aboriginality into Australian culture is not reflected in the content of the book, which is clearly about the political history of white Australia.

A major theme of the post-Mabo history, the Aboriginal experience of the past was virtually absent from the old paradigm. Not because it was unknown: the coexistence of Indigenous and non-Indigenous peoples in the country has always been an everyday social reality in Australia, however politically suppressed the facts and their implications could have been. But the part the Indigenous inhabitants had played and were later doomed to play in the formation of the continent was regarded insignificant as compared to the progress made since the coming of the white civilization. Occasional attempts to assess race relations reflect a lack of research not only because of ideological reasons but also because of the lack of sources. The *Historical Records of Australia*, a multi-series and multivolume collection of government documents that historians relied on extensively, does not seem to have given adequate support to researchers on this topic. The topic of Aboriginal (pre)history and culture, as well as European–Aboriginal relations belonged to the category of "the great Australian silence" at this time. W. E. H. Stanner

> described this silence as 'a cult of forgetfulness' or 'disremembering' that had been 'practiced on a national scale'. [. . .] And, as well as there being a silence, there had also been a silencing: 'the great Australian silence', Stanner argued, 'reigns [over] the other side of a story', an Aboriginal history, the telling of which, he recognised, 'would have to be a world . . . away from the conventional histories of the coming and development of British civilisation'. (Attwood, *Age* xiv)

Before rejecting native title in the *Gove* case (1971), Justice Blackburn examined past evidences and concluded that there had been no public recognition "that the relationship of the aboriginals to the land of the colony posed any serious problem" (*Milirrpum* 255 qtd. in Reynolds, "Whose" 28). For those aware of the silence of the old paradigm of Australian history about this crucial issue, his conclusion is not surprising. On

the contrary, supported by new research, the *Mabo* decision (1992) brought an entirely different conclusion. Moreover, the majority of judges in the *Wik* case (1996/98) relied on the legacy of *Mabo* when they decided that the pastoral leases in front of the Court are a product of Australian history. Without going into details of this case about one specific aspect of native title, let me point out that in *Wik* the judges relied exclusively on historical material before 1849. The primary sources used by them testify deep concern for Aboriginal property rights and legislate against the violent expropriation that took place on the frontier in those days. The *Wik* case reveals the strength of the new historical paradigm in two major points: (1) that the judges used sources that were rediscovered by new historians, and relied exclusively on the version of history according to the new paradigm; (2) that since *Mabo* it became acceptable and "foundational" to use "a distinctive reading of history" "in the formulation of legal norms" (High Court justices qtd. in Brennan, "Land" 50).

The late 1960s saw the rise of a new generation of historians, who derived their fresh perspective from formidable studies in anthropology. C. D. Rowley observed that "a few young historians are beginning to work in the field of Aboriginal affairs, but it is mainly the anthropologists, in their attempts to explain how things got the way they are, who have been forced to write history" (48). The intrusion of anthropology into historiography became absolutely necessary at a point of time when "the great Australian silence" was becoming suffocating. Under the social and political pressures of the late 1960s, the old historical paradigm arrived at the stage of crisis. Attitudes, ideologies, methods, sources proved to be incapable of solving anomalies that surfaced whenever, in the atmosphere of political liberation, black and white voices clashed. As the old paradigm denied any relevance of an Aboriginal past to the present and failed to recognize the root of the problems in colonial history, a new discipline was called in to help. Anthropologists gathered data during fieldwork, in day-to-day immersion into Aboriginal culture. Ronald Berndt kept his anthropological treatise, *The World of the First Australians*, deliberately descriptive, so that the facts accumulated by individual scholars could serve as a foundation for well established new research instead of speculation. The findings accumulated in approximately three decades made him speak up for the importance of having a "good grasp of the 'facts' of a situation before theorizing *about* that situation" (Berndt and Berndt, foreword). Directed by C. D. Rowley, the Aborigines Project of the Social Sciences Research Council of Australia (1964-1967) was the first independently financed and controlled survey of Aborigines throughout Australia. As the first centrally

governed survey in the field, it must have been a fertile source of new ideas for anthropology, historiography and, as a result, for politics—a kind of catalyst revealing anomalies and undermining the conservative paradigm. Surfacing anomalies included outstandingly high rates of mortality, poverty, criminality, unemployment, health and housing problems, and all forms of racial discrimination on the one hand, and rich, vivid, and diverse cultures with strong oral traditions of their attachment to the ancestral land on the other hand. The answers that old histories gave to problem-solving questions proved to be totally inadequate. In fact, both asking and answering vital questions pertaining to welfare measures to improve third world conditions, property law, and frontier violence fell outside the scope of the old paradigm. Following the political changes after 1966, Rowley's innovative primary aim in *The Destruction of Aboriginal Society* was to write a survey of Aboriginal affairs for practical use in policy making:

> This survey should, I believed [*sic*], be as comprehensible as possible, offering a coherent view of past and present policies and practices, since there were no Australia-wide studies which could offer background on the situations which would have to be considered by policy makers [. . .]. (v)

He also predicted that the problem of dealing with the Aboriginal question in Australian society "is bound to become a major political issue" (vi), which came true during the movements for human and land rights for Aboriginal people, resulting in the Commonwealth Racial Discrimination Act (1975) and the Commonwealth Native Title Act (1993).

Rowley's work is not another general history of Australia, although the scope it covers is not limited in time or space, understandably as a result of the overall survey the author directed. To the contrary, it is limited in topics. He devotes a whole book to discovering fields of history that earlier historiography was practically silent about. "Failure of colonial administration," "destruction," and "injustice" are keywords from the titles of chapters and subchapters of his work, which were soon accompanied by "resistance," "exclusion," "exploitation," "extermination," and "genocide" in articles and books by other anthropologically trained or infected historians, such as Kenneth Maddock, Raymond Evans, and Henry Reynolds.

Besides enunciating that "the frontier in Australia has been marked with a line of blood" (Maddock ix), works of the new paradigm break down, or at least question, concepts of "progress," "assimilation," and "freedom." Maddock exemplifies emancipation attempts of the Australian Aborigine by setting up a parallel with the

situation of German Jews to illuminate the tragic nature of assimilationist policies and to revise the established view about assimilation as progress. He writes that "if these criteria are all [i. e. progress is quantitative and accumulative in time (cf. Kroeber, *Anthropology* 1923)], then to defend Aborigines against assimilation is to hold out against progress" (Maddock 181). He suggests that the concept of "progress" in history needs revision. It is a compelling demand brought to the surface by anthropological research work, and completed, though in another field of study, by Thomas Kuhn's famous book, *The Structure of Scientific Revolutions* (1962, 1970).

Books of the new paradigm rely on a huge stock of previously unpublished sources and manuscripts to explore questions left in silence by earlier generations of historians: race relations and violence. New concepts are introduced, old terms gain new working definitions: legal and political anomalies demand redefining who an Aborigine is (Rowley 341-42), what "freedom" is, what "possession" means. Most significantly, British "occupation" of Australia is redefined to imply invasion or conquest. Accounts of "peaceful settlement" are discredited. The chronology of the history of the continent is expanded to 40,000 BP (more recently to c. 100,000 BP) and books treat this period accordingly: 1788 is not a starting date any longer. The new paradigm brings a new perspective: that of the other side of the frontier. Young researchers come from outside the prestigious Melbourne or Sydney schools, most often from the northern regions where racial tension is most acute. They often serve the shocking new facts in a passionate style; Not only the facts, but also the accompanying language is often deliberately shocking:

> The Aboriginal has been 'written out' of Australian history; the tragic significance of conflicts have long been bowdlerized and forgotten. Yet, even if vicariously, our guilt remains, as does our responsibility. Aboriginal attitudes take on a new dimension in the light of history, and no policies should be formulated except in that light. This is a book to stir the sleeping white Australian conscience. (Rowley, back cover)

Authors find it important to classify their predecessors historiographically so as to define their own position. Evans, for example, distinguishes two groups of historians: conservatives and attackers. Looking up the references attached to the representative names in the endnotes of his *Exclusion, Exploitation and Extermination*, one can come to a revealing but not too surprising conclusion. The publication dates belonging to the works of the conservative group give the following sequence: 1964, 1966, 1966, 1966. The attacks are dated 1970, 1972 and 1973. The caesura observable between these two groups

of dates supports my proposal that the paradigm-shift in Australian historiography began around the turn of the 1960s and 1970s.

The products of new research are dressed into new outfit: tell-tale visible features such as book covers, typeface, publishing series, titles, and headings disclose the content. Covers portray Aboriginal Australians, scenes of contact on the frontier, or patterns of Aboriginal art. The word "Aboriginal" cannot go without capitalization in any of its forms, what is more, "Australian Aborigines" are preferably referred to as "Aboriginal Australians." More recently "i/Indigenous peoples" is becoming the neutral term, and individual tribal names like "Warlpiri," "Yolngu," "Koori," "Nyoongar," are used to acknowledge diversity professionally and politically. New knowledge is first published in new series, such as Sociology & Anthropology, and Race & Aboriginal Studies. General histories begin the sequence of events with a substantial chapter on Aboriginal culture to provide foundation for an understanding of the consequent contact history. The proportion of writing on Aboriginal matters in such general histories does not go under ten per cent, and the topic is always very well indexed. Titles and headings display words like "invasion" and "dispossession" on the one hand, and "self-determination," "reconciliation," on the other.

The advent of the new historical paradigm was necessarily politicized because it was generally perceived to be attacking the foundations of the legal and political order. Considerable political activity, journalism, and public debate accompanied its intrusion into academia. The High Court's decision in *Mabo v. Queensland* and the subsequent *Commonwealth Native Title Act* (1993) declared conservative views of history untenable. Through these events, Aboriginal people officially entered the history of Australia, which caused a series of articles in *The Age* as a form of public debate between Geoffrey Blainey and Henry Reynolds. Since in Blainey's imagination, and in the narrative discourse he represents, Australia is "one nation – one continent" ("Land Rights"), and the area of land is identified with the idea of nation, he opposes the *Mabo* decision on the basis of the following argument:

> In that long north-south corridor of Aboriginal lands there are only a couple of gaps of any size, [. . .]. If, in 10 or 50 years' time, the Aborigines should move towards self-determination, this corridor could be the nucleus of a nation. [. . .] If the possession of land was as vital to individual survival as in 1788, we could easily respect the plea that today's Aborigines be granted their share, even more than their share. But today the ownership of land is

> not vital for the survival of any Australian family. (Blainey, "Land Rights" 16)

In his answer, Henry Reynolds points out a major weakness of Blainey's argument that is based on a misinterpretation of the past and a purposeful unwillingness to acknowledge any simultaneous existence of Aboriginal and European histories:

> [Blainey's] most substantial criticism of the court is that the six judges who affirmed the existence of common law native title did so by projecting the standards of the present on to the fundamentally different world of 1788. But nothing is further from the truth. There was a clear recognition in the practice and the law of the British Empire that indigenous people had a form of title to their land based on their prior occupation. (Reynolds, "Laws")

Henry Reynolds' career is one of the classic examples of the new history. It also illuminates how the study of history can shape the legal and political practices in a country.[103] Anthropology took the initiative in the field of studying history in the late 1960s, whereas the 1980s saw the new perception of history leading jurisprudence out of a maze of practical problems. Born as a Tasmanian, Reynolds spent most of his research career at James Cook University, Townsville, Queensland. He is the author of the prize-winning *The Other Side of the Frontier* (1981), as well as *Frontier: Aborigines, Settlers and Land* (1987)*, The Law of the Land* (1987)*,* and several other volumes, the most recent of which is *Why Weren't We Told?* (1999). He was a member of the Ministerial Reference Group on Aboriginal Education, frequently provides informal advice on land rights claims, and has been a respected commentator on Aboriginal history for many years. The exposition of his radical views in the media has also made him a popular target for conservatives in the wider society. Recently he has been dealing with what is currently the most controversial question relating to *Mabo*: pastoral leases. It is largely to his findings that the *Wik* judgement (1998) acknowledged the non-extinguishment of native title on pastoral leases, which cover a large portion of the land of Australia. Therefore, the issue is of great legal and political consequence. It is also of great historical interest because pastoral leases were created by the policies of the Colonial Office in the 1840s.

[103] A coincidence is that Reynolds' wife, Margareth Reynolds became a Senator for Queensland.

Reynolds' critical stance in historiography has been noted from the very beginning of his academic career.[104] C. D. Rowley's work inspired younger historians including him and Raymond Evans to address the themes of white violence and Aboriginal actions. Reynolds argued for a variety of Aboriginal strategies—resistance, accommodation, and appropriation—in the face of the European presence. His most famous work, *The Other Side of the Frontier,* was first published by James Cook University, Townsville in 1981. Another expert in the field, Richard Broome writes that it is

> a classic work which revealed how the traditional ideas of reciprocity, sorcery, exchange, and so forth, shaped the active and varied responses of Aboriginal people to Europeans on the frontier. This work dispelled the passive image of Aboriginal people and brought them to the centre of frontier history. (69)

The front cover of the book deserves deeper analysis. It displays an etching presumably from the early nineteenth century ("Aborigines surprised by Camels," without date), that shows two groups of people facing each other in the bush, the Australian frontier. Aboriginal men are standing with their back to the observer of the picture, facing the group of pioneering white men with their camels and packages. The blacks are holding their boomerangs still but ready to protect their women and everything that may be behind their back, which the picture does not show. Observers unconsciously assume the Indigenous point of view. They are obliged to see the frontier from the Aboriginal perspective, because the perspective of the picture forces them to. This is "the other side of the frontier," meaning another perspective as well as another interpretation of frontier history. As a sign of change between 1965 and 1981, it is worth mentioning that, in spite of their enormous conceptual differences, both Russel Ward's *The Australian Legend* and Henry Reynolds' *The Other Side of the Frontier* were awarded the Ernest Scott Prize for the most distinguished work in Australian, New Zealand, and Colonial Pacific history.

Although a caesura between the two paradigms of history obviously took place in the early 1970s, I suggest that the actual change of the paradigm was sanctioned by the

[104] "One academic historian, Henry Reynolds has, however, recently attacked head-on those who have written 'the Aboriginals [*sic*] out of our history ... [and] also written out much of the violence', in a short, though illuminating article entitled 'Violence, the Aboriginals [*sic*] and the Australian Historian'. He has since supported this challenge with a thoughtfully chosen selection of documents, which, along with Rowley's chapter in *The Destruction of Aboriginal Society*, pays particular attention to race relations in Queensland for the first time. He is especially critical – and understandably so – of Ward's conception of a frontier without firearms and quotes examples from Queensland to show that it was 'never safe to go unarmed'," writes Evans 35.

decision of the High Court of Australia in *Mabo v. Queensland* in 1992. In social sciences, changing a paradigm is rarely the deed of a single person, therefore it is very difficult to define when it began, and it is always a long process. Something started in the 1970s that came to its close with the *Mabo* decision, which gave the legal verdict: a new paradigm was born. It belongs to the nature of paradigms that their change never comes without a sign. A growing number of inextricable anomalies precede the change of the old pattern which, consequently, needs to be adjusted to answer them. In a period of crisis, new kinds of solutions coming from outsiders or "attackers" may challenge the paradigm in power. The change comes at a moment when the new framework provoked by the various new solutions becomes capable of answering most of or all the anomalies, and so eventually it becomes recognized, accepted, and acknowledged. This happened with *Mabo* and the native title legislation that legalized the change. In the meanwhile, books projecting conservative views and silences in their narratives were still republished several times by major publishing houses and re-edited by their authors. Works with opposing views about European–Aboriginal relations were published side by side in the decades between 1970-1990, even as late as in the 1980s.

What is the nature of this new paradigm, then? At the most fundamental level it is characterized by the return of an Aboriginal past which had been suppressed by the dominant history by means of silencing and disremembering. The return of Aboriginal peoples into the history of Australia has profound consequences. It destroys the myth of "the youngest continent" by dramatically changing the chronology of Australian history, as well as the role of its protagonists: Aborigines become the first discoverers of Australia instead of Europeans. The past three decades have seen an enormous growth of interest among Aborigines in history, resulting in a discourse now commonly known as Aboriginal History. Among other things, this includes oral histories recorded by elderly people, younger Aborigines expressing their past in the field of arts, and Aboriginal spokespersons proclaiming rights of ownership to the aboriginal past.[105] Bain Attwood summarizes the essence of the change in powerful words: "it undermines the theory of peaceful settlement as well as the notions of British justice, humanitarianism and egalitarianism which were

[105] See, for example, Labumore (E. Roughsey), *An Aboriginal Mother Speaks of the Old and the New*; J. Davis and Mudrooroo Narogin, et al., eds. *Paperbark: A Collection of Black Australian Writings*; paintings by Gordon Bennett; J. Ryan, *Mythscapes: Aboriginal Art of the Desert* and *Paint Up Big: Warlpiri Women's Art of Lajamanu*; Mudrooroo, *Us Mob.* The list is by no means complete.

central to the Australian nationhood and identity constructed by the earlier history" ("Mabo" 104).[106]

The political solution that the old paradigm gave to the anomalies was protection, paternalism, and assimilation. Inaugurated by the Keating government (1991-96),[107] the new solution is reconciliation: an official policy concerning Aboriginal relations, which involves a healing integration, if not a peace treaty, between the two cultures. Many Australians now believe that the understanding of their common past holds the key to Australia's future. The *Mabo* decision and the Native Title Act of 1993 have justified this belief. The emerging new paradigm of history cannot be dismissed simply as a "black armband view of history"[108] to raise a feeling of guilt in the white Australian public; its implications are much deeper than that. I firmly believe that unfavorable political changes since 1996[109] cannot reverse the new course taken. Nationalist and chauvinist political voices can reiterate obsolete views, but they do not bring up new anomalies and do not ask for new solutions. The new paradigm rewrote Indigenous peoples into Australia's past to enable them, as well as non-Indigenous people to cope with the future. By 1992 a scientific revolution has changed the historical view of the academic community in which it occurred. The changing paradigm necessarily effected the contents and structure of textbooks and research works: in 1992 Aboriginal Studies was introduced into the school curriculum to educate further generations in accordance with policies on social justice and equity. A new generation of children may yet puzzle their curious parents with matter-of-fact answers, stating: "Well, we can do it [the school assignment] about anything, I thought I might do it on the white invasion!"[110]

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[106] For the Australian self-image, see Russel Ward, *The Australian Legend.*

[107] Note that Prime Minister Paul Keating's speechwriter was a historian, Don Watson.

[108] Geoffrey Blainey's coinage "to describe the trend in Australian historiography toward focusing on hitherto neglected aspects of the country's various histories of oppression" (Goldsworthy 220).

[109] John Howard's conservative Liberal/National Coalition government or Pauline Hanson's One Nation party.

[110] Fr Frank Brennan SJ's nine-year-old niece in the 1997 video *Talking Native Title & Reconciliation: Aboriginal and White Australians Speak Out*.

5.2. The New Policy of the High Court

"[T]he founding fathers did create a judiciary who have become legislators." (Solomon 246)

How could the High Court deliver such a revolutionary decision? Although justices in the High Court of Australia[111] are reputedly conservative in their political orientation, the Court's recent decisions, since the late 1980s, have received much criticism for their alleged radicalism: a pioneering role in initiating legislation rather than interpreting existing legislation *verbatim*. Analyses of the position and decisions of the judiciary vary according to their legal, political, or ethical approach, and accordingly they attribute differing motives to an apparent change in jurisprudential tendencies, manifest mostly in cases involving indigenous rights and human rights. Having synthesized various assessments I have concluded that a new policy of the High Court indeed exists, and it has three components:

1. Implied rights in the constitution or previous legislation can be relied on in decision making. This has not been possible under the previous, strictly legislative approach, prevalent before the Mason-court.[112]

2. International law found its way into Australian jurisprudence. Although Australia has been a leading party and willing signatory to international covenants, it has not been acceptable to rely on other than Australian common and statute law until recent times.

3. There has been an increasing awareness of the inconsistencies between justice and morality in law. This component follows from the first one and is inseparable from that, because the new policy of applying implied rights is justified by the supremacy of "moral justice" over "legal justice".

Coacting with these factors through the *Mabo* decision, the historiographical paradigm-shift was able to induce legal and jurisprudential, as well as political changes, at least in the field of race relations. I will unravel this string of ideas in the following sections.

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[111] The High Court of Australia is the country's supreme judicial institution. Its primary role is to interpret the Constitution, but it also serves as the ultimate court of appeal mostly deciding cases that involve interpretation of law, and human rights cases.

[112] Sir Anthony Mason, Chief Justice, 1989-95.

Implied Rights

The High Court has been accused of making up law by implying rights in the Constitution that are not explicitly written there. Although this can be verified by social/cultural necessities as well as legal/historical research, the High Court's new policy has raised doubts when it transformed into an anti-formalist *versus* formalist legal theoretical debate, in which formalism had long been on the winning side. In other words, the High Court has been accused of delivering anti-formalist judgments that consciously oppose a formalist interpretation of the law.

The High Court interprets the Constitution in cases of special leave:[113] it is not empowered to make law or alter the Constitution, but it is empowered to interpret existing law. It could get into the position of having to identify implied rights in the Constitution because Australia does not have a bill of rights or human rights charter that would explicitly recognise and protect human rights arising from the individual. The Constitution protects only "rights implied from the institutions secured in the Constitution, negative or residual rights derived from the representative and responsible government" (Patapan 181). Apart from a few exceptions (voting rights, religious freedom, and due process of law), personal rights are not protected in it.[114] Since the late 1980s, however, cases affecting human rights issues have come on for trial in the High Court—ones that international law considers universal but Australian statute law does not recognise. An alternative solution the Court has opted for is to aver recognition and protection if not by word then by interpretation. To spell out "existing" rights (by altering the Constitution or making a bill of rights document, for example) would be the task of another branch of government: the legislative, which, however, is controlled by the will of the majority of society through an electoral system. Therefore the Court has faced double pressure: to find and defend "existing" rights on the basis of a document that was designed not to spell out those rights, and so indirectly to become lawmaker and creator of rights. Only in the sense that, after all, justices deliver interpretations based on but not exceeding the text of law can I rightfully accept Haig Patapan's opinion that "[. . .] the Court's implied rights decisions did not represent an innovation in Australian constitutionalism" (181). This may be true within a formalist logic. Not even a best-intentioned High Court could read into the

[113] A special leave is awarded by the High Court for cases in which important constitutional issues are at stake.
[114] With this, Australia is in exceptional position among western democracies today.

inflexible text of the Australian Constitution other than the freedom of political speech as indispensable for representative and responsible government. However, the High Court has already become innovative by opening the ground for anti-formalist interpretations pointing beyond the legal text.

Is it their new policy, or is it the new type of minority rights cases in court that make the High Court so influential? Castles and Davidson offer yet another approach: because in a democracy it is the majority that brings decisions and makes laws, minorities have to depend on defending and asserting their rights against involuntary oppression by the majority. The scene of this defence and assertion is the legal system (169), that is, the courts. The new policy of the High Court came along simultaneously with the period when minorities increased in number and Indigenous peoples spoke out for their rights. Because political avenues for indigenous claims were generally closed (see, for example, their limited self-determination), litigation became increasingly politicized. Without a charter or bill of rights, human rights issues need to be determined in court, whose decisions, expectably but not mandatorily, will be followed by parliamentary acts. In Parliament, however, parties and the government make decisions, which might be influenced by international forums to a large extent because governments count with the risk of losing good international reputation as too serious a determinant. Yet another factor influencing policy-making, as Patapan highlights, is openness towards the public:

> The major claim of the new High Court is that its workings are no longer 'secret'. It now prides itself on its openness to public scrutiny, discussion and critique — its democratic credentials. But this claim to openness implicitly affirms the Court's ability to mould society, restating an even more compelling case for attempting to delineate the boundaries and character of its 'desire' to shape society. (180)

This openness of the Court[115] also fits into the general tendency to open up public decision making bodies to scrutiny and get people involved in their community's work at local level and higher. The citizenship debate[116] is both an example and the context of this tendency.

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[115] One manifestation of the Court's openness is that virtually all of its proceedings are available online. I am not sure, though, whether this is a consequence of the Court's new policy or part of a general computer networking revolution.

[116] For an extensive treatment of the various approaches to citizenship, see Hudson and Kane, eds., *Rethinking Australian Citizenship.*

Actually, native title is also an implied right that was not recognised in Australian statute law before 1992. Yet native title differs from other High Court implied rights decisions in that (1) it derives from common law, not the Constitution; and (2) it is group-differentiated, not an individual right. Points of similarity are that (1) it is recognised in international law, and (2) moral justice dictates that it exists. Beside the rather technical differences, similarities weighed more heavily in the recognition of native title. Australia participates in the United Nations Working Group on Indigenous Populations, which completed the *Draft Declaration on the Rights of Indigenous Peoples* in 1993 (the International Year of Indigenous Peoples). Canada, the United States, and New Zealand have all recognised prior occupation by Indigenous peoples in treaties which were later incorporated into their constitution or statute law. Historically, Australia proceded along the same colonial path but economic interests coupled with racist ideologies prevented pacification and signing a treaty (Espák, "ausztrál").

I do not support views that accuse the High Court of historical anachronism saying that justices projected present-day value judgments back to 1788 and adjudged a fundamentally colonial problem according to today's moral norms. During decision-making in *Mabo*, the High Court relied on historians' and anthropologists' evidence to an unusually high extent. Based on these, they concluded that the Colonial Office was aware of the unjust situation of Indigenous peoples and tried to remedy it in its measures. Lawfulness, however, could not always be achieved, due to the enormous geographical distance between London and the colonies. Perceived in this way, the High Court actually restituted legal continuity by declaring that native title is recognised in common law and, fortunately, its decision coincides with today's moral norms and international legal trends. Ironically, however, without a thorough knowledge of historical evidence one might easily pass criticism on the Court, for the same reason. This makes me argue that the *Mabo* decision could not have been concluded in the way it was without a paradigm-shift in historiography, and that eventually the *Mabo* decision sanctified the paradigm-shift.

Criticism of the High Court's native title decision was largely methodological: the method of demonstrating legal and historical evidence, and the use of international analogies were targeted. Significantly, nevertheless, the essence of the judgment—that native title is recognised in common law and it has not been automatically extinguished by the act of Crown (annexation)—remained untouched. Thus, in order to reach a rightful decision, the High Court was obliged to use unorthodox methods because those of the old paradigm could no longer serve purpose and, quite understandably, a comprehensive new

theoretical framework did not exist yet. This conclusion of mine coincides with Patapan's observation about the theoretical system underlying the Court's jurisprudence:

> But because the High Court has undertaken to articulate and justify its decisions by relying on such concepts in developing its jurisprudence, it will have to rework, renegotiate and reconcile its innovations with the complex theoretical structures that support such concepts. In doing so, it will have to concern itself with principles and ideas that are increasingly removed from the conventional understanding of law: having entered the province of politics, political theory, philosophy, sociology and economics to name a few, the Court's judgments now have to meet the higher requirement of theoretical exegesis as well as legal argument to dispose of a dispute. (188-89)

Indeed, the Court ventured a radically new method by moving beyond a declaratory theory of law to historical interpretation, by which justices consciously but not compulsorily took over a law-reforming role. They, however, cannot be charged for this, because such a role follows from the position of the Court as an Australian institution. Since legislature and the executive government were reluctant take up the burden themselves, another arm of the governing machinery filled in. "[The Court] has announced that it is more than an 'arbitrator', it makes the law by formulating general principles. Significantly, because it is difficult to amend the Australian Constitution the Court's constitutional decisions are (for all practical purposes) final" (Patapan 179-80). This observation about the formation of principles in Patapan's opinion is significant because it rejects the attack that the Court would just make up non-existing law or concepts. "Making law" in this sense is part of the Court's new policy that came to life to balance missing action in the executive and legislative branches. It is not the Court itself that creates (drafts and ratifies) the law, but as it is lord over the Constitution, consequent laws must be consistent with its judgment. The Court makes law only in the sense that by judging in relevant cases it sets guidelines for urgent future policy and lawmaking in the name of justice.

International Law

Whereas national law is concerned with relations among people, and between people and their government, international law is concerned with the relationship between states as

represented by their governments. However, since the end of WW2, international law's concern with people has increased enormously, "largely through the development of a substantial body of standards and processes relating to human rights" (Nettheim 196). Consequently, Indigenous peoples may appeal to international law under two premises: first, they can argue that their rights to sovereignty have never been subdued; secondly, that their human rights are endangered.

The first claim is unlikely to be supportable because states protect their sovereignty (and implied territorial integrity) above everything else.[117] In Magallanes's terms, it is unlikely that Indigenous peoples can become "subjects" of international law, rather than "objects" of it. (It must be noted though that becoming the object of international law is already an enormous development, due to the advancement of human rights.) The United Nations Working Group on Indigenous Populations (WGIP, established in 1982), for example, avoids the term "peoples" in its name because of states' objections that "peoples" in international law might imply sovereignty. However, it is a sign of change in international perception that by 1993 the WGIP, consisting of representatives of Indigenous peoples and governments from all parts of the world, developed a *Draft Declaration on the Rights of Indigenous Peoples* with a concept of self-determination inclusive of the right to decide over political development. This is, in fact, a word by word application of self-determination as a universal human right of all peoples to indigenous peoples:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (UN ICCPR and ICESCR article 1, section 1)

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development[.] (UN WGIP, *Draft Declaration* article 3)

[117] In *Indigenous Peoples, the United Nations and Human Rights*, Sarah Pritchard defines some important doctrines of international law: sovereignty, equality of states, and territorial integrity. About the latter in relevance to indigenous self-determination, she adds: "In its 'Friendly Relations Declaration' of 1970, the UN General Assembly sought to clarify the relationship between this aspect of the principle of territorial integrity and the principle of self-determination of peoples. The Friendly Relations Declaration states that it shall not be understood to support any action which would impair the territorial integrity of any states" (10).

Australia is party to all international human rights instruments,[118] including the International Covenant of Economic, Social and Cultural Rights, and the International Covenant of Civil and Political Rights (cited as first above).[119] The *Draft Declaration* (cited as second above) has not been adopted by the United Nations General Assembly yet.

The second claim is more approachable and gives larger scope for "the policy of embarrassment." Signatories, like Canada and Australia, are subject to international conventions about human rights. Accordingly, Australia established the Human Rights and Equal Opportunity Commission (HREOC) in 1986 to provide a forum for minorities to demand protection of their rights as established by the United Nations. The Commission, does not have law-making or law-enforcing power, but it can be influential on policy-making because of its advisory role and connection to the UN Human Rights Commission. In *Mabo* the High Court considered international law to acknowledge Indigenous people's right to occupy their traditional lands. J. Brennan cited the Optional Protocol to the International Covenant on Civil and Political Rights. He argued, "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights" (*Mabo* 42). Indeed, since Australia became signatory member to international covenants and independent from the Privy Council (1986), domestic law is increasingly synchronized with international law (Solomon). Indigenous peoples try to argue in various international forums that human rights include group-differentiated political rights because the right of self-determination implies so. However, this avenue of argumentation finds opposition in domestic policy forums for reasons of implied sovereignty I suggested earlier.

Two problems arise, then, from the position of Indigenous peoples in international and domestic law. First, it is dubious whether Indigenous peoples as national minority communities within federal states are subjects of international covenants. Secondly, it is

[118] The international human rights instruments of the United Nations are as follows: (1) International Covenant on Economic, Social and Cultural Rights; (2) International Covenant on Civil and Political Rights; (3) Optional Protocol to the International Covenant on Civil and Political Rights; (4) Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty; (5) International Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (8) Convention on the Rights of the Child (UNESCO).

[119] Canada is also party to all but one (on the abolition of death penalty) of these international instruments (UNESCO).

also arguable whether states are willing to sacrifice what they perceive as their sovereignty under presumed threats to their territorial integrity, which is an internationally protected priority. However, sovereignty does not necessarily mean secession, as theoreticians as well as activists argue.[120] International law does not support such radical solutions either, as it is expressed in the preamble and article 1 of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169):

> Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and
>
> Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and
>
> Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, *within the framework of the States in which they live*, [. . .] (preamble, my emphasis)
>
> 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law. (article 1, section 3)

While versions of shared-sovereignty have been offered as plausible solution in Canada, in Australia the mutually acceptable solution is still under debate (Leahy). Although it is the bare minimum to reach some degree of common understanding, a simplified talk about "self-determination" is not enough, because the term is too vague and legally as well as politically uninterpretable. The decision in *Mabo*, however, does not result in the legal possibility of Aboriginal sovereignty because, on the one hand, in legal terms sovereignty passed on to the Crown in the act of settlement and, on the other hand,

[120] For discussions of interpretations of "sovereignty" and its theoretical as well as political manifestations in Australia and Canada see among others Fleras, "Politicising"; Kymlicka, *Multicultural*; Asch, "*Calder*"; Foster, "Canada"; Alfred.

this cannot be contested in court because as an act of state[121] it is non-justiciable in British Courts (a court cannot overrule its own existence). Consequently, the High Court has not attempted to, cannot, and will not take sides in the sovereignty debate.

Justice and Morality

That moral norms are not absolute is not a recent discovery—a strictly legislative approach in jurisdiction could hold the field because the philosophy of law has long been aware of this problem. The text of law is supposed to provide black or white directives, hence interpretive difficulties must be dealt with relying on the text *verbatim* and not on some implied intention of the lawmaker. This is a principle to be respected. In full accordance with it have recent developments in international law come to the foreground when instruments protecting human rights became accepted in a supra-national context, with universal force, by the power of the numerous signatory countries. Thus, now there exists a legal practice abstracted from and uninfluenced by local values and interpretations, which does recognise supra-national, universal (*quasi*-absolute) norms. These new moral norms then penetrate local jurisdiction by their international force; in other words, this universal "moral justice" allows for local creation, adjustment, and interpretation of the law accordingly. The development of international law in this sense has definitely assisted outgrowing a strictly legislative approach.

Another important factor that has made the discovery of implied rights ineluctable was a paradigm-shift in the perception of European–Aboriginal relations. Literal interpretation simply did not make it possible to recognise evident historical truth. Eventually, that is how *Mabo* affected a complete and irreversible change: legal and moral justice came into such obvious contradiction that a western liberal democracy under the scope of international law could only decide in favour of JUSTICE in all capitals.

"[H]uman rights became the moral *lingua franca* of international law" (Patapan 178): there is much discussion about the morality of law, especially in texts that compare indigenous and non-indigenous systems. Indigenous perspectives (Alfred; Rowse, *After Mabo*) generally presuppose a lack of morality in "colonial" law as opposed to full moral and ethical concerns of the indigenous systems. Based on her anthropological fieldwork in the Victoria River and Kimberley regions, Deborah Bird Rose summarizes local

[121] The act of state doctrine "holds that the extension of sovereignty is a matter of the prerogative powers of the Crown which cannot be questioned by the courts" (Reynolds, "Sovereignty" 209).

indigenous opinion that "Captain Cook's law is a law of madness. It is based in and effected through destruction, and people cannot go on destroying forever" (Rose 197-98). There is usually a fallacy of ignoring post-colonial and recent development in white man's law, and another fallacy of equalizing "the state" with "the law, the oppressor, the other." Although these fallacies may be misleading, they have an ingredient of the truth about the situation in Australia, which "shoved a continuing reluctance to enact those [international] provisions" (Patapan 179). Australia is usually praised as one of the world's leading democracies, a multicultural country with discrimination non-existent, except (as sadly admitted) against Indigenous peoples. Unfortunately, often it is not objective examination but the observer's political preference that decides which clause of the preceding sentence is true or false, voiced or silenced.

"The cleansing of the regime that is attempted in *Mabo* and *Wik* seeks to identify the judiciary as the heart and conscience of the polity, and appears to relegate the problem of the definition of property to the demands of justice" (Patapan 182). Indeed, a significance of the role taken up by the High Court is that strictly defined legal norms enabled it to guide historical discourse through the maze of political rhetoric. Incidentally, however, the Court also voted in the affirmative for a certain moral position which coincided with its legal argumentation. Criticism for this immediately targeted the institution, even though it never transgressed the limits drawn by the sovereignty of the Australian state. In the context of legal theory, it is ambiguous if introducing a discourse of morality into jurisprudence is progressive or not, nevertheless it helps social reconciliation a lot. The reception of *Mabo* placed the decision unanimously into a moral and historical context, which appears in the closing document of the Council for Aboriginal Reconciliation:

> [. . .] We believe that reconciliation will be achieved when Australians, in all our diversity, commit to make reconciliation a living reality in our communities, workplaces and organisations.
>
> We acknowledge that many wrongs and injustices suffered by Aboriginal and Torres Strait Islander peoples in the past continue today, flowing from their dispossession and dispersal from traditional lands.
>
> *Our nation has taken many steps along the road to reconciliation. The 1967 Referendum, which was overwhelmingly supported, led to a landmark amendment to our Constitution. The High Court's Mabo decision in 1992 finally overturned the myth of* terra nullius*. The Council for Aboriginal*

> *Reconciliation was established nine years ago by a unanimous vote of the Commonwealth Parliament. Since that time there have been many achievements by communities, sectors, organisations and individuals.*
>
> While honouring these achievements, we also recognise that much remains to be done towards the goal of true reconciliation. [. . .] (Austral. CAR, *Corroboree* 2, my italics)

Mabo made a revolutionary new precedent in Australian jurisprudence, and it also raised several problems to be solved by historians, lawyers, and politicians in a common effort. It uncovered moments of injustice in legal practice (and history) through a case. Its results were put into law admirably quickly in the Commonwealth Native Title Act, 1993. *Mabo* transformed historiography and property law, and it is difficult to say which caused more turmoil in society. The Opposition[122] attempted to jump this bandwagon in the parliamentary debate of the Native Title Bill:

> Leader of the Opposition's address to the nation
>
> *John Hewson MP*
>
> I welcome this opportunity to talk to you tonight.
>
> Mabo is an important issue for all of us.
>
> It is important because the High Court has now formally recognised that Aboriginal people occupied Australia before it was settled by Europeans and has raised the possibility that they have rights over substantial parts of Australia.
>
> Understandably, this belated recognition of what the High Court calls Native Title is particularly important to Aboriginal people and Torres Strait Islander people.
>
> But it has raised doubts about what has been done in managing our land over the last 200 years.
>
> In good faith we have all bought homes and farms and opened mines and businesses, absolutely confident that we would own them and could operate them without legal challenge.
>
> So while Aboriginal people want the land they are entitled to, other Australians want to be sure that they do indeed own their home or their farm and that they won't have to go to court to defend them.

[122] Liberal/National Coalition.

Mabo calls for a delicate and sensitive response in the interests of all Australians.

The High Court decision presents us with a challenge and a responsibility.

Our *challenge* is to respond to the High Court's judgment.

Our *responsibility* is to do so in a way that is fair for *all* Australians—not just us and not just now, but for the sake of our children and their future in this country.

How do we do this;

We do it by ensuring that all Australians are treated equally under the law. We do it by recognising that any just and lasting understanding among the people of Australia must be on the basis that we share a common destiny as citizens of an undivided nation.

We do it by drawing a line in the sand.

We can't undo the past.

What's been done has been done.

[. . .]

But let me make one thing very clear: Mr Keating's Mabo legislation will not address the real problems of Aboriginal and Islander Australians: it won't do anything about their health, it won't do anythingk [sic] about their education, and it won't do anything about their welfare.

But a lot of big city lawyers will be rubbing their hands together. For them, Mabo will be an absolute bonanza that lasts for years.

Your taxes will pay their fees.

Most Aborigines won't be better off because of Mr Keating's legislation, but I can tell you that a lot of other Australians will be worse off.

[. . .]

Mr Keating says that his legislation is a milestone for Australia.

I say it is a millstone around our country's prosperity and our kids' future.

Mr Keating's legislation asks ordinary Australians to sign off on a blank cheque on the future.

[. . .]

Mr Keating's law can't re-write history.

> It can't undo the wrongs of the past.
>
> We have a responsibility to our Aboriginal and Islander community that must be in the first rank of our national priorities.
>
> But Mr Keating's scheme that could see the handing over of vast tracts of land and billions of dollars will solve absolutely nothing.
>
> Now is the time for all Australians—our indigenous people and those whose forebears came from elsewhere—to recognise that we all belong here.
>
> - that we are all Australians
> - that, as Australians, we need to help one another
> - and that we need to keep an eye to the future, not so much to the past.
>
> [18 November 1993] (Goot and Rowse, eds. 239-43)

Abundant in rhetorical twists, the main stride of John Hewson's speech acknowledges dark events in Australian history (which cannot be denied since *Mabo* anyway), but it shifts the emphasis to the financial worries of the ordinary Australian taxpayer (most of which are also unsubstantiated by the decision). Naturally the answer to worrisome questions like "will they take away my backyard?" could only be negative because the court declared that existing freehold title (private property) has extinguished native title and the Native Title Act confirmed this decision. The speech that I have quoted in detail above, therefore, stirs excess emotions instead of trying to highlight the symbolics of the act and its role in the process of reconciliation. A telling feature of its rhetoric limits the scope and significance of native title legislation (quite paternalistically) to "our indigenous people," whereas corresponding financial burdens will fall on "all Australians." The logic of the speech thus divides society into winners and losers.

As a major effort to achieve reconciliation, a social justice package was the third state of the Keating Government's response to *Mabo*.[123] Proposals for it were put forward by ATSIC, CAR, and ATSI Social Justice Commissioner, so it showed considerable indigenous initiative as well as governmental goodwill to cooperate. As Garth Nettheim summarizes, the recommendations for the social justice package had included "matters such as constitutional protection of indigenous rights, indigenous participation in the structure of government, revision of inter-governmental financial arrangements, cultural

[123] The first was the Native Title Act 1993 (Cth), the second was the Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth).

heritage, regional agreements, self-government, compensation, and progress towards a 'treaty' or (a) document(s) of reconciliation" (204). The Howard government (1996-present) dropped the planned social justice package altogether (Gardiner-Garden 20).

How long-lasting will Keating's progressive attempts at, for example, constitutional protection of indigenous rights have proven after 1993 (and especially after the 1996 conservative change) shall be the subject of another study. In one of its first measures to curb indigenous power, the Liberal/National Coalition Howard government revoked progressive decisions: they reduced funding for ATSIC and sought to restrict its power; cut the budget for CAR by nearly a quarter; proposed changes to the Native Title Act (especially after *Wik*); and dropped the social justice package proposals worked out by the previous government. Not even in a preamble did the 1999 referendum (about becoming a republic and adding a new preamble to the Constitution) approve recognition of Indigenous Australians as first peoples and custodians of the land. All in all, causes and manifestations of the development of minority and indigenous rights in the post-1992 period are so complex that they transcend the scope of the present dissertation. However, I would like to remonstrate that the transitional period under my observation between 1988 and 1992 established a foundation for Aboriginal peoples to emerge from the mist of previous historical discourse, gain political role, and obtain legal protection. We cannot overemphasize the significance of these steps on the road to self-determination, even if political and legal obstacles quickly showed its limits. A most recent report of the United Nations High Commissioner for Human Rights (Concluding Observations of the Human Rights Committe: Australia, 2000) attests this:

> <u>Principal subjects of concern and recommendations</u>
>
> 9. With respect to article 1 of the Covenant,[124] the Committee[125] takes note of the explanation given by the delegation that *rather than the term "self-determination" the Government of the State party[126] prefers terms such as "self-management" and "self-empowerment" to express domestically the principle of indigenous peoples exercising meaningful control over their affairs*. The Committee is concerned that sufficient action has not been taken in that regard. [my italics]

[124] International Covenant of Civil and Political Rights.
[125] Human Rights Committee.
[126] Australia, John Howard's Liberal/National Coalition government in office.

> The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (article 1, para 2).
>
> 10. The Committee is concerned, despite positive developments towards recognising the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo 1992, Wik 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limits the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.
>
> The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of the exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

Among others, the Human Rights Committee reproves Australia for unsatisfactory progress in indigenous self-determination and the protection of native title, whereas further articles unquoted here express disapproval of and recommendations for the protection of sacred sites; the treatment of the consequences of stolen generations; the protection of human rights in general; mandatory sentencing for Aboriginal people; and mandatory detention of unlawful non-citizens. The cited sections highlight political conflicts beyond legal terminology, as well as negative policy tendencies directly following from governmental sovereignty and individual liberalism, which replaced the direction of positive change in 1992. Furthermore, the quotation highlights the power of the policy of embarrassment, inasmuch as international law represented by the UN has authority to influence domestic policy and law-making through recommendations. This is all the more helpful because indigenous policy generally lacks bipartisan consensus, and

although neither major platforms are willing to tamper with issues testing the limits of state sovereignty, it is the incumbent party which draws the line at extending group-differentiated rights or even an official apology. Their leading ideologist I take to be the liberal individualist political philosopher Chandran Kukathas, who finds that an "important impediment [to toleration] is the conduct of sects or minorities in a society, and the attitudes they might evince" (7), and aspires to get rid of the "the categories of race and ethnicity from our legal and political practices [because] [t]hey are irrelevant, misleading and dangerous" (9). Contrary to his views, since the paradigm-shift there is substantial *raison d'ĕtre* underpinning the communitarian trend of liberalism as represented by Charles Taylor[127] and Will Kymlicka, who argue that group-differentiated citizenship (that is, identity and rights based on ethnic and racial belonging) need not contradict liberalism. In fact, it is a tool of democracy, where individuals can access a full range of choices in their own ethnocultural context.

Concluding Note: Legal Assistance

In this chapter I have showcased the *Mabo* decision, mapped a historical paradigm-shift, and proposed a new policy of the High Court under pressures of academic research, international influence, and moral justice.

I conclude that the High Court's decision made the historical paradigm-shift irreversible, and its legal judgment coincided with moral justice, so it could lend a new dimension to indigenous fight. *Mabo* demonstrated that litigation as a method to exercise rights can also be successful, but it strictly circumscribed the limits of self-determination. Thus it protected state sovereignty from the pitfalls of parallelism and opened the road for negotiation, legislation, and a communitarian concept of liberalism.

[127] For a good overview of Taylor's communitarian conception of justice, see Leahy 8-12.

6. CONSOLIDATION AND CONCLUSION

Consolidation

My two core objectives with the minute analyses in preceding chapters of this study have been (1) to dispel the myth of success surrounding multiculturalism as a population management policy, and prove that minority interests in the two countries under observation are much more complex than what a social policy unacknowledging legal, historical, and philosophical backgrounds can manage in the long run; and (2) to highlight that indigenous interests (claims to land, identity, and political voice) in Canada and Australia cannot be realized and fulfilled, because they are perceived as threatening to fundamental national interests such as the maintenance of state sovereignty and protection of territorial integrity, and not because they might be culturally and politically inferior, as earlier views might suggest. In order to support these arguments, I needed to examine what the indigenous interest and claims were; whether they materialized; what the national interest was; and how multiculturalism attempted to deal with conflicting national and minority interests.

It is their express demands that represent indigenous peoples' interests from their perspective. Consequently I needed to examine sources that reflect indigenous demands. In Canada, the relevant sections of the Meech Lake Accord, the relevant clauses of the constitution and Charter (1982), relevant parts of the Charlottetown Accord; as well as reactions to these have formed the object of examination. In Australia, I have observed the Barunga Statement, demonstrations, the Reconciliation movement, and the *Mabo* decision. I have selected these sources because, on the one hand, these are the major documents of the Canadian constitutional crisis, with sections pertaining to Aboriginal peoples. On the other hand, no such crisis to be examined has evolved in Australia yet, so sources initiated solely by Aboriginal peoples and their reception can be analyzed. I find it crucial to emphasize the importance of observing the indigenous perspective because their interest can only be seen from their point of view. (My perspective would present my arguments, the perspective of the federal government would present theirs.) For a long time it has been a problem that indigenous culture was visible only through white documents: its own voice was suppressed. By now, however, silencing of indigeneity has been discredited.

I have examined whether indigenous claims and interests could materialize, and have demonstrated that they could not. I have contrasted the essentially identical proposed objectives (inherent self-government in Canada, treaty in Australia) with what was realized of them in the evidence. I claim that these objectives are essentially identical because both derive from prior sovereignty and minority nationhood.

As regards the national interest, I have located it in the integrity and flourishment of the country (political unity and economic welfare). This is a general expectation by the public, which political rhetoric cannot overemphasize at a time of crisis. If it is not a time of crisis, then they emphasize how good political unity and economic welfare are. To be more specific: a Canada-clause found its way into the Charlottetown Accord; and the Australian government reacted to the Barunga Statement by launching Reconciliation and legislating after *Mabo*.

National and indigenous interests conflict because the national side presumes that the indigenous side threatens national integrity (sovereignty), and the indigenous side presumes that the national side unjustly objects to expressions of indigenous sovereignty. This might as well be true, but in this case the presumed situation is more important than an objective truth, because the two sides fight according to presumed rules under their own perspective. It is paramount to maintain national integrity because an operating state needs to consider all its citizens' interests. Disruptions in territorial, political, or economic integrity will inevitably affect citizens' life in negative direction. Canada as a player in international fields cannot allow political instability to produce economic uncertainty and power insecurity. In this sense, simultaneous efforts by Quebec to gain sovereignty have derogated from indigenous prospects because Quebec's larger economic and political inertia is more threatening to national interests, so satisfying Quebec's demands claims primary significance.

The economic aspect (as eventually integrity also links there) could supersede considerations of justice because Canada, as all western democracies, follows the principle of majority good. All citizens are affected by economic prosperity and the system of social welfare. To cause turmoil in this machinery in the name of historical justice may be acceptable only if it can be justified by eventual and long-term national interest.

Two ways exist to push through historical justice even if it disagrees with momentary econo-political interests: by negotiation or by litigation. Both requires thorough preparation, so that academia should preferably already have substantiated the "new" (that is, unaccepted by the canonizing power of the national interest) truth, which

would preexempt it from charges of subjectivity and unconfirmability. Preferably, both ways should be accompanied by increasing public support of people apprehending the "new" truth. Necessarily, obtaining this is a slow process, but civil organizations (NGOs) can effectively initiate and exercise pressure if negotiations proceed.

By negotiation: Even if historical justice breaks through, it is unlikely that its consequences can fully be realized. All parties will have to compromise under the coercive power of the economic potential of the national interest. This is especially so in Canada, where residual powers are assigned in section 91 of the Constitution Act, 1867 to the federal government "to make laws for the peace, order, and good government of Canada in [. . .] all matters not [. . .] assigned exclusively to the legislatures of the provinces," and "rights and freedoms set out in [the Canadian Charter of Rights and Freedoms] are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Charter, section 1). This, in excessively plain words, might mean that other interests can be ignored for the sake of the national interest.

By litigation: Litigation normally proceeds if avenues of negotiation are blocked irrevocably. Some major disadvantage of court procedures lies in that only individual, specific cases can be decided (so a test case needs to be typical), they incur expenses, they linger long, and because of determinative precedents they may produce unfavorable outcomes. An advantageous decision, however, may incur political confirmation by compulsory legislation, because governments are unlikely to oppugn decisions of the court. At most, they might incline to make compromises by referring to the national interest, as they would have done under the option of negotiation.

A keyword underpinning the conflict of interests, then, is sovereignty. Sovereignty means that a "state" has full administrative authority over natural and material goods under its jurisdiction. However, all peoples have the right to self-determination, and Indigenous peoples claim that their peoples form nations and federations with sovereignty that has never been subdued. According to this, double sovereignty exists in Canada and Australia. The other party, as a matter of course, does not recognize this claim.

These conflicting interests may be reconciled in either of the following ways: (a) accepting indigenous arguments through persuasion, negotiation, or litigation, by signing a "treaty" which would consequently regulate the parties' rights (including limited sovereignty); or (b) rejecting indigenous arguments, by making allowances in the name of the sovereignty of the stronger party, which Indigenous peoples might accept under the circumstances. The latter implies submission of their radical claim.

Version (a) was pursued in the Charlottetown Accord, which would have recognized the inherent right of self-government and proposed to implant it as third order into Canada's constitution, within the framework of the Canadian state. Version (b) is pursued in Australia, where native title has been incorporated into statute law but treaty claims and expressions of political self-determination have been consistently refused.

Still, it is possible to approach this conflict from an altogether different angle. I now proceed on to what has been accomplished by governments to safeguard the national interest (integrity and stability). Because it is all about conflicting groups of society, there have been federal attempts to treat the problem from a governmental perspective. Let me premise that it is not possible to contrast a governmental perspective with an indigenous perspective as binary oppositions (all the more so because Indigenous peoples are also a very diverse grouping), because a government needs to consult the interests of all its constituent ethnocultural groups. Primarily, governmental perspective is that all constituent groups of the country live in peace and order and under good governance. Because a country is made up of several constituent ethnocultural groups who may or may not have come together voluntarily, are more or less satisfied by the opportunities offered, differ in needs and demands, and change in composition relatively rapidly, there needs to be a population management policy that attunes and consolidates their life. In the period between 1988-92 this task is carried out by the policy of multiculturalism, which manifests in bilingual context in Canada because of the economic and political weight of the French-speaking population.

The fundamental principle underlying the policy of multiculturalism is equality; that is, politically speaking, multiculturalism deals with various ethnocultural groups on an equal footing because this is perceived as the fairest deal. This is, all in all, also the most easily accomplishable solution, because there is no need to distinguish between groups according to their demands. ("Bilingual context" in Canada implies a sort of distinguishment, nevertheless, but distinctions of a more subtle kind are not supported by the policy.) Multiculturalism has become a relatively successful population management policy—it has brought undeniable improvement compared to previous policies based on racial and ethnic superiority. However, it is discernible that its handling of society as if it were made up of co-equal elements on English-speaking and/or French-speaking foundation has dissatisfied elements who perceive themselves as distinct and, by the right of their own society, want to and are able to manage their own population. These distinct elements are peoples/nations within the state who fulfil the generally accepted but not

exclusive criteria—territory, language, culture, institutions, history—of nationhood. To be more specific, they are Aboriginal peoples (Indian, Inuit, Métis) and Québécois in Canada, and Indigenous peoples of an officially unrecognized diversity in Australia.

I suggest adapting the policy of multiculturalism to the given situation. The concepts of multinationality and polyethnicity need to be introduced to differentiate groups within the state who have a distinct national identity from those who do not. For the former, differential policies need to be worked out, or they need to be allowed to manage their own population. The latter can be dealt with under the umbrella of "multiculturalism." Such a change in the practice of "multiculturalism" needs to be communicated towards the populace responsibly and lucidly. Then, renewed negotiations with intra-state national societies can be launched to conciliate interests. Equalizing directives of multiculturalism will not hinder the procedures then, however, the issue of sovereignty will still be in the way. If no compromise is achieved in how to share sovereignty, interests are not likely to approximate in the foreseeable future.

Conclusion

In chapter 2 "Why Meech Lake Failed" I have examined the essential distinct society debate at Meech Lake, the constitutional position of First Nations, the rights discourse of ethnic minorities, and the provisions of the Multiculturalism Act pertaining to national minorities and ethnic groups. I have concluded that the failure of the Meech Lake Accord pushed the country towards a federal and identity crisis inasmuch as it failed to reconcile the interests of national minorities with the interest of the nation as a whole within one legal framework. The leveling tendencies of the ideology of multiculturalism antagonized Aboriginal peoples and Québécois because over the years it had become impossible to push nationalist arguments through the wall of liberal egalitarianism. Continuing clashes over the constitution show, however, that inherent cleavages in the body politic have survived, so multiculturalism could not adequately respond to the federal and cultural identity crisis and it has remained a partial solution to a population management problem.

In chapter 3 "Identity and National Priorities in Australia" I have critically surveyed the debate about Australianness at and around the time of the Bicentenary, analyzed the Barunga Statement as an expression of an alternative indigenous history and politics, considered its underlying motif of self-determination, and examined whether provisions of the *National Agenda* accommodated indigenous and ethnic minorities. I have

concluded that the Bicentenary reinforced the nation-building myths of white Australia's past 200 years, while simultaneously opening a forum for discussing the nation's future. In the early 1970s a new (non-nationalist) politics of identity emerged, and through the next decades it gave growing intellectual and political support for the Aboriginal land rights movement (as well as other social movements), cherishing inclusive multiculturalism. The Barunga Statement and the findings of the Royal Commission into Aboriginal Deaths in Custody put morally and politically binding obligations on the government of the day by bringing historical and social wrongs to light. Whereas the claims in the Barunga Statement were endorsed only by the governing party because of its implied differentiation between groups of society, the *National Agenda for a Multicultural Australia* enjoyed bipartisan support primarily because its central notion was equality for all Australians (and because it promised to improve economic efficiency). In the absence of legal recognition of enclosed societal cultures in Australia until 1992, governmental obligations were embedded in the language of moral justice and liberal equality instead of treaties and self-government rights. For this reason, the *National Agenda* seemed a sound nation-building document to lead the country into a new century.

In chapter 4 "The Charlottetown Accord" I have analyzed the improved constitutional text of the Charlottetown Accord, the third order model of government and its preceding alternatives, and the directions of Quebec and First Nations politics after repeated constitutional failure. I have concluded that the Charlottetown Accord offered a model acceptable to all parties in the debate because it nearly satisfied both the ideal of national coherence and the demands of First Nations to inherent self-government. All parties had to give up something, though, for a compromise, which resulted in an uneven text that manifests residual moments of biculturalism (two nations), multiculturalism in bilingual context, and self-government (three nations)—all for a national unity. The Accord failed notwithstanding, which cleared the ground for more radical models and increased the likelihood of their prevalence, despite their obvious irreconcilability with the national interest of political and economic integrity.

In chapter 5 "*Mabo* and the Native Title Legislation" I have showcased the *Mabo* decision, mapped a historical paradigm-shift, and proposed a new policy of the High Court under pressures of academic research, international influence, and moral justice. I have concluded that the High Court's decision made the historical paradigm-shift irreversible, and its legal judgment coincided with moral justice, so it could lend a new dimension to indigenous fight. By this, it rocked the foundations of the Australians legal and political

system. *Mabo* demonstrated that litigation as a method to exercise rights can also be successful, but it strictly circumscribed the limits of self-determination. Thus it protected state sovereignty from the pitfalls of parallelism and opened the road for negotiation, legislation, and a communitarian concept of liberalism.

General tendencies of indigenous and ethnocultural politics in Canada and Australia between 1988-92 can be summarized (with similarities and differences) as follows:

1. In the period between 1988-1992 the problematized focus of debates in Canada and Australia were the constitution and a national identity, respectively.
2. In both countries, consensus was hindered by the national/ethnic/racial problem.
3. Political solution directed at the removal of these barriers was found in the policy of multiculturalism. However, its controversial aspects have already led to crisis in Canada, which has not been the case in Australia yet.
4. The historical, federal and social context of Australian multiculturalism and identity politics is different from the situation in Canada, because in Australia there is no single-block significant (non-Indigenous) national minority comparable to the Québécois, with distinct history, political structure, and territorial basis. Indigenous peoples in Canada may also voice their demands more successfully because of the recognition they were awarded in the past in the form of treaties and because of their involvement in the constitutional debate. Recent immigration patterns (post-WWII) to both countries show similar trends, resulting in ethnic diversity.

Distilled and synthesized, all my arguments point in the direction of the following eight—correlated and complementary—conclusions:

1. Indigenous demands have political consequences.
2. Governments are willing to support indigenous claims only to the extent that they do not incur political consequences.
3. Governments are prone to change their position according to their "national interest."
4. In both countries multiculturalism serves as fundamental policy of nation formation.
5. Multiculturalism as an ideology is rooted in an individualist egalitarian conception of liberalism, which cannot handle claims raised by national minorities.
6. The demands of indigenous national minorities will be subordinated to the principle of national integrity (national unity).
7. In Canada in the period of observation the drive to maintain national unity manifests in efforts to keep the confederation together by constitutional reform.

8. In Australia in the period of observation the drive to maintain national unity incurs conscious politics of identity involving the use and abuse of history.

Therefore I have found that my systemic study of federal multicultural policies and the politics of indigeneity in Canada and Australia between 1988-1992 supports adequately my initial thesis, and I can safely conclude that government responses to social and cultural diversity in Canada and Australia do not, as a matter of course, embrace the full political consequences of recognizing the claims raised by indigeneity. The degree of willingness to accommodate indigenous claims of "land, identity and political voice" (Fleras, "Politicising") depends on the perceived national interest, while the policy of multiculturalism is primarily a tool to satisfy minority claims within the framework of liberal individual rights. It cannot, however, satisfy the claims of "nations within" for a group-differentiated right of self-determination. Managing federalism is the ultimate priority of federal multicultural and indigenous policies in Canada, whereas in Australia a politics of identity dominates both multiculturalism and indigeneity.

Evaluating the achievements of the research we can conclude that

(a) this systemic study of federal multicultural policies and the politics of indigeneity in Canada and Australia between 1988-1992, both in its chapter-by-chapter conclusions and in its overall thesis (as described above), satisfies its original proposals and fulfills its fundamental aims to highlight that (1) multiculturalism is not a fully successful population management policy, because minority interests in the two countries under observation are much more complex than what a social policy unacknowledging legal, historical, and philosophical backgrounds can manage in the long run. However, at the same time the dissertation also emphasizes that (2) indigenous interests (claims to land, identity, and political voice) in Canada and Australia cannot be realized and fulfilled, because they are perceived as threatening to fundamental national interests such as the maintenance of state sovereignty and protection of territorial integrity.

(b) the dissertation is original work because by the interdisciplinary study of the interaction of multiculturality and indigeneity in Canada and Australia it supplies information on a previously uncovered research area.

(c) the originality and usefulness of the study is further emphasized by acknowledging that (1) it examines cultural and theoretical issues of current significance (minority and human rights, multiculturalism, Indigenous peoples in multicultural states); and (2) by discussing the transitory period of 1988-1992 and defining its major socio-political

tendencies, it establishes the direction of further research for comparative and interdisciplinary studies of the post-1992 period.

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