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This thesis was submitted by its author to the School of English and American Studies, Eötvös Loránd University, in partial fulfilment of the requirements for the degree of Bachelor of Arts. It was found to be among the best theses submitted in 2020, therefore it was decorated with the School's Outstanding Thesis Award. As such it is published in the form it was submitted in **overSEAS 2020** (http://seas3.elte.hu/overseas/2020.html)

A HKR 346. § ad 76. § (4) c) pontja értelmében:
„… A szakdolgozathoz csatolni kell egy nyilatkozatot arról, hogy a munka a hallgató saját szellemi terméke…”

NYILATKOZAT

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Budapest, 2019.11.15.

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aláírás

ALAPSZAKOS SZAKDOLGOZAT

Őslakos területi jogok Ausztráliában

Aboriginal Land Rights in Australia

Témavezető:

Gall Cecília

Lektor

Készítette:

Mihályi István Mátyás

Anglisztika

Angol specializáció

2019

ABSTRACT

The question of land rights is an important topic when it comes to the discussion of the history Australian Aboriginal rights. Because of their unique spiritual and economic connection to their territories, native Australians suffered for long decades, as mining and pastoral companies invaded sacred sites of the Dreamtime. In the second half of the 20th century, two events, the Wave Hill walk-off and the *Milirrpum v Nabalco* case signalled a radical change in Australia's Aboriginal policy. Aboriginal land rights were in the focus of public, legislative, and political debate, which culminated in the Aboriginal Land Rights (NT) Act of 1976. The act not only established a system for natives to reclaim their land, but also served as a cornerstone for further legal cases and the advancement of Aboriginal rights.

INTRODUCTION

Aboriginal rights have long been an issue in all nations which were once founded as colonies. Colonisation was not sensitive for the human rights of the indigenous people, as the aim of the colonisers was to build the largest empire of the globe. The Australian Aborigines' case is similar to other native populations, yet, still exceptional. At the time of the colonisation Australia was treated as a land without inhabitants or lawful owners; terra nullius. This particular way of establishing the country put the Aboriginals in an exceptionally disadvantageous situation compared to other parts of the world. Whilst Native Americans and the Maori of New Zealand were able to put up a fight for their land, the indigenous Australians' unique lifestyle and social system made it hard to issue an immediate response to the threats of colonisation. As a result, the advancement of Aboriginal rights was constantly behind the aforementioned native populations.

Fortunately, the political climate of the second half of the 20h century helped to speed up the advancement. Both native and white Australians played significant roles in the changes, and their fight started to gain public support in the 1960s. The contents of this paper focus on two events that are considered to be milestones in the Australian Aborigines' land rights issues. Firstly, to provide background information, the special connection of the land and the indigenous Australians will be introduced briefly, alongside with the effects of colonisation. Then, the events and the importance of the Wave Hill walk-off will be discussed, supplemented with various speculations about the roles of Aboriginal and white Australians in the protest. Finally, the paper unfolds the story of the Yolngu people, who brought their land claims to the court in 1968. Additional information is presented to explain the motivation behind the judge's decision in the case. As a direct result of the events, the Aboriginal Land Rights (Northern Territory) Act 1976 and its significance and effects are also discussed. As a conclusion, the paper reflects on the current state of the Aboriginal land rights issue.

1 Australian Aborigines' relationship with land

1.1 Connection to Land

Approximately 300 000 native people inhabited Australia at the time of its colonisation, organised into more than 500 different tribes (Broome 11). These communities were different and colourful in the respect of their languages, dwelling place, traditions and ceremonies but they also shared some similar values. One of them being the connection to their land. This connection is both physical and spiritual.

The physical aspect comes from their semi-nomadic lifestyle. Aboriginals were effective hunter gatherers because they knew every bit of land in their tribe's territory. As a result, they were extremely dependent on the land. The continent's fauna have been isolated for several thousands of years and thus developed its own ecosystem. Unfortunately, the arrival of European settlers, and with them, foreign animals, this precious ecosystem has been corrupted beyond repair.

Aborigines' spiritual connection to the land is just as vital. According to their culture, their ancestors created the land in the Dreamtime, and they continue to live in it (Broome 15). Because kinship is the core value of the Aboriginal social system, people naturally want to stay close to the ancestors. Wandering the same places as their predecessors strengthens their sense of belonging to the land and to the community. This aspect of their connection was also damaged with the arrival of the Europeans.

1.2 Exploitation of Land

At the time of the colonisation of Australia, there were three ways of claiming land: conquest, cession and settlement. Legally, Australia referred to itself as a settled colony, which means that the land was uninhabited before settlers arrived, therefore there was no need for a treaty or conquest to acquire it. However, the indigenous people of the continent were living there

for at least 50 000 years (Broome 11). This means, that their ownership of land was essentially unrecognised, and remained so until the late 20th century.

The two major industries to exploit the native's land was the mining and pastoral industries. Coal mines opened shortly after the First Fleet's arrival. In the 19th century, the discovery of gold on the continent led to the Australian 'Gold Rush', and as a result the colonies saw a sudden increase in population. In the second half of the 20th century new resources were found, and the industry grew at a sudden pace (McKay et al).

The pastoral industry also has a long history, especially the cattle industry, as the first cows were brought in with the First Fleet. Until the 19th century, some pastors deliberately used Crown land for cattle and sheep grazing without a license. Eventually some of these squatters gained leasehold title and continued to use enormous territories. These territories were the home of Aboriginal tribes, who often had no choice, but to work as stockmen for the pastoral leaseholders, as their traditional lifestyle was not sustainable anymore ("Squatters and Pastoralists").

1.3 Life Quality of Aboriginals

As the settlers established their properties, the Aborigines' situation became increasingly dire. Their living conditions were especially harsh in the Northern Territory, where Ronald Berndt and Catherine Berndt conducted a research during the Second World War, in 1944. The subject of the research was the life of Aboriginal workers at Wave Hill and other cattle stations, owned by the Vesteys, who were infamous for their treatment of native workforce. Most commonly, stockmen were paid for their efforts in portions of tea, flour, sugar, tobacco and sometimes meat (Gray 6). Occasionally they had time to go hunting and gathering. Housing conditions were below standards with no flowing water and sanitation in camps. Although there were regulations made by the government, they mostly relied on the pastoral companies to ensure the standards were met. The Berndts only published information that

could be supported by evidence, however, Catherine Berndt hinted that they also witnessed the cruelty of white pastoral workers towards Aborigines. These included “setting dogs on them; shooting around them; ‘white’ station-hands living with Aboriginal women and girls” (Gray 19).

In these horrific living conditions, it is no wonder that they have found the Aboriginal population declining. The main cause, the Berndts suggested, was that the Aborigines had simply ‘lost interest’ in life or reproducing. Malnutrition was one of the main issues, as it made their immune systems even more vulnerable to foreign diseases, and also contributed to high infant mortality. Abortion was also observed to be common among the natives. The physical suffering was paired with psychological; as their traditional lifestyle ceased to exist they could not connect with the land, which was the centre of their culture. Ultimately, this led the Aborigines to question the purpose of their lives and if it was worthy to bring children into this world, that only offers pain and suffering. Some natives, ‘drifted’ to larger towns, trying to assimilate with little to no success. Others remained in reserves, which were being established as long ago as the 1700s, but could not live as semi-nomads because their mobility was heavily restricted.

In the light of anthropological research, like the Berndts’, that foreshadowed the disappearance of the Aboriginal people, the public started to be concerned about the issue. The second half of the 20th century brought countless changes in Western societies with the emerging civil rights movements. In Australia, the 1967 referendum it was decided that Aboriginal people will be counted in the census, so that the government can make special laws for them. However, the fight for Aboriginal land has started beforehand. Two milestone events were the Wave Hill walk-off and the *Milirrpum v Nabalco* case.

2 The Wave Hill walk-off

Strikes or walk-offs have occurred at multiple stations of the Northern Territory in 1966. The primary cause was a decision made by the Conciliation and Arbitration Commission. In 1965, the North Australia Workers Union (NAWU), pressured by the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI), suggested equal wages for the aboriginal pastoral workers. Up to that time, aboriginal workers were generally paid only a fraction of the minimum wage, if they were paid at all ("Australian Heritage"). The Commission eventually ruled that there should be equal wages, however, because of the lobbying of pastoral land holders the ruling would only come into effect in 1968. The delay was explained as giving time to prepare for the changes for both Aboriginals and pastoralists. In addition, the Commission has not erased the slow worker exception ("Australian Heritage"). Employers could decide if their employees were inefficient compared to others, thus making them exempt from the equal wages. The Commission's decision caused outrage amongst the Aboriginal people, who have been working in inhumane conditions for generations (Attwood, "The Articulation" 6).

2.1 Other walk-offs

Prior to the Wave Hill strike, other walk-offs have been organised in the Northern Territory, namely at Newcastle Waters and Helen Springs cattle station in April 1966. The person who helped initiating events was an Aboriginal man, president of Northern Territory Council for Aboriginal Rights and organiser for the NAWU, Dexter Daniels (Riddett 50). With the increasing support for Aboriginal rights in the Commonwealth, Daniels felt that the time has come for the natives to act. However, his initial motion for a Northern Territory-wide strike was denied by the Union. The NAWU's secretary, Paddy Carrol, thought that negotiating with the pastoralists should be enough to settle the dispute and also felt that the Union would

not be able to support a collective strike (Riddett 50). This decision eventually resulted in Daniels taking a leave from the NAWU. He started to have meetings with the leaders of the Aborigines living at the cattle stations, urging them to walk off the job and protest for equal treatment and working conditions. These strikes were settled in a few weeks time, unlike the strike at Wave Hill.

2.2 Events of the Wave Hill walk-off

The Wave Hill cattle station was the property of an English food company, the Vestey Brothers, who acquired the pastoral lease for the land in 1914. The leased area was situated approximately 600 kilometres South of the city of Darwin and was 13 500 square kilometres (Attwood, "The Articulation" 8). The territory was inhabited by indigenous people, collectively called the Gurindji.

All sources agree that the organization of the Wave Hill walk-off started in early August 1966, in Darwin, where Dexter Daniels, and Vincent Lingiari, leader of the Gurindji people at Wave Hill met. Hokari assumes that their meeting was made possible because Captain Major, the Aboriginal leader at Newcastle Water station, told Lingiari about Daniels and his connections after he helped organise their strike (Hokari 106). Daniels managed to convince Paddy Carrol, NAWU's secretary, to support the Newcastle strike with food and other supplies, but Wave Hill was different. Because the area was relatively isolated Carroll was afraid of the logistical challenges, and chose not to provide the Union's support to strikers. Daniels, possibly frustrated by this decision, took leave from the Union to help organize support for the strike himself (Attwood, "The Articulation" 6). Eventually the NAWU, under pressure by the FCAATSI, gave its support to the Wave Hill Aboriginal workers for the whole duration of the walk-off (Riddett 50). After talks between Daniels, Lingiari and other elders at Wave Hill, the walk-off began on 22 August 1966.

Sources vary about the exact details of the beginning of the walk-off. Lyn A. Riddet, who traveled to Wattie Creek in the later stages of the movement, stated that Aboriginal stockmen and their families walked for 3 days and a total of 30 kilometres. Hokari, on the other hand, claims that it was a 16 kilometres long walk. Measured on up-to-date maps with satellite images the walking distance is estimated to be 16 kilometres despite Riddett's statement. Additionally, taking into account the food portioning system and the malnutrition of stock workers, a 3 day long walk does not seem possible. The number of natives who walked to Wave Hill Station is estimated around 200 and 250, 80 of them being the workers (Attwood, "The Articulation" 8). The reason to walk off the station instead of staying there and simply stop working is also an aspect that leaves scholars puzzled, however, Hokari offers a logical explanation. Firstly, because of the Aborigines' traditional semi-nomadic lifestyle, moving from one place to another was often a way of solving a crisis. Secondly, a more plausible explanation, in order to get proper support and be in contact with organizations they needed access to the telegram at the welfare station (Hokari 107).

When they reached the welfare settlement, Vincent Lingiari in fact requested messages to be sent to Daniels and the Aboriginal Rights Council (Riddett 50). The Gurindji then set up their camp in the dry river bed near the Wave Hill welfare settlement ("Australian Heritage"). In the following week, members of the NAWU, the Northern Territory Council for Aboriginal Rights (NTCAR) and the FCAATSI arrived, bringing much needed supplies from Darwin. A TV crew also came to make reports with the Aboriginal leaders, which they later aired nationwide ("Australian Heritage"). The Gurindji people also received help and material supply from Bill Jeffery, the Wave Hill welfare officer at the time (Riddett 54). In September, 1966 the NAWU sent a message to the Wave Hill Welfare settlement saying that the negotiations for equal wages were successful (Riddett 54). However, sources unanimously say that the Gurindji elders decided not to go back to the cattle station but set new demands. Now they wanted to get rid of the Vestey company's employees and run the cattle station on

their own, because as they claimed, it was their land. As the wet season approached, the Gurindji moved their camp on higher grounds, even farther from the welfare station ("Australian Heritage"). With the help of Frank Hardy, writer and activist, a petition was handed in to the government in October, in which the Gurindji wanted their ownership of the land recognized. It was later denied and other alternatives were offered, but the Aborigines held themself to their principles, and refused (Attwood, "The Articulation" 36).

By March 1967, the Gurindji settled at Wattie Creek, in the Daguragu or Seal Gorge area. They built up their own shelters and decided to continue living there. They were now approximately 12 kilometres from the welfare station, which meant that they had to rely entirely on themselves and occasional supplies delivered to them by supporters. Some members of the tribe went to work at other stations to earn money and support their kin (Riddett 54) . Additionally, Richard Jefferey left the welfare station, and the new officers were not keen on helping the Gurindji (Riddett 54). In April, another petition was made with the help of Hardy, this time to the Governor General, in which the Aborigines showcased their history with the land and wanted their ownership of their country recognised. This petition was also denied. Finally, after seeing that the Gurindji stuck to their land no matter what happened, the government seemed to reach an agreement to grant them a 10 square kilometre area, in 1968. However, this decision met heavy resistance from the pastoralists and eventually never went through (Attwood, "The Articulation" 36).

As a result, the Gurindji camping at Daguragu was still illegal. The welfare officers tried to persuade them to live at the station from time to time with no success. Riddett also witnessed as a truck took the children taken to the school at the welfare settlement, but only brought them back two or three days later. Even though they could not count on the government, civil supporters were there to aid the Gurindji. From 1970, the supporters arrived frequently and helped develop the Wattie Creek camp into a settlement and cattle station that

the Aborigines could run on their own. Finally, after eight years at Wattie Creek, PM Gough Whitlam transferred the lease of 3 236 square kilometres of the area to the Gurindji.

2.3 The original idea of claiming the land

It is important to emphasise the fact that the idea of the walk-offs originate from Aboriginal people. Welfare officials and other bureaucrats in the Northern Territory did not think that the natives can organize protests themselves. Many thought that the Communist Party of Australia (CPA) and other white 'do-gooders' were behind the scenes (Riddett 52). While the effort of the protesters in fact received support from the FCAATSI, the NAWU, and later from civilians, it is undeniable that they took the first steps on their own.

Minoru Hokari conducted research with the help of contemporary written sources and the oral history told by the Gurindji people themselves. His findings further reinforce that the Aboriginal people had a definitive plan well before the walk-offs began. In the interviews he conducted, members of the Daguragu (formerly Wattie Creek) community all agreed that the mastermind was a fellow Gurindji tribesman, Sandy Morey, also called Tipujurn. He was from Wattie Creek and worked with a white pastoral inspector, Alex Morey. His job made it possible for him to travel to other states of the Commonwealth and examine the Aboriginal non-Aboriginal relationships elsewhere. It is not exactly clear, but Hokari suggests that it was seeing relatively better conditions at other stations that made Tipujurn think about improving the living conditions of his community. He started meetings at Wattie Creek and explained his plan to get their land back to other authoritative members of the Gurindji. These meetings can be traced back to around 1950 (Hokari 103), which makes it clear that the core idea was born well before Vincent Lingiari contacted Dexter Daniels. Eventually, Tipujurn also get to know that there are organizations, such as the NAWU, that can help them in their fight. Vincent Lingiari and Captain Major, the leader of the natives at Newcastle Waters, both had frequent talks with Moray, who often reminded them that they will need support to achieve

their goals (Hokari 103). The delay of equal wages and the contact with Dexter Daniels from the NAWU proved to be the optimal circumstances for them to launch their campaign.

2.4 Non-Aboriginal influence

Involvement of non-Aboriginals and their role in the unfolding events is debated. Attwood suggests, that the aim of the walk-off was undecided and the Wave Hill workers heavily relied on Daniels and other outsiders to help them set their demands. This assumption is partly incorrect, according to Horaki's research, as the ultimate aim of the Gurindji was clear from the beginning. Nonetheless, every article agrees that the help of non-Aboriginals was essential for the walk-off to succeed. Firstly, they needed material support, because they were not eligible for their food portions and, of course, did not have any money to purchase supplies. With the Union's and civilian support food was supplied to them and they also relied on 'bush' food they could gather (Riddett 59). The other reason was that they needed a narrator, or an intercultural translator, who could understand their demands and forward them to the appropriate bodies. At first, they have found this person in Dexter Daniels, but later, it was Frank Hardy who became one of their most important allies.

Frank Hardy was an Australian author who was also a member of the Communist Party of Australia (CPA). Hardy flew to Darwin for personal reasons in June 1966, and when he learned about the strikes of Northern Territory Aborigines for equal wages, he offered his help to Dexter Daniels and the NATCR. He agreed to be the publicist of the Wave Hill strike and to help organise support for the effort (Attwood, "The Articualtion" 11). Attwood and Riddett both suggest that Hardy's role was probably more than a publicist, he was actively involved in the land right claim. However, there was a good reason to deny his deeper involvement in the Gurindji's walk-off. Because he was a CPA member, politicians and pastoralists, who were under pressure, could easily convince the public that the Gurindji walk-off was orchestrated by the communists, if he openly played a supportive role. This

would have shifted the focus from Aboriginal land rights to politics and the end result would have been a failure. Interestingly, Attwood also points out that Hardy tried to hold himself to the CPA's policies while helping the Gurindji. This meant aiding the Aborigines and letting them fight their own fight. Hardy is also quoted to say that the greatest importance of the Gurindji's movement is that "they have developed their own leaders" (Attwood, "The Articualtion" 11).

Furthermore, Attwood also claims that Hardy influenced the Gurindji to move their camp to Wattie Creek. He sees a parallel between the Gurindji's move and a strike that occurred in 1946, at Pilbara, a strike that was well known amongst CPA members. Stockworkers walked away similarly to establish their own pastoral and mining company. However, Hokari's approach finds another possible explanation for the Gurindji's motivation. He found that Sandy Moray was originally from the Seal Gorge area, and the Gurindji moved their camp there as a tribute to the mastermind of their plan. In addition to this, Seal Gorge being a sacred Dreaming site could also made place's importance understandable for white Australians (Hokari 111).

2.5 Conclusion

Although there is no clear evidence for the exact roles of the participants in the event, the results of it are undeniable. Both the Gurindji and their supporters recognised the appropriate time to protest for the Aboriginal land rights, which ensured nation-wide coverage for their cause. The Wave Hill walk-off also showed that there is support for the Aborigines from organisations and from civilians too (Attwood, "The Articulation" 4). The wide publicity of the case could give emotional support to Aboriginals who were in a similar situation (Riddett 51) and put additional pressure on politicians to improve the lives and rights of indigenous Australians. However, the Gurindji were not the only one who fought for their land rights in the 1960s; the Yolngu people at the Yirrkala Mission were also trying to prove their

ownership of the Gove Peninsula before it is completely occupied by mining companies.

3 Milirrpum v Nabalco

The Gurindji people were not the first to press for the rights of their traditional land. In 1963, the Northern Territory government leased an area of more than 300 square kilometres in the Gove peninsula to a mining company, Gominco (Korff). The Yolngu people, who were the traditional owners of the land, petitioned the government to cease all mining activities in the territory, which was already an Aboriginal reserve at the time. The first petition was not recognised, so a second had to be made. Later these became known as the Yirrkala bark petitions, because of the bark paintings that served as a frame for the texts. Ultimately, the government didn't make any adjustments to the lease, and by 1968 mining continued. The Yolngu turned to the Supreme Court in the same year. Their case was heard, but the judge decided against them in 1971. What followed the decision, however, was a major victory for all Aboriginal people at the time, the Aboriginal Land Rights (NT) Act 1976.

3.1 The Yirrkala Bark petitions

The Yolngu people inhabit the Northern part of Arnhem Land, located on the Gove Peninsula in the Northern Territory. The Yolngu consist of several smaller tribes. The Methodist Church established two mission stations in Yolngu country; at Milingimbi, in 1923 and at Yirrkala in 1935, both in operation until 1974 ("Milingimbi Mission"). Superintendent Edgar Wells, and his wife, Ann were appointed to the Milingimbi mission in 1950, where they had spent ten years. After being a representative of the Queensland Methodist Conference for two years, Wells and his wife returned to field work at Yirrkala, in 1962. Wells wrote a book about his time as a superintendent at the Yirrkala mission titled "Reward and Punishment in Arnhem Land 1962-1963", focusing on the events that led to the submission of the bark petitions. He was keen on improving the living conditions of the Yolngu people by encouraging the

practice of art which proved to be an excellent community building exercise among the Aboriginals. The Yolngu could then sell their bark paintings as a source of income. Wells was not appointed to the Yirrkala mission accidentally. The Methodist Church needed an experienced superintendent as the people at Yirrkala were distressed and troubled. Wells' prior mission at Milingimbi made him the perfect fit for the job. Shortly after his arrival Wells found the cause of the distress; miners were trespassing in territories that were the Yolngu's traditional land.

In 1949, the traces of bauxite were discovered in Arnhem Land. Since then, the government had leased several square kilometres of land to mining companies (Wells 4). In 1963 the leased areas were only half a mile away from the Yirrkala mission, essentially reducing the station to half a square mile (Wells 33). Wells suggests in his book that the Mission Board and the government negotiated the leases without contacting the staff of the mission or any of the Aboriginals (Wells 26). At this time, the Aborigines were wards of the Commonwealth, which meant that decisions could be made concerning them without their consent. Even though what the Church had done, was not illegal, it was immoral, because it undermined the aim of the Yirrkala mission. When Wells realised that help from the Church cannot be expected, he decided to make the case public. In February, he sent identical messages to Reverends of the Methodist Church, editors of the Sydney Morning Herald and the Courier-Mail, the secretary of the FCAATSI, and the ALP's leader, Arthur Calwell. The short telegram described the impossible situation of the natives, who were "squeezed by the bauxite land grab into half a square mile" (Wells 43). This put the Yolngu in the focus of the public, scholars, and politicians.

In May 1963, Kim Beazley from the Australian Labour Party introduced the motion to the House of Representatives to recognize aboriginal land title. In July, him and Gordon Bryant visited the Yirrkala mission, having conversations with the locals and the superintendent. Before they left, Beazley recommended that the Yolngu made a bark petition

to the parliament and left a draft version of the petition for them. It took several days for the Aboriginals to complete the Bark paintings and Wells' wife helped typing out the petition in English and in Yolngu language (Wells 80). The first petition was not recognized by the parliament because they thought it was the superintendent and other labour party politicians who were behind it. It was a typical tactic of playing down the importance of Aboriginal issues like in the case of the Wave Hill walk-off (Riddett 52). The parliament did not accept the Aboriginal names that were included in the bark petition as proof for the petition being theirs. They also questioned the authority of some of the Aboriginals who signed a petition stating that they were too young to be leaders of the tribe (Wells 83). It meant that a second petition had to be made. This time the aborigines included their fingerprints on the petition to make it authentic. The second petition was received on 14 August 1963.

3.2 THE FIRST LEGAL STEPS

Two weeks after the reception of the second petition, with support from the ALP, Bryant and Beazley urged the government to set up a committee that looks into the grievances of the Yirrkala people (Attwood, "Aboriginal Rights" 248). During the hearings it was established that the Aboriginal leaders all thought of the land as their own for generations. The committee suggested compensation for the lost land (Wells 37). These events helped to maintain the focus on the Yolngu people's struggle. However, the newly elected government failed to carry out further action in the case and the publicity of Yirkkala began to decrease. Mining, and construction continued at the Gove Peninsula. Edgar Wells was removed from the mission, but fortunately, his successors were also keen on helping the Yolngu in the fight for their land (McHough 301). In 1968, the Methodist Church was approached by lawyers, John Little and Ted Woodward, who claimed that there was legal ground for the Yolngu's claim of land ownership. Their claim was that the Yolngu people held traditional ownership of the Gove Peninsula before the colonisation. They also studied cases from Canada, New

Zealand, and other British colonies, and their natives' land rights, which led them to believe that there were certain 'international principles' which could be applied to Australia too (McHough 302). They handed in their claim in December, 1968, and thus started the case that made the Yolngu land claim a milestone in the fight for aboriginal land rights.

3.3 The terra nullius problem

Both the Methodist Church and their lawyers knew that it will be difficult to win the case. The main concern was that even though in several former colonies there were similar principles that could be applied to Australia, in Australian law, the Yolngu claim was rather moral than legal in nature (Attwood, "Aboriginal Rights" 303). There were multiple factors that confirmed the fear of the Yolngu's lawyers. Firstly, it was the fact that Australia, in Australian common law, was a settled colony. This means that the land that was claimed for the Crown in 1788 was in nobody's possession, unoccupied . This type of land is also referred to as terra nullius. It is obvious, however, that Australia was not terra nullius at the time of colonisation. Nonetheless, British law did not recognize the customary laws and land ownership the Aborigines had at the time of colonisation.

Colonists saw the natives as aimless wanderers, and because of the vast cultural differences, and partly, ignorance, they did not assume that the Aboriginal had a code of law too, which would have lifted Australia from the status of terra nullius (Kinchman 30). The tribes did not mark their territories in a similar way to Europeans, because they did not have to. They simply knew the country they belonged to based on their own set of rules since the Dreamtime (Attwood, "Aboriginal Rights" 315). They also had a system of vesting land based on kinship, and different types of land which were not necessarily in their possession but could be used for hunting and other specific activities (Kinchman 27). This system meant that Aboriginal land property was different from the European definition of the term. According to Beazley, this contributed to the unfavorable situation in which the natives found

themselves after colonisation. He also pointed out that in New Zealand, for example, the Maori had a clear cut definition for each clan's property, thus it was recognizable for the settlers at the time (Attwood, "Aboriginal Rights" 250). The natives' right to their land was also recognized in the United States and Canada. Although they were eventually exploited with treaties and such (Kinchman 28), by title, they had the right to their land.

In addition to the special relationship to land, the natives' kinship system also proved to be disadvantageous at the time of colonisation. It was the elders who were the most authoritative figures (Broome 20), but there was not one distinct leader of a tribe. This was problematic, because different tribes could not organise themselves to fight collectively against the settlers. It also made it hard for the colonists to recognize the laws and customs according to which the natives lived. Western societies had various institutions with different ranks and leaders. These ranks were missing from the indigenious society so it reinforced the settlers' view of them as aimless wanderers or even barbars.

Although Australian law never referred to the country as a settled colony, supposedly, because the acquisition of the land was based on international law (McHough 238). This meant that Australia's settled colony status was not recorded officially. Multiple sources agree that the first official record of Australia as a settled colony is from a 1889 legal case, Cooper v. Stuart (Nettheim). In the judgement, the British Privy Council declared that "the land was practically unoccupied without settled inhabitants or settled law" (Kinchman 8). This decision remained a roadblock for the advancement of Aboriginal rights for several decades. The Privy Council was above the High Court of Australia and the Supreme Court of the Northern Territory, and its decisions had to be respected. It was not until the introduction of the Privy Council Act in 1968, that appeals to the Privy Council were limited, and since 1975 ("Role of the Privy Council), appeals from the High Court were essentially abolished.

Considering the factors above, it was no surprise that the first writ submitted by the Yolngu had almost failed in court. However absurd it seems, according to the law, their

ownership of land was never recognised, so there was no legal basis on which the Yolngu could claim title to their land. The Commonwealth demanded the case to be dismissed at its preliminary hearing, in 1969 (Attwood, "Aboriginal Rights" 321). The presiding judge, Justice Richard Blackburn eventually ruled that the hearing should continue, but a new writ had to be submitted. The plaintiffs were more specific the second time, challenging the idea that the Crown's acquisition of land extinguished the Yolngu's traditional ownership of their land and cited the Letters Patent establishing the colony of South Australia from 1836, which protected and therefore, admitted the Aborigines right to land (Attwood, "Aboriginal Rights" 304). Although the claim was more than decent, in 1971, Justice Blackburn ruled in favour of the Commonwealth.

3.4 The aftermath of the case

Even though the Yolngu people lost the case, it was generally looked upon as a great step forward for the Aboriginal land rights. Firstly, Justice Blackburn held his judgement to the terra nullius doctrine and the precedent ruling of the Privy Council, according to which native title does not exist in Australian common law (Attwood, "Rights" 306). Secondly, the Court questioned the nature of property rights that the Yolngu claimed to have. As discussed before, the tribe's connection and right to their land was based on their ancestors who, they believe, created it during the Dreamtime. The tribe gathered on various religious occasions, but remained scattered otherwise. In an economic sense, the relationship with land was different. The members formed smaller groups when they went hunting and gathering, and entered territories which were not necessarily the parts of the tribe's country (Keen 46). Additionally these parties often had members from other tribes. The common law recognised land ownership in terms of economy, not religion, thus Justice Blackburn had to decide that the plaintiffs did not have a propratory relationship with their claimed land (Keen 42).

However, it must be noted that Justice Blackburn essentially recognised the Yolngu's ownership of land based on their spiritual and religious connection in his judgement. This had no precedent in the history of Australian jurisdiction. Furthermore, he indicated that the Yolngu had a "recognizable system of law" (Kinchman 35). This statement is the opposite of the conditions under which a land could be claimed as terra nullius. Going further, it questions the validity of Australia as a settled colony on legal, not moral, grounds. However sympathetic Justice Blackburn was towards the Yolngu people, his hands remained tied by the common law.

The decision also started the process of resolving the land rights issues of the Australian Aborigines. The case gained wide publicity and received criticism by academics at the time who highlighted the flaws of the system (McHough 52), in which it is known that the natives own land, but their ownership could not be recognised. The political climate was also changing for the better. In 1972, Gough Whitlam was elected as Prime Minister, and he ensured the Labour Party's commitment to take the appropriate steps in legislation. In February 1973, he appointed Justice Edward Woodward as the head of the newly formed Aboriginal Land Rights Commission. The commission's aim was to determine how the statutory land rights should be granted to the native Australians in the Northern Territory. If proved successful, the aim was to extend the practice nation-wide (McHough 54), something that eventually did not happen. The first report was made in July 1973 and the second and final in April 1974. Although the reports did not offer immediate solutions to all the problems, important steps were taken to the right direction. One of the immediate results of the first report was the establishment of the Northern and Central Land Councils which consisted of Aboriginal members elected by the community. It is important to note that Woodward's recommendations also signal a shift in the government's view of Aboriginal issues; the idea of assimilation was finally left behind.

3.5 Aboriginal Land Rights Act (NT) 1976

The pressure of Aboriginal land claims and the Woodward Commission's second report culminated in the Aboriginal Land Rights (Northern Territory) Act of 1976. In 1975, Gough Whitlam was dismissed by the Governor-General, following the constitutional crisis. New elections resulted in the conservative coalition's victory, led by Malcolm Fraser. The original bill was introduced by the Whitlam government in 1975 but did not pass legislation. In 1976, the Fraser government introduced a modified, weaker version, favouring mining and pastoral interest-groups. Despite these modifications, the bill was heavily based on Woodward's reports (McHough 53).

The Act established Aboriginal Land Trusts, based on the second report. These smaller institutions were to become the effective owners of the land. Such corporate bodies were necessary to conform to the law (Kinchman 37). After all, it would have been difficult to grant a territory to a tribe, because the common law does not recognise such entities. Although in his second report Woodward admits that land trusts have mostly symbolic significance, he hopes that the head of the trust would be chosen carefully, making sure that they can help the councils in making the right decisions. Additionally, a third council, the Tiwi Land Council was established with the legislation of the act.

The act vested the title to land of territories which were already controlled by Aboriginals. These territories included reserves, missions and stations. Importantly, the trusts received the land under unalienable freehold title. Unalienable means that these territories could not be bought, or acquired. Additionally, the freehold title allows the natives to do whatever they want to do with the land, except selling it (Kinchman 36). As an example, a part of the land can be leased to a mining company, and the profit can be invested into the development of the local Aboriginal community.

However, a significant amount of territories were not inhabited nor controlled by the Aborigines, yet they still thought that they were the traditional owners of them. An example is

the previously discussed issue of the Gurindji people. The Act aimed to resolve these problems by making unalienated Crown land claimable to the land trusts. The act allowed the natives to prove their ownership of the land by tradition, which included performing songs, rituals, telling stories, similarly to how Justice Blackburn acknowledged the Yolngu's ownership of the Gove Peninsula. The protection of territories acquired by Aboriginal land were strengthened by the Aboriginal Land Ordinance 1978 (NT) Act which prohibited entry without permission. The permissions could be granted by the appropriate Land Council (Chesterman and Galligan 201).

The Yolngu people's story started off as the fight of a few hundred people for the land that they believed was theirs. More than a decade later, their effort and the support they had received scored a major victory for the whole native population of Australia. Although land trusts existed in other states, the Aboriginal Land Rights (NT) Act was the first legislation that allowed the indigenous people to claim land based on traditional ownership. Although the act was not passed on a national level as Gougham intended it to, the mechanics of land claiming that it established served as the basis of several other land trusts in the coming years. Additionally, it set up the ground for further improvements for Aboriginal land rights.

CONCLUSION

Both the Wave Hill walk-off and the *Milirrpum v Nabalco* case were groundbreaking events in the Australian Aborigines' struggle for rights. The walk-off was the first case of a tribe openly protesting for their land which was taken from them, while the Yolngu were the first to bring their claim to the court. The former's achievement is that it brought the public's attention to the issue, and strengthened the white Australian's support of the cause. The latter had made it clear that legislative steps were necessary for the advancement. Of course, it has to be taken into account that these events were not the only ones that made progression possible. Several organizations like the FATSCII or the NAWU and civilians worked hard for

the successes. However, given the publicity and the vehemence of the two cases, without them, the state of Aboriginal land rights would not be where it is today. In a long-drawn legal fight, *Mabo v Queensland* (No 2), the High Court finally eradicated the doctrine of terra nullius with the acknowledgement of native title in 1992. Four years later, the Wik-decision stated that certain types of pastoral leases could coexist with native title to the land. According to the AIATSIS Native Title Newsletter, in 2018, 35% of all Australian land was held under native title.

Despite undeniable legal successes, the Aboriginal land rights issue and the effectiveness of the native title system is debated. Although in theory, native freehold lands could be leased, and the generated profit could be used for the development of the community, it practice this rarely happens. So much so that in 2006 the ALRA (NT) was amended, and it allows 99-year long township leases, where the government takes over the native title land and can give certain sub-leases to companies (Watson 535). The main argument for the need of such intervention is that the life quality of communities that actually live on native title land is dangerously low. Gary Johns, writer and former Labour Party politician argues (Gary 66) that too much faith was put into the traditional culture of Aborigines, and an economic-integration is needed. The issue therefore is far from being resolved. Even though many Australian Aboriginals reclaimed their land, they could not retain their traditional lifestyle. The colonisation, and all that it brought to the continent made such ambitions practically impossible. As Bain Attwood put it, the Gurindji's victory and the Aboriginal Land Rights (NT) Act were both results of a "cross cultural dialogue" (Attwood, "The Articulation" 5). Perhaps in the future, a similar dialogue will resolve the Aboriginal issues in Australia so that everyone is satisfied.

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