

Devolution and Constitutional and Political Development

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Constitutional development in Australia's Northern Territory is as complex a matter, theoretically and in practical politics, as it is in Canada's Northwest Territories. The theoretical and practical questions have recently been well set out by Gurston Dacks in a paper in *The Northern Review* (no. 5) on the influence of devolution on constitutional and political development in Canada's two northern territories. Dacks begins by noting that, in the territories, the constitutional future of the North is one major subject of political debate; another is the appropriate form of government for the Northwest Territories. He goes on to say that full provincehood will not come to the North until there is a consensus in territorial society about the appropriate form of representation and government. This consensus appears to be a matter of widespread consent and widespread support, although at times, Dacks does speak as if it also encompasses absence of dissent and absence of opposition (see also Partridge 1971). The focus of his paper is to consider the effect on constitutional and political development of the devolution of power by the federal government in Ottawa to the territorial governments. In this formulation, the territories have their own process of political and constitutional change. A second process, devolution, has an independent source and may be varied, both in speed and character, independently. The second process will modify the first and in particular help to determine constitutional outcomes for the territories.

Similar observations might be made about Australia's Northern Territory. The constitutional future is a matter of political debate even if it has always been taken for granted that responsible government is the appropriate form of government. The mechanisms of government and representation are built on the assumption, seldom contested, that the Aborigines, the indigenous inhabitants who amount to about 23 per cent of the population, need only the most minimal of special arrangements at the level of local government. A process of devolution which yielded a high level of self-government in 1978 by the transfer of federal powers to the Territory has since been

virtually halted. The end result for many, but not all, Territorians is clear: full statehood with powers no different from those of the other states in the federation. In the mid-eighties, it was thought that this might be achieved as one package after a sustained process of political debate and intergovernmental bargaining; it has recently been proposed that 1 July 1990 should be established for the completion of the transfer of powers to the Northern Territory (Northern Territory 1989, 5), a date since passed without any transfer. It may now be accepted that the powers of self-government will be increased in a piecemeal fashion, with statehood attained at some indefinite time in the future.

The constitutional history of territories like the Australian Northern Territory and the Canadian Yukon and Northwest Territories can be told as an evolution from colonial or semi-colonial status to self-government. Although the word 'colonial' is sometimes thought to be pejorative in this connection, it does nonetheless indicate the dependent or subordinate constitutional status of the territories, a status quite different from that of provinces in the Canadian federation or the states in the Australian federation. Furthermore, even if the word colonial is not used, the model for the evolution of the constitution of the dependent territory to self-government is normally drawn from the history of the evolution of former British colonies to self-government.

Three things must be noted about this model. First, the emphasis in the texts recounting the history is on constitutions and is therefore almost always formalistic, even legalistic, in character. Other parts of a political system, parts which may be taken for granted by the protagonists or which are not regarded by lawyers as 'constitutional' in nature, are then likely to be neglected even though they may well be of considerable importance in the functioning of a self-governing territory. The party system and the interest groups are the most important of these parts. Second, the evolution follows a single course through the development of representative parliamentary institutions to responsible government. There are minor variations in the course of events in different countries but the broad pattern and the end result is the same in all of them. Third, the word evolution is important in the model for two reasons. It suggests that territories have an inherent political vitality which ensures political and constitutional change. They could not fall, as some other former colonies have fallen, into a state of arrested or frozen development. Furthermore, the word conveys the idea that the change taking place is progress, even, perhaps, an inevitable development to a more

advanced state, and the implication is that anything which blocks this progress is a reactionary force, doomed to failure in the long run.

The change in status of a territory can be seen as an evolution if it is considered from the point of view of the territories themselves or, if it is considered from the point of view of the imperial power in London or the federal powers in Ottawa and Canberra, it can be viewed as a devolution, a word less freighted with implications of progress and inevitability. In each case there is a transfer of power from a central authority to a new unit of government in a territory hitherto dependent on the central authority. In each case, if the new unit of government is part of a federation, it has a measure of sovereignty not only within a geographical jurisdiction but also within a limited range of powers or functions. The conceptual difficulties which this division of power between central and territorial governments presents for certain doctrines of sovereignty need not detain us.

Federation in Australia in 1901 took place in one step although at the time Queensland was irresolute and opposed to entering until the last minute. The thought that New Zealand might join at a later date has come to nothing. From time to time, there have been rumblings of discontent which would have changed the federation had they come to anything, the main ones being a secessionist movement in Western Australia in the early 1930s and movements for carving new states out of New South Wales in the 1920s and 30s. The most important changes have taken place in the two mainland territories, the Northern Territory, acquired by the Commonwealth from South Australia in 1911, and the Australian Capital Territory (ACT), carved from the state of New South Wales in 1909 to be the seat of the national capital, Canberra. These have both become self-governing, the ACT in 1989 and the Northern Territory (NT) since July 1978. The Northern Territory may usefully be compared to the two Canadian territories, the Yukon and Northwest Territories; the ACT, on the other hand, is not only in the south, it is also different in so many other respects that it would be pointless to consider it in the present discussion.

The Northern Territory does not comprise the whole of the Australian north. Long before federation, boundaries of the two states, Queensland and Western Australia, had been drawn to include large northern parts of the Australian land mass. Queensland also added to its space by successfully claiming, late in the nineteenth century, the islands of the Torres Strait northwards to within a few kilometres of the coast of what is now mainland Papua New Guinea.

Although there have been new state agitations in the north of Queensland and some regional dissatisfaction in the north of Western Australia, there is no likelihood that these areas will become separate states of the federation. In 1987–88, the Torres Strait Islanders called for their ‘sovereign independence’, evidently meaning independence from Queensland, but within the federation (*Report of the Interdepartmental Committee on the Torres Strait Islands*, [Canberra] August 1988, 1). This call is unlikely to succeed, although it should be noted that the Australian federal constitution does make provision in Chapter 6 for the admission of new states to the federation.

Two strands are interwoven in the history of the Northern Territory: constitutional development and concurrent political development. The constitutional story of the NT has been usefully summarised by Heatley (1979) and Jaensch (1990) who use a model of development drawn from works on the transition from crown colony to responsible government in the British Empire in the nineteenth century. Alistair Heatley has also described the politics of the NT’s transition from government by ‘Canberra’ to self-government (1990). Other texts round out his account of political development in the NT (cited in Loveday forthcoming), describing, in particular, the formation of the conservative Country Liberal Party, in government since 1978, and the reformist (with radical elements) Labor Party, in opposition since 1978. These two parties are linked with their national counterparts. The present system of self-government in the NT is not, however, the equivalent of that in other states in the Australian federation and arguments about the transition to full statehood have been presented in a book of documents edited by Loveday and McNab (1988). In this respect the Northern Territory is similar to the two Canadian territories which also have fully elected legislatures and responsible government but do not have the status of provinces.

The constitutional development of the Northern Territory includes two distinct processes: the development of a representative system and the development of the rules and conventions of responsible government. From 1890 to 1911, the Territory had some representation in the South Australian parliament and from 1922 to 1947 it was represented by a single member, with very limited right to take part in proceedings, in the national parliament in Canberra. It did not obtain its own legislature until 1947, and it was a hybrid, part elected, part official, like the councils in the British colonies a century before. For the elected members the major issue in the fifties and

sixties was to gain a majority in council but the federal government in Canberra resisted their demands until 1968 when it agreed to an elected majority. Six years later, the council was replaced by a fully elected legislative assembly (Jaensch 1990, 3, 6–9).

Throughout the period from 1911 to 1974, the Territory's affairs were administered by an administrator under the direction of a minister in Canberra and, on the basic policy questions, under the direction of the government of the day. The administrator did not have an executive council although for short periods in 1919 and again in the twenties he did have an advisory council. From 1947 to 1958, the administrator had a majority in the legislative council to override the elected members and, after 1958 when three nominated nonofficial members were added to the council, he could normally secure such a majority. In any case the government in Canberra retained a power to veto over resolutions of the council throughout its life (Jaensch 1990 9–11; Heatley 1979, ch 2). In 1974, the legislative council was replaced by a fully elected assembly. From 1974 to 1978, the administrator remained at the head of affairs in Darwin, the seat of government in the Territory, but the elected legislature focused its attention on the government in Canberra. Given the Labor Party's traditional preference for a unitary as compared with a federal state, Whitlam's Labor government (December 1972–November 1975) would not consider statehood for the Territory but it did set up a committee to recommend a devolution of powers, a committee whose report was the basis of the eventual settlement. The succeeding Liberal party prime minister, Malcolm Fraser, promised statehood within 5 years, and although leading Territorians were sceptical of the promise being kept, they continued to work for constitutional development (Heatley 1990, 53). The period from 1974 to 1978 was one of transition, during which a fully elected legislature, the assembly, maintained the pressure on the government in Canberra for self-government.

The story is evolutionary in its general character. Autocratic rule was inherently untenable once the representative system, based on a reasonably sized population, had taken shape. As elsewhere, elected representatives slowly wrung reforms from government and bureaucracy in Canberra, reluctant to agree because of the financial dependence of the Territory on the national treasury. The legislative council, Jaensch comments, "turned out to be an institution of transition" from autocratic rule to responsible government or self-government as it was called when it was instituted in 1978.

The self-government agreement between the national government and the Territory included a special financial agreement and a

timetable for the transfer of other state-type powers for the administration of law and order, land, fisheries, mining, transport and roads, power and water supplies, health, education, services to primary production, registration of births, deaths and marriages, certain taxes and so on. These powers entailed that the administrative arm of government, hitherto controlled by authorities in Canberra, would be transferred to control by the new NT government. It would also be reorganised along conventional state-type lines. The national government reserved a right to legislate on state-type matters but only to the extent necessary to secure a national policy objective and in consultation with the NT government; in other state-type matters the NT government would have autonomy under the "general oversight" of the national government (Heatley 1979, 43-4).

Self-government did not, however, give the Territory full statehood equivalent to that enjoyed by other states in the federation, and in later years a strong move to gain full statehood was developed by the NT government. It prepared a long list of the disadvantages which hampered the Territory and of these the most important politically were the inadequacy of the NT's representation (2 members) in the Senate (elected upper house of the national parliament) in comparison with the representation of the other states (12 Senators each); national ownership of uranium deposits in the NT (but not in the states) and control of uranium mining; the national 1976 legislation for land rights for Aborigines in the Territory which the Territory legislature could not amend and for which there was no equivalent in the states; the national government's ownership and control of two large national parks in the NT, again with no equivalent in the states (Loveday and McNab 1988, 267-81). The more recent submission (Northern Territory 1989) calls for full transfer of powers, including transfer of ownership of uranium deposits, of the Aboriginal land rights legislation and of the administration of national parks to the Territory but it avoids talking of statehood as a single package with a single target date.

Constitutional change has been accompanied by political development; the growth of political parties and organised interest groups; the enlargement of the electorate to include Aborigines and their increasing participation in elections and in various political organisations and by extension of local government to the very small townships with accompanying political activity by local citizens, both black and white. In these respects the Northern Territory has followed a path similar to that followed by the Australian colonies in the nineteenth century. In all of them there was very broad agreement

on the desirability of responsible, parliamentary self-government; constitutional development took place by means of devolution of power from Britain; it was piecemeal but as far as internal political life was concerned it was virtually complete long before the end of the century when the first parties were becoming established (Loveday and Martin 1966; Loveday, Martin and Parker 1977). Consensus, in a rather loose sense of the term, preceded constitutional development and devolution which, in turn, preceded political development. The Aboriginal population was completely ignored by those concerned with political and constitutional development.

Political parties, formed nationally in the first decade of the century and in all states about a decade earlier, were consolidated in Australian politics by the end of the First World War. It was another 50 years or more before a party system was established in the Territory. From 1922 to 1934, the NT's sole representative in the national parliament was a Labor Party man but there was no party organisation in the Territory. Parties took shape only when the institutions of representation had been set up and in direct response to the opportunities they presented, but even then, although there were attempts to conduct early council elections on party lines, it was not until 1966 that 'the competition of the Labor and Country parties came to dominate Territory politics' (Jaensch 1990, 13). Even then, party competition in the legislative council was muted because elected members were all determined to work together to increase their power to manage their own affairs. Adversary party politics prevailed in the legislature only with the coming of self-government in 1978. In the electorate, once the Labor and Country parties became dominant, independents and minor parties were increasingly at a disadvantage and won fewer seats and proportionately fewer votes. The voters in the Territory either came from down south or were the small but growing band of Territory-born. Their party preferences had been formed either by their own or by their parents' prior acquaintance with party politics elsewhere. The task for the Territory parties was to build on the existing commitments of voters and to convert them to Territory political ends; party identification did not have to be built *de novo*.

The Aborigines were a different matter. Constituting about 23 per cent of the Territory's population (155,000 approx), those of voting age (18 years old or more) are divided about half and half between rural and urban residential locations. Whites, on the other hand, are predominantly urban in residence although some are to be found scattered throughout the Territory in mining, some agricultural and

horticultural occupations and in the cattle and buffalo industries, to name the principal ones. Rural Aborigines live in settlements which vary in size from about 50 to 500 people. They retain a high degree of mobility and a substantial subsistence where resources have not been too depleted by 'sedentarisation' and expansion of population—the usual consequence of bureaucratic administration and mission activity. Urban Aborigines retain a strong sense of their Aboriginal identity and varying aspects of traditional culture, including tribal identification and close family links with rural kin, even though culture and language are attenuated by contact with white society and the demands of urban life.

Aborigines had no prior participatory experience of elections and party politics although they had been the unconsulted subjects of much political action and presumably had some political knowledge as a result. They were not enfranchised for national and Territory elections until 1962, and until 1983 they were not required to enrol, as other eligible citizens were. They were consequently not required to vote. At first, only about one in eight of those eligible were enrolled. This figure had risen to about one in two by 1974 after an early electoral education program (Loveday 1988, 343). By 1987, it was estimated from survey data that 80 to 85 per cent of Aborigines were on the electoral roll (Jaensch and Loveday 1987, 137). Given that voting in Australia is compulsory (strictly, attendance at the polling booth), turnout is not a particularly useful indicator of participation but it is thought to be about 80 to 85 per cent for Aborigines as compared with 95 per cent of non-Aborigines. Aborigines tried unsuccessfully to form their own political party for the 1983 NT election (Loveday and Jaensch 1984, 55) and on various occasions several, including at least three women, have stood as candidates for one or other of the political parties, a few of them successfully. Although Aborigines predominate numerically in several rural electorates their voting strength has not been organised in competition with the parties and when independent Aboriginal candidates have stood, they have not attracted a significant number of votes away from white party candidates. Survey data obtained in election studies in the Territory and in a study of the electoral information program of the Australian Electoral Commission show that Aborigines have some knowledge of party politics and the issues of the day and maintain that knowledge by attention to the media. Surveys have, however, shown that they are not always familiar with the technicalities of the Australian voting system and in 1987 there was also

strong evidence that 'leadership' style campaigns left a large proportion of Aboriginal voters confused about the party identifications of the leaders (Jaensch and Loveday 1987, 152-3).

This is not to say that Aborigines were effortlessly absorbed into the dominant political system or that they are now content with their part in it. It was certainly the hope of Australian governments, both in the assimilationist period of the fifties and sixties, and afterwards that they would be. Consequently the possibility that different political and constitutional arrangements might be more appropriate and acceptable to Aborigines was scarcely even imagined let alone considered.

In the Northern Territory, as elsewhere in Australia, interest groups are an important form of political action and are more important, according to Heatley (1979, 176), than parties as agents for 'demand articulation'. Interest groups supplement the parties by focusing on the administration agencies of the government as well as the legislature; they play very little part in electoral politics. Heatley notes that "there are few areas of economic, social and cultural life which do not have organisations active in defending or promoting group interests" (1979, 176). Many of them are as interested in federal as in Territory affairs. Some interest group organisations (including trade unions) or their predecessors were active from early in the period of federal control, but most groups appear to have been formed or to have become active concurrently with the growth of the parties and the prospect of increased local control, through a Territory-based administrative system, over local affairs. In other words, this form of political development was stimulated by constitutional and administrative organisational development.

The history of the development of Aboriginal organisations is more complex and more recent. Although there were early organisations for political action such as the Half Caste Progressive Association, present-day organisations have short histories, most dating from reforms in the administration of Aboriginal affairs which followed the acceptance of Aborigines as full citizens in the 1967 referendum and the election of the national Labor government in 1972. Administratively the main change was to set up the federal Department of Aboriginal Affairs with generous funding, a change which marked the end of the paternalistic and assimilationist welfare era in the NT, but politically the Aboriginal land rights legislation for the Territory, the only area of direct federal jurisdiction, was also of the utmost importance even though the bill was not passed until 1976 by the following Fraser non-Labor government. In the early seventies

the ill-fated National Aboriginal Consultative Conference, and then the National Aboriginal Conference, were formed, with state and Territory sections, stimulating Aboriginal leaders and organisations to take political action—not infrequently in tones too strident and demanding for those who had created them. At the local level the national Labor government in Canberra took control of local affairs out of the hands of white departmental officials and tried to place it in the hands of elected Aboriginal community councils, often with results confusing and disheartening to the local people who could not move in one step to total competence in handling their relations with a white bureaucracy in Canberra unaided by white advisors.

Today there is no single group representing Aboriginal interests in the Territory; instead, under federal legislation, there are three land councils, one in the centre, one in the north and one for the Tiwi islands, and they have the “central responsibility in relation to the administration of Aboriginal land” (Peterson 1981,37) which, with land under claim, constitutes over 40 per cent of the Northern Territory land area. Numerous other organisations exist, most of them functioning principally as community business organisations (housing associations, pastoral companies), as administrative agencies with some business and consultative functions (town campers service organisations) or as functionally specialised service agencies such as the Aboriginal legal and health service agencies. None of them would be regarded as “voluntary” or representative organisations of the same kind as the Chamber of Mines or the Master Builders Association but they are virtually the only organisations of Aborigines for the conduct of “political”, including administrative, business. These Aboriginal organisations, unlike the trade union organisations or the economic-employer organisations do not have informal links to the political parties although there are some links of a personal kind. If we look back 23 years to the 1967 referendum when Australia voted overwhelmingly to give Aborigines full citizenship, the growth of Aboriginal organisations has been phenomenal, but from a political point of view, it must be emphasised that most of the organisations were not formed for political interest group action but for other purposes, that they are under-resourced by comparison with white pressure groups and that they are divided and subject to various handicaps for work in the political arena by reason of inexperience, past history and culture. In other words, their handicaps are very like those which Dacks describes for indigenes in Canada’s Northwest Territories.

Two more things must be mentioned: public service employment and local government. Many Aborigines have greatly increased their

knowledge of political, organisational and administrative matters in working for the federal or the Territory public service. The Territory government set a target of 20 per cent Aboriginal public service employees early in the eighties but, despite major efforts, it has not achieved much beyond 8 per cent. Those who are employed are disproportionately in the lower ranks even though, in some departments, such as education, efforts to ensure that capable Aboriginal public servants reach the executive level have had some success.

Local government, it must be noted first, is not a function of the land councils but of small settlement-based elected councils. These have limited land areas relative to the areas of land transferred to Aboriginal ownership under the *Aboriginal Land Rights (NT) Act*, 1976. The elected Aboriginal "village" councils which were started at the end of the fifties were seen primarily as training and consultative mechanisms and the local control of settlements and missions remained in the hands of white superintendents. These councils had a fitful existence until the mid-seventies when, in the name of the new policy of self-determination, Labor attempted to transfer control to them (Loveday in Wolfe 1989, 13–33). The two non-Labor national parties, Liberal and National, in government in coalition in Canberra from 1975 to 1983, refused to accept the slogan of self-determination and produced one of their own: self-management. This, rather than self-determination, lay behind the Northern Territory's community government legislation at the end of the seventies. In the Territory, the Country Liberal party government introduced what was called "community government" for the many small settlements, black, white or mixed, which had hitherto had no local government at all or at best the "village" councils. This new form of local government offered considerable flexibility within the overall framework legislation. A settlement could choose whether and when to opt for a community government scheme, tailored to its needs, including the land area within which it would operate, the manner of representation, including tribal group representation, on the council and the range of powers, including the power to operate commercial profit-making enterprises, which it would adopt. Although this has the appearance of conceding a substantial measure of self-government, the community government councils operate under two major constraints. The first is that, unless they can generate their own funds from commercial activities (for which there are few opportunities in most communities), they are almost wholly dependent on funds from the federal and Territory governments, administered by the NT's Office of Local Government. The maintenance of essential services is

a first charge on the funds. Second, the powers that a council may take on are so defined that they do not erode the control of those central agencies of government which deliver services in the communities, particularly health and welfare, education and law and order services.

Why are the arrangements regarding the Aborigines central to the discussion of devolution and constitutional development? It is necessary to turn back to Dacks. Two contentions are central to his analysis of the constitutional development of the Yukon and the Northwest territories. The first is that, before a society attains provincehood or statehood, there should be a consensus within it on its system of representation, its boundaries and the desirable form of government. If this consensus exists, then the government will have legitimacy and stability. The second contention is that devolution of power should not outstrip the development of the consensus. Devolution should not be pushed ahead too fast, in case it forecloses options that should be explored, nor should it be too slow in case it threatens progress. With these two contentions and some supplementary explanation he explores constitutional development in the Yukon and the NWT, showing that in recent times they have followed two different paths.

The Yukon has parliamentary and responsible government with a three party system. Its Indian population, about a quarter of the total, is dispersed throughout the territory. It is represented in the Legislative Assembly through the party system. Since 1985 the New Democrat government has given priority to Indian land claims, removing a major source of apprehension about other policies and further devolution. Indians see local government and local politics as the arena within which they can attain a high degree of control over their own affairs. They accept that at the territorial level the unit to be represented is the individual; they do not wish to change the boundaries of the territory by subdividing it to create sections within which they have predominance. There is, in other words, a consensus on representation, boundaries and the form of government. Devolution has been neither too fast nor too slow and, presumably, can now be taken the few extra steps needed for full provincehood without any risk that the stability of government will be threatened.

The Northwest Territories is a different matter. It has a representative system and a parliament, with a cabinet of elected members. But it does not have a party system and as a result collective responsibility is difficult to maintain in the house and public accountability is hard to achieve in the electoral arena. Its indigenous inhabitants are not

one but three groups: Inuit, Metis and Dene. They are not dispersed throughout the territory but are locationally more or less distinct from each other and from the white population, which as elsewhere, is mostly in the urban centres. The three indigenous minorities dislike party politics because it does not allow for an acceptable balance between individual and collective rights and gives preeminence to the individual at the expense of the collectivity. For them, self-government with a strong collective component is an option—but at the price of some kind of subdivision of the NWT. In the politics of advancing their case in opposition to the territorial government's case for further devolution to the NWT within its present boundaries, the indigenes suffer from inadequacy of political resources and from their own disunity. Their difficulties, Dacks comments, "add up to a problem of political development." The prospect of further devolution alarms the indigenous people because the powers which the territorial government does not yet possess, "in particular authority over oil, gas and most of the land are politically very important powers because they touch aboriginal interests so intimately." Dacks then comments that "devolution works to the advantage of the territorial government;" it undercuts the indigenous peoples' idea of a "government by 'partnership' among ethnic groups of the western NWT should division of the territories take place" to create Nunavut for the Inuit. It appears to "put Ottawa's stamp of approval on the vision of those who see the present government and its evolution in the direction of the standard parliamentary model as right and inevitable." Dacks then explores the implications of further devolution for the structure of territorial self-government, land claims, aboriginal self-government, division of the NWT and regionalism. In summary there is no consensus in the NWT on the representative system or the form of government. People disagree about the basic unit, individual or collectivity, about the boundaries and about the appropriateness of party and responsible government. Lacking consensus, the legitimacy of the governmental institutions is easily questioned. Further devolution now would not only increase the political tension but it would also foreclose the exploration of other options, options outside the conventional model of progress towards responsible self-government.

The Australian Northern Territory is similar to both the Yukon and the Northwest Territories in some respects and different from them in others. It therefore presents us with a third and different example for examining Dack's analysis. Like the Yukon, it has parliamentary and responsible government with what is basically a

two-party system. Its constitutional development appears to have been both "right and inevitable," to use Dack's phrase. It would therefore seem proper that it should continue on the same course by the devolution of further powers. But this is to forget the Aboriginal component of Northern Territory society, a component which has not yet reached an accommodation with the governing white majority and has not been accepted by that majority as a distinct people or "first nation" to use the Canadian term.

Since the Territory is different from its two Canadian counterparts, more detailed discussion of two matters is necessary, namely, the lack of consensus in the Territory and the possibility that some different options might be envisaged for constitutional development.

Consensus in the Northern Territory might be contemplated in one of two ways. It might be a consensus arising from the Aborigines' acceptance of the prevailing system of representation and government and its established boundaries and acceptance that individuals are the units of the system. The requirement would be not only that the indigenes were in substantial agreement with the prevailing system but that the whites themselves were also in substantial agreement about it. This version of a consensus would be called the assimilationist version. An alternative would be that black and white had reached substantial agreement which allowed for diversity in the system of representation and its basic units, for variation of boundaries and for guaranteed protection of basic interests of the indigenous minority, possibly the protection afforded by indigenous self-government within the parent state. This could be called the federal or bicultural version of consensus although it does provoke ill-informed cries of "Apartheid in reverse" from the right in Australian politics.

The preceding discussion has shown that the trend of both constitutional and political development in the Territory has been towards developing an assimilationist form of consensus. A conscious effort was made late in the eighties to increase the level of the consensus by having a statehood team tour the Territory to take submissions about statehood and to explain its meaning and benefits, principally to Aboriginal communities (Australian Marketing Institute, *Marketing the Constitution*, Darwin 1989,1). It was also accepted by the government in 1987 that a referendum would have to be held to establish that a high level of consensus existed in order to convince Canberra, and possibly doubtful state premiers, that the Territory was united to a high degree behind the government on this

question (Legislative Assembly of the Northern Territory, *Information Paper No 1* [1987]5; The Seventh Australian State? *The Parliamentarian*, 69,3, July, 1988). Politically, statehood is on the back burner, the referendum has still not been held and the evidence is that there is a long way to go before consensus of this kind is broad enough to warrant further devolution of power from Canberra.

Aborigines, as one of the two "parties" to the possible consensus, are not agreed among themselves on a number of basic issues and they therefore cannot be agreed with the other party, the non-Aborigines who, in turn, are also deeply divided on basic questions. Statehood is the key question because it comprehends most of the others. To agree to statehood as it has so far been discussed is to agree to a form of government and to the method of representation on which that government would be based, these being what the Territory now has. It is to agree that the basic political units of the society are individuals. To agree to the government may make for a readjustment of boundaries in island areas which it might want, such as Cocos Keeling Island and Christmas Island because of disproportionate numbers of Labor voters. It is to agree that a state government would be entitled to the full representation of twelve Senators alongside other states in the federal upper house, at least in the near future if not at once, even though its population is minuscule beside that of all other states (Jaensch in Loveday and McNab 1988, 70-3). It is assumed that such an enlargement of the Senate with Territory members might well result in a very long term, if not permanent, majority in the upper house for the non-Labor parties in Canberra, with the consequences that future national Labor governments would be in office but possibly not in power and that a constitutional crisis of the magnitude of 1975 could be provoked by refusal to supply or refusal to consider a motion for supply by the non-Labor Senators at any time of their choosing.

Opinions on statehood have been canvassed several times by survey methods. One polling agency reported in 1985 that "non-Territorians are cautious about giving the Northern Territory Government full control over such things as the development of off-shore resources, uranium mining and Aboriginal land rights" and that among [urban] Territorians "opinion was divided 38 per cent to 35 per cent in favour of statehood" (in Loveday and McNab 1988, xv). Surveys of urban voters and of Aboriginal voters carried out in 1987 at a time when the Labor opposition had agreed with the CLP government on a bipartisan approach to the issue revealed that nearly 60 per cent of the Aborigines questioned were opposed to

statehood and 56 per cent of urban, mostly white, voters were opposed (Jaensch and Loveday 1988, 156, 188). Similar divisions of Aboriginal opinion were reported on the questions whether the federal government or the Territory government should control national parks, uranium mining and Aboriginal land. Non-Aborigines were more in favour than Aborigines of Territory control over these matters (70 to 77 per cent in favour) and, while non-Labor (Country Liberal and National party) voters were 90 per cent in favour, Labor voters were divided approximately half and half on the questions of control (Jaensch and Loveday 1988, 156, 193). The differences among Aborigines about mining and mining exploration reach the media from time to time when particular proposals are under discussion and need not be catalogued here. Other evidence of a lack of consensus may be noted briefly. There has been considerable tension, not to say disagreement, within the CLP leadership itself about the number of Senators the Territory should demand (Heatley 1990, 164–5); voters in 1987 were divided in the questions whether statehood would mean higher taxes and higher cost of living and whether it would bring benefits; another division was revealed with the question whether land rights for Aborigines should be guaranteed before the Territory got statehood. The Northern and Central Land Councils both issued tapes about statehood which indicated clearly their distrust of the Northern Territory government and its promise to guarantee Aboriginal land rights (Loveday and McNab 1988, 301–13 for the transcripts). For its part the Northern Territory government has treated the Land Councils with hostility and encouraged a breakaway land council movement and has opposed most Aboriginal land claims, in some cases with every conceivable legal technique of delay, entailing ruinously high legal expenditures by the Land Councils. Its interest in promoting economic development, through mining, tourism and pastoralism, brings it inevitably into conflict with Aborigines and the land rights legislation which gives them control of traditional lands (Gibbins 1988, 30–45). Given that this is the recent and continuing situation there is little likelihood that an assimilationist form of consensus will emerge in the near future.

Probably because assimilationist tendencies have persisted long after the policy itself was officially abandoned, there are few signs of an alternative approach which might lead to a federalist consensus, one in which it is accepted that Aborigines are a distinct people with a different culture and an ancient traditional attachment to the land. For many purposes in Aboriginal society, the basic unit, to consider

one of Dack's points, is not the individual but the group. There are different groups for various purposes: family, skin group, tribe, clan or language group. One change in recent times has already been noted: the substitution of the group for the individual as the unit to be represented in some community government schemes. In Ngukurr, seven language groups are to be represented each by two elected members; in Nguiu, four skin groups are represented, each by four elected members; in Numbulwar, ten clans are represented each by two elected members while twenty clans at Angurugu are entitled to nominate candidates; in Daguragu, nine male and nine female skin groups are each to be represented by one appointed or elected member (cf Wolfe 1989, 61-3). The arrangements are an amalgam of Aboriginal and non-Aboriginal ways of choosing councillors and it appears that they may have formally recognised what had already been developed informally by the Aborigines themselves (Jaensch and Loveday 1981, 90-2). The community government legislation also provides for the local community to be consulted about and to have a major say in the boundaries of its jurisdiction (Wolfe 1989, 50-6).

The land rights legislation also gives recognition to ownership by a trust on behalf of a descent group (Neate 1989, 15) and, in the course of completing a land claim based on traditional criteria, the boundaries of the land claimed have to be established. The legislation also provides that, in carrying out its functions in respect to Aboriginal land, the relevant Land Council should make sure that the traditional owners understand any proposed action and consent to it as a group (Neate 1989, 356, 361-7). Again we see an amalgamation of European and Aboriginal concepts. The legislation is, however, federal legislation and, given that the Territory government is determined to amend it if it wins the power to do so, it cannot be foreseen how much will survive and whether the Territory government does accept the principle of group ownership with a title which is tantamount to inalienable freehold. It is unlikely to remain unchanged because, although the Territory government does not oppose Aborigines owning land on its terms, it wants all land under "root title" of the Territory. Although the most recent statement promises "an appropriate degree of protection for Aboriginal interest in land, with special provision for the Commonwealth to guard the arrangement" (Northern Territory 1989, 39-40) if the legislation is transferred to the Territory, it is likely that the land would become a marketable commodity, that it would be subject to the regulations and public purpose requirements of government and that mineral exploration and mining could be carried out on the land.

Given the difficulties they confront, it is not surprising that Aborigines have begun to discuss the possibility of self-government. Fairly early in the life of the Land Councils, it was thought that they had the potential to become "fully indigenously controlled institutions, independent of government" even though they did not have "anything vaguely approaching sovereignty" (Peterson 1981,4). But it now seems unlikely that they could be the vehicle for the development of a federal form of Aboriginal self-government. Gibbins, who considers this possibility (1988, 126-8), notes that to create a federal form of self-government the Land Councils' powers may have to be extended to other areas of particular importance to Aborigines, such as social services, justice, education, economic policy and cultural affairs. It is extremely doubtful whether the Country Liberal party Territorial government would be willing to negotiate the transfer of these powers and to curtail the scope of its own central agencies. Furthermore Gibbins notes that the Land Councils are under "extensive ministerial control over their financial affairs" and that they are "unable to accumulate financial resources" needed for economic development and financial independence. The recent financial problems of the Northern Land Council underscores Gibbin's observation. Finally he observes that if the Councils were to take on the features of governments, they would need the power to impose decisions on constituent communities which, in turn, would have to sacrifice some of their autonomy. This, he comments, "will not be easy to accomplish" and the growth of the breakaway land council movement since then amply confirms this judgement.

The question of sovereignty, touched on by Peterson, is another major stumbling block to a federal solution. One sympathetic writer, in an article entitled "Two Laws in One Territory" argued on much the same lines as Dacks that in the transition to statehood, the broad support of a large majority should be demonstrated at each step. This could be achieved only if the "two laws," Aboriginal and non-Aboriginal, are each recognised and the conflict of interests embodied in two competing claims to sovereignty over the land are resolved by negotiation. "Statements which recognise the prior and continuing claims to sovereignty over traditional lands by Aboriginal people and the crucial importance of these to the survival of Aboriginal culture would have to be written into the constitution. Equally, the legal and economic sovereignty over the same lands by the Australian society as a whole should be recognised in the document" (Toyne 1989, 40). Although this comment calls for clarification, it does draw attention to the fact that, in a federal system, two jurisdictions can

apply in relation to the one land area and the one population, an important reassurance for those who fear that a divided sovereignty means a loss of land and a change of land boundaries. Only then, Toyne says, would the constitutional stability which Dacks talks about be achieved in the NT. But, notwithstanding that sovereignty is already divided in the Australian federation, a further division of sovereignty seems unthinkable. It had been flatly rejected by a former federal Labor Minister for Aboriginal Affairs and it seems to challenge the notion, popular on the non-Labor side in politics, that we are all "one people" (even though it is manifest that we are not) and evokes inappropriate remarks about apartheid. Gibbins concludes that a federal form of self-government, embedded in a new Territory constitution, without explicit recognition of sovereignty, may be as close as the Aborigines will get to what they want (1988, 131, 138-9). In 1989, the Central and Northern Land Councils organised a conference on the future of government for Aborigines in Central and Northern Australia at which the idea of self-government was discussed (see papers by Jull and Rummery). It appears that the present breakaway land council movement may be inspired not only by dissatisfaction with the Central and Northern Land Councils but also by a desire to attain a greater and more direct measure of local self-government, and possibly better coordination with local community councils, within limited areas of Aboriginal land. The model may have been provided by the Tiwi Islanders, culturally distinct from other Aborigines and under their own community government councils, who also have their own land council with jurisdiction over the islands and communities within it. Be that as it may, small breakaway councils are not likely to be viable institutions for self-government: Gibbins has commented that the land base and populations of the existing Land Councils are "about as small as one could get and still have Aboriginal governments of reasonable autonomy and scope" (1988, 12). In summary, there is a long way to go before existing institutional fragments and current discussion could develop into a federalist or bicultural consensus and displace the assimilationist tendency of the past.

Nonetheless, it may well be easier to work towards a federalist form of consensus than the assimilationist form. For Aborigines, it is not just a question of boundaries, the basic political unit and the systems of representation and government. For them the land and their relationship to it, fundamental to their culture and social structure, is basic; since they have not given up their traditional claims to it in well over a century of non-Aboriginal occupation and

exploitation of these lands, it cannot be expected that they will do so now. Yet that is what the assimilationist consensus calls for: agreement that the Aboriginal relationship with the land should be given up and the non-Aboriginal system of land use and tenure be accepted by Aborigines instead.

There is, however, a different way in which agreement might be reached, namely by negotiation. The federalist form of consensus does not call for a complete change of beliefs about fundamentals on the part of any participants. What it calls for is a willingness to tolerate differences, to forgo confrontationism and to negotiate to reach agreement about matters in dispute, including guarantees which each side might give to the other and processes to be set up for the ongoing resolution of new disagreements and the renegotiation of past agreements as circumstances change. The latest document from the Territory government (Northern Territory 1989) is much less confrontationist—in relation to the federal government—than preceding statements and it does call for a joint Territory-Commonwealth working party to “develop issues [in dispute] and to identify the steps involved” in their resolution. In other words, while it opens the door to negotiation, it does not invite the Aborigines to take part in the discussions.

In the context of Australian history, the Northern Territory is different from the other states at earlier stages of their development. Political development in the Territory has not resulted in the loose consensus of the former colonies but has instead exposed its absence. But to insist that it emerge, at least in its assimilationist form, before further devolution could occur, is to defer further transfer of powers to the remote future; it imposes an extremely conservative constraint on possible constitutional development, a constraint which may well be so much at odds with political development that it leads to a destabilisation of the system rather than its stabilisation. The alternative of a federalist consensus cannot be made a precondition of devolution but it could be identified as an objective to be achieved in the processes of negotiation towards devolution of remaining powers and the design of a constitution for the new state.

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