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BURIED ALIVE**

ABSTRACT. Indigenous peoples struggle to survive the policies of the colonial states and their ability to annihilate, make invisible, destroy and re-construct our ancient identities. This is my story. I am an Indigenous women to the country known now as Australia. I write from the inside, about our law and life ways which are buried alive by a dominant colonising culture. The tale of *terra nullius*, its capacity to bury us and its own capacity to survive and go on burying us is told. It is a story which has a resonance beyond Australia, one that can be found throughout the world wherever there is struggle for the future of the planet, wherever there is struggle for diversity, and resistance to being consumed by corporate greed and complicit states. It is finally a story about hope for a way forward, and moving in a clear direction. A direction without illusion, one that braves the truth as to our future as diverse peoples of colour, laws and cultures, the bearers of generations to come.

KEY WORDS: aboriginal-law, colonialism, homogenous/minority, sovereignty, *terra nullius*

> *In the beginning there lived a giant frog, who drank up all the water until there was no water left in the creeks lagoons rivers lakes and even the oceans. All the animals became thirsty and came together to find a solution that would satisfy their growing thirst. The animals decided the way to do this was to get the frog to release the water back to the land, and that the 'proper' way to do this was to make the frog laugh. After much performing one of the animals found a way to humour the frog, until it released a great peal of laughter. When the frog laughed it released all the water, it came gushing back to the land filling creeks, riverbeds, lakes and even the oceans. As the community of animals once again turned their gaze to the frog they realised they had to make the large frog transform into a smaller one, so that it could no longer dominate the community. They decided to reduce the one large frog to many much smaller frogs, so that the frog would be brought to share equally with all other living beings.*[1]

I write as a survivor of *terra nullius*, at a time when the Australian state persists with the burial of my living being: I am one of the 'voiceless amidst the chaos' seeking to write my way out of the rubble that buries.

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** I am grateful to Valerie Kerruish, Stewart Motha and Colin Perrin for their comments. The stories of my old people write themselves, I live in (awe) wonderment of their ability to survive.

[1] This story is known throughout Aboriginal Australia.

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From the attempted genocide of Nungas (Aboriginal peoples) the Australian state retains control over Nunga territory, the ruwi (land) of my ancestors, through a power which mantles a white Australian homogenous identity, over our Nunganess. The coloniser perceived this Nunga place as available to be filled with their 'beginnings' of history, and 'evolving spirit'. Their new empire state, was forecast by 'great white men', as being part of an evolutionary process which would shift the centre of civilisation from Europe in a movement north west, to centre and 'evolve' itself further in the lands of Great Turtle Island.[2] A civilising mission that veered southward to our old peoples' ruwi, to a place where they perceived their violent invasion would bring their 'evolved' spirit to a place free and open to 'discovery', like a virgin awaiting their penetration. They came to a place where Nunga history, songs and stories of spirit-law, were always embodied in land, the greater natural world and universal order of things. The krinkris[3] imposed violence, in all its forms, rendering our life and our laws[4] pre-historic, invisible, un-evolved in time, in presence *terra nullius*.

The muldarbi[5]-coloniser viewed our laws of ruwi as pre-historic ancient tribal systems, and exotic customs. In the futuristic and 'civilised' planning of things our ways of life were annihilated and replaced by the 'functional, objective qualities and inherent rationality' of the state. It was 'known' that "world history takes account only of peoples that form a state."[6] A parallel process to bringing their 'rules' existed in the way the state was also a part of "the march of God in the world".[7] The formation of a new social order was founded on the possibility of our disappearance. As our peoples were mowed down like flies by gunshots and diseases, we questioned their violation of ancient Aboriginal laws: were we the enemy, 'their uncivilised, irrational' peoples of the earth? Doomed by the idea of evolution.

Our laws of ruwi are ancient. They come from a time the old ones called Kaldowinyeri – the dreaming, the place of lawfulness, a time before, a time now, and a time we are always coming to. A time when the first songs were sung, as they sung the law. Laws were birthed as were the ancestors – out of the land and the songs and stories recording our beginnings and birth connections to homelands and territories now known as Australia.

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2 The indigenous name for the landmass known as North and South America.

3 Means white people, for when the invaders first arrived the old people sat watching them walk ashore and thought that they were the spirits of ancestors returning.

4 When I refer to our 'laws' or the 'law' I mean Aboriginal or Nunga laws.

5 Means demon spirit.

6 Hegel cited in J. McCarney, '*Hegel on History*' (London: Routledge 2000), 154.

7 Hegel cited in F. Dallmayr, "Re-thinking the Hegelian State", in D. Cornell, M. Rosenfeld, and D.G. Carlson, eds., *Hegel and Legal Theory* (New York: Routledge, 1991), 321–346.

Our laws are lived as a way of life, they are not written down because the knowledge of the law comes through the living of it, as law is lived, sung, danced, painted, eaten, walked upon, and loved; law lives in all things. It is law that holds the world together as it lives inside and outside of all things. The law of creation breathes life as we walk through all of its contours and valleys. It holds a continuity as there is no beginning or ending, for the constant cycles of life are held together by law.

It is law which lives in the lives of the community of animals who were brought together to determine a resolution to the problem of the giant frog and its need and greed. The animals' determination was expressed by an act that posed no harm or threat to the future existence of the frog. Instead the animals pursued an inquiry into the frog's trauma, which in turn led them to decide that through laughter the frog could be brought to release the life-giving waters back to the land. There was no retaliatory action taken but rather an understanding of the continuity and balances of life and law and the need to reduce the frog without taking from it its future. As all things have a right to life, the power to determine otherwise is of muldarbi origins not of law.

Law is different to the European idea of sovereignty, different in that it is not imposed by force of arms and does not exclude in its embrace, it envelops all things, it holds this world together. In this paper I discuss state sovereignty in the same sense that I understand the frog, that is as a being which can be reduced by law. All peoples come into the laws of place as they come into ruwi, but the greater majority have no sense or recognition of laws of place as they succumb to the idea of sovereignties of state. Laws are of ruwi and the first peoples are its carriers as they are the caretakers of both ruwi and law. Law is in all things. It has no inner or outer, for one is all, all is one.

The idea of an inside and outside determines boundaries, and boundaries which have been constructed from a place of power, invoke a closure. The Australian state in imposing boundaries does this from a place of power and not law, as it draws its imagined lines across the earth's body. It constructs these lines in an attempt to displace laws of ruwi and also to enclose a place, one that is beyond closure, in the same way that the universe and beyond is. There is a parallel between the drawing of lines and the growth of the frog as law comes to bring its own lawful reality.

The experience lived before the time of Cook was more than the idea of sovereignty. It was freedom from the muldarbi, freedom yet to be known by the muldarbi and its agents of power. That time before, what the muldarbi called pre-history, is now sought again so that we may become free to live without fear of genocide. Nungas coexisted in the law; we were not

waiting to be 'discovered' or waiting to be 'granted the right to be' self-determining, for we were already the truth of who we are as Nunga. The colonial state cannot 'grant' us who we are, for it was never theirs to give. Who we are emanates from law. We cannot seek back the ability to be from the one who has not yet become, become a (legitimate) being of the law. And yet we dialogue with the muldarbi in the language of self-determination, in the struggle to reclaim a territory, which is free of its genocide, so that we may teach the law to a world, which is deprived and malnourished for the lack of it.

For those who walk away from law and live in a place that is taken up by the 'sovereign' state, they remain nevertheless in the embrace of law, for law is alive in all places and lives in the declared and 'enclosed' muldarbi spaces. Nungas dressing in the 'clothing'[8] of the coloniser, are the uncivilised on the path to civilisation. Some of them become the muldarbi's native police of the new nation, living in the sovereign state but always returning to law for that is the cycle of indigenous being. We are all cycling in the constant being of law, for we are all indigenous to a place in time and history. However some people are more embodied with this idea than others who find a place to survive that is indifferent to the earth.

There exists different ways of knowing what is law, for example Nunga relationships to ruwi are more complex than owning and controlling a piece of property. State sovereignty and authority is established through the power of acts of state and the planting of a flag. From this, the land becomes enslaved and a consumable which is traded or sold in and out of existence. We are the natural world; it is a mirror of our self, our Nunganess, so how can we sell our self? (Unless we are a people descended into a place of great trauma as we have/are increasingly becoming). We nurture ruwi as we do our self, for we are one. The non-indigenous relationship to land is to take more than is needed, depleting ruwi and depleting self. Their way with the land is separate and alien, unable to understand how it is we communicate with the natural world. We are talking to relations and our family, for we are one. We seek permission from the spirit world for our actions; nothing is assumed. When food is taken from ruwi thanks are given, in hope that food will again be provided in the future. Our ways are considered backward and not a part of the steps of the 'evolving spirit', evolving is always the question. Our ways guarantee a sustainable model not only for Nungas but for all in the wake of their own embrace of Nunganess.

[8] I speak about clothing in the sense of colonising layers, for further discussion see I. Watson, *Raw Law, the Coming of the Muldarbi and the Road to its Demise*, PhD Thesis, University of Adelaide, 1999.

In imposing 'sovereignty' over indigenous laws, the state through military force rapes its way into existence, creating a sovereignty of violence, and not of law that is always known. Law is creation; it is a song; it is a love of law, and its land and its peoples; it is all things and in all things. This muldarbi sovereign erases peoples' memories and ideas of laws, in constituting its own statehood, one which assumes a foundation based on law, and not by force.

THE *TERRA NULLIUS* OF SOVEREIGNTY

Imperial Britain imposed *terra nullius*, of territory/land, law and people, and covered every part of my Nunga being with their myth of emptiness justifying the lie that a space existed/exists for their invasion, and settlement of the ruwi of my ancestors. Their claimed sovereignty denied ours and in planting the flag – supported by violence – an act of state, they violated the laws of the first peoples. *Terra nullius*, the muldarbi rule of law and international politics and its violence made Nungas and our laws invisible, while our ruwi become[9] enslaved, commodified and entrenched in their rules of property. We never cultivated the land, an idea alien to those who live 'on', 'in' and not 'of' the land. Our relationship to land is as irreconcilable to the western legal property law system, as it is to fit a sphere on top of a pyramid.[10]

To remedy the international guilt which surrounded the underlying racism of *terra nullius*, the question of its application to the territories of the Western Sahara people was determined by the International Court of Justice (ICJ).[11] The court decided *terra nullius* could no longer legitimise state acquisition of territories based on occupation where those territories are inhabited by peoples living as 'organised societies'. Following the *Western Sahara* decision, *terra nullius* in theory became discredited as a tool for the colonisation and occupation of territories. The rejection of *terra nullius* was to be followed by the Australian High Court.[12] But prior to the decision in *Mabo (No. 2)*, Paul Coe in a representative application for the Wiradjuri, Ngunawal and Arrente peoples/nations wrote to the

[9] I use this tense because it is as I know it; a continuum.

[10] See S. Motha, 'Encountering the Epistemic Limit of the Recognition of 'Difference', *Griffith Law Review* 79 (1998), 79–96, M.J. Detmold, "Law and Difference: Reflections on Mabo's Case", *Sydney Law Review* 15 (1993), 159, and the High Court in *Mabo (No. 2)*, which failed to recognise difference in their construction of native title so as to make it fit within a western property paradigm. See also Brennan J at *Mabo (No. 2)* 175 CLR 1:51.

[11] *Western Sahara Advisory Opinion*, 1975 I.C.J. 12.

[12] See Brennan J, *Mabo* v. *Queensland* (1992) 66 ALJR: 408, 421–422.

Secretary-General of the United Nations, to gain support for an Advisory Opinion from the International Court of Justice. He sought their opinion on similar grounds to the Western Sahara application, on the recognition of Nunga sovereignty.[13] The application fell by the way in light of the *Mabo (No. 2)* decision and the following enactment of the *Native Title Act 1993*, as both developments were viewed by the UN as progressive advancements towards the 'rights' of indigenous peoples.[14]

The early voice of Nungas in international forums up until the decision in *Mabo (No. 2)* was loud in its critique and questioning of the constitutional foundation of the Australian State and has since then been altered by the manipulation and power of states. Now replaced by a quieter and more pragmatic voice, one that no longer calls into question in international forums the nature of the sovereignty and 'law' held by the Australian State. These early Nunga voices had exposed the *terra nullius* underpinning of the Australian legal system and its continuity even after its rejection in *Mabo (No. 2)*. It is no mystery that our voice speaking up the laws of Aboriginal peoples ruwi appears surrendered. It has not surrendered. It is digging itself from the rubble of the aftermath and the impact of *Mabo (No. 2)*, and the *Native Title* legislation, to excavate its way through an understanding of how unlawfulness continues in a space declared lawful.

Since the native title decision there has been a rush by claimants to establish both non-native title and native title 'rights'. The claiming process is the madness of a gold rush, one which buries all that lies in its path. And now, 11 years on, the rush is seeing that the only 'pot of gold' is being mined by its own native title advocates and corporate greed. Others are clearing away the rubble and fall – out from yet another unrecognised act of genocide as the quality of Nunga well-being has been further sacrificed to native title and the illusion or the possibility of Nunga survival within the space of consuming muldarbi greed and lawlessness.

While 'justice' is held by force, freedom never arrives.[15] To show this, it was the community of animals who applied law and humour to bring

[13] This application is discussed by the son of Justice Brennan, in Frank Brennan, 'Mabo and Its Implications for Aborigines and Torres Strait Islanders', in M.A. Stephenson and S. Ratnapala, eds., *Mabo: A Judicial Revolution The Aboriginal Land Rights Decision and Its Impact on Australian Law* (St. Lucia: University of Queensland Press, 1993), 24–47. He swiftly concludes, Nungas have no capacity or international personality to seek an opinion from the UN.

[14] Committee On the Elimination of Racial Discrimination 54th Session 1–19 March 1999, Draft decision (2) 54 on Australia of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. UN doc. CERD/C/54/Misc.40/Rev.2.

[15] Jaques Derrida, *The Politics of Friendship* (London: Verso, 1997), 91 where he is in agreement with the ideas of Plato on justice not being attained while it is bound to power.

balance to the frog's power the question of force was unnecessary, as all members of the community regained the freedom to drink the waters. The High Court in *Mabo (No. 2)* was given the opportunity to consider the power of the frog and to decide on the possibility of freedom and the future co-existence of Nunga peoples and the Australian State. Instead the court's decision determined the ongoing genocide of Nungas, by accepting that Australian sovereignty was based on an 'act of state'. The court refused to inquire further into an area it said would fracture the Australian legal system, as Brennan J was careful to ensure no radical departure was made from the existing rules and regulations.[16]

The court did not consider the question: what constitutes the sovereignty of the Australian state? It also avoided an interrogation of what Greta Bird suggests is how the 'skeletal framework privileges white versions of history and legality'.[17] Instead the court decided the question was non-justiciable within the Australian legal system,[18] thereby imposing its own limit on how far we can safely live without the threat of violence and death while law continues in its being before and beyond a claimed sovereignty. The court while declaring the unlawfulness of *terra nullius* refrained from considering the powers held by the state to steal our lands and commit acts of genocide on Nunga peoples.[19] As a result the state unlike the frog still holds onto its vastness, continuing to expand and grow, while the community of Nungas live to die inside the continuing reality of genocide.

It is only the continuance of exploitation and the filling of gaps with pragmatism, while all else continues as before, that washes the shores of where Cook walked before.[20] *Mabo (No. 2)*[21] created an illusion of doing justice, while also justifying and expanding the muldarbi, into a new form – and life – in its power of extinguishment. A colonising theory, is not only renewed by the High Court, but also sanctified, and purified; once

16 *Mabo* v. *Queensland* (1992) 175 CLR 30.

17 G. Bird, "Koori Cultural Heritage: Reclaiming the Past?" in G. Bird, G. Martin and J. Nielsen, eds., *Majah: Indigenous Peoples and the Law* (Annandale: Federation Press 1996), 100–128.

18 *Mabo* v. *Queensland* (1992) 175 CLR 1, 31–35 and 78.

19 Here the frog is the state, and all other manifestations of slurping power, that of for example trans-national corporations.

20 Taken from an idea by Catharine McKinnon, for further discussion on the Aboriginal industry of pragmatism, see I. Watson, "Power of the Muldarbi, the Road to Its Demise", *Australian Feminist Law Journal* 11 (1998), 28–43.

21 *Mabo* v. *Queensland* (1992) 107 ALR 1, 18, 28, per Brennan J, and at 82 per Deane and Gaudron JJ, and at 141, per Toohey J, declare the 'death' of terra nullius in relation to the property law of Australia.

more made good, as an act of god – an act of the British state in establishing a colony that formed into the Australian state and its constituted/s sovereignty. This is a decision which assists the laundering of its own colonial history, but the stains remain embedded in the fabric of Australian sovereign/laws, yet to be removed.

The creation of native title is what come out of the illusionary rejection of *terra nullius*. But I see it as a further erosion and subversion of Nunga identities, and not a recognition of Nunga rights to land.[22] Many native title claims compete for the same ruwi; conflict is created and the muldarbi is successful in establishing ways of annihilating the possibility of peaceful co-existence, cunningly, in a way which appears to be establishing 'rights', as it kills. Granting title to land has never been our question. We know the land belongs to the ancestors and we are both owners and carers during our short time on earth. Native title is the domain of those who want to establish space rocket launching facilities and nuclear waste dumps; of those who want it named and determined for their short time and space on earth. As we travel back to this place in space as carers for a troubled and sick landscape of the future dawning. Native title does nothing to help us care for country. The decision in *Mabo (No. 2)* to remove '*terra nullius*' from the language of Australian property law did little in returning Nunga rights to land. The power of the state to steal and remove us from ruwi continues today as trans-national corporations in their merging to become an even bigger greedier frog, are empowered to steal and plunder the remaining internal organs of our ruwi-ancestors.[23]

AM I THE ENEMY?

Derrida in thinking about the work of Carl Schmitt asks: 'who sets down the law, and who founds law as a right to life?' Is it a living present, a god or man, and for whom? '*Whose* friend or enemy?'[24] But are my questions

[22] The *Native Title Act 1993* (Cth) created a native title claims process, based on the common law rules established in the High Court decision *Mabo (No. 2)*. If I am able to prove that I am sufficiently native, that is, still holding the same law that my grandmother held in 1788, and the law of the ruwi has not been extinguished by other property interests over the land, then I may hold a form of native title. A title that is determined by the *Native Title Act 1993* (Cth) and now state legislation following the *Native Title Amendment Act 1998* (Cth).

[23] For further discussion on the greedy frog see, I. Watson, "Indigenous Peoples' Law-Ways: Survival Against the Colonial State", *Australian Feminist Law Journal* 8 (1997), 39–58.

[24] Derrida, *supra* n. 17, x1.

about who is our friend or enemy? Or is it that law embraces all as I have discussed above and that while law is in all things the division of friend and enemy is what lives outside of knowing the oneness or greater lawfulness: that friends and enemies are what live in the place of the muldarbi. That place of friend and enemy is found in the conflict, which resides inside the muldarbi – sovereignty as it empowers a predator to violate law, in its eating land and its peoples. Yet in the face of the muldarbi, law is living in the universal order of things, law is non-extinguishable, and without limit in the face of the predator's lust to bring an ending to law, one which has no beginning or no ending not ceasing to exist. The state in powering over and assuming legitimacy through its own muldarbi creation, remains itself inside and challenged by the laws of creation and the song 'always was, always will be'. As the friend and enemy of the muldarbi go on inside its own nightmare. Law is in its face throughout.

Schmitt argues that without enemies there would be no politics,[25] for 'the political as such would no longer exist without the figure of the enemy'.[26] Schmitt writes: 'The specific political distinction, to which political actions and notions can be reduced, is the distinction between friend and enemy.'[27] But as Derrida states 'all the concepts of this theory of right and of politics are European, as Schmitt himself often admits'.[28]

Nevertheless theories of right and politics hold the state in its place. The history of my ancestors and a small part of what has become known as the Coorong massacres involved the killing of white shipwreck survivors followed by the hanging and silent unacknowledged massacre of their alleged murderers, the Milmendjeri of the Tanganekald people of the Coorong.

The colony of South Australia called my grandmothers and grandfathers the enemy and without trial or proclamation of martial law they were hung at a place along the Coorong in 1842. We were known as the 'myall' blackfellers, living outside the 'settled' sovereignty of the crown; the 'unsettled', and open frontier peoples who, like the *kungari* – the black swan – were vulnerable to annihilation. The old people were hung without trial or proclamation of martial law, for the alleged murders. While the colony's Advocate-General offered the following justification for the hangings:

> . . . for the safety of the colonist, and for the prevention of plunder and bloodshed, it may be necessary to view such tribes, however insignificant their numbers, or however savage

[25] For further discussion *ibid.*, 77.
[26] *Ibid.*, 84.
[27] *Ibid.*, 85.
[28] *Ibid.*, 89.

and barbarous their manners, as a separate state or nation, not acknowledging, but acting independently of, and in opposition to British interests and authority.[29]

The Governor of the colony of South Australia, Governor Gawler requested an opinion from Cooper J of the South Australian Supreme Court, in response to public protests over the hangings, 'on the amenability of the Aborigines to European law'.

The judge replied, it is

> ... impossible to try according to the forms of English law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion.[30]

The Milmendjeri people who resided outside the sovereignty and law of the Crown, were considered the enemy. There was no declaration of martial law issued, even though the soldiers who led the Coorong massacres assumed they were acting against a savage enemy from lands within. Governor Gawler in his report to the Executive Council found ways to domesticate their struggle to claim our country:

> ... they are to be held and dealt with as British subjects, ... cannot be received without modification. ... as regards those tribes with whom we have constant and peaceable intercourse – for whose subsistence we provide – who acquiesce in, and acknowledge a friendly relation with us – and who are making advance towards civilisation. To our intercourse with these, the ordinary forms of our Constitution and laws may be beneficially and effectually applied. The extension to them of the full rights of British subjects may be practicable, and attended with no evil result. ... to hold that the same maxims and principles must be applied without modification to distant tribes inhabiting a territory beyond the limits of our settlements with whom we have never communicated under friendly circumstances, whose language is equally unknown to us as ours is to them, ... who have never acknowledged subjection to any power, and who, indeed, seem incapable of being subjected to authority or deterred from atrocious crimes, except by military force. ... for the safety of the colonists, ... it may be necessary to view such tribes, ... as a separate state or nation, ... in opposition to, British interests and authority.[31]

They considered the ancestors as myall blackfellow, those people who remained outside, never subjugated to the British regime. They were the enemy. And yet against all evidence of a violent invasion and an historical process of genocide Australia was 'known' as a peaceful settlement, at which the 'Aborigines' become 'British subjects'. From Kaldowinyeri, who we are/were/will be is set in the landscape – the law, and is affirmed

[29] Cited in S.D. Lendrum, "The Coorong Massacre: Martial Law and the Aborigines at First Settlement", *Adelaide Law Review* 6 (1977) 26 at 30.

[30] Cited in A. Castles, *An Australian Legal History* (Sydney: Law Book Co, 1982), 524–525.

[31] *The South Australian Register*, 19 September 1840, cited in H. Reynolds, *Aboriginal Sovereignty, Three Nations one Australia* (Sydney: Allen and Unwin, 1996), 121.

in the language, ceremonies, and songs. 'Becoming' British was one of the first of the many lies they layered upon our black and naked bodies. But always there has remained the myall blackfeller the un-settled, non-subjugated, non-extinguishable Nunga.

If we were to forgo the absurdity of the lie that we had become British subjects for a moment and consider the treatment the ancestors received while deemed British, many questions arise. Why were the common law rights of indigenous peoples – the right to land ownership, and the fundamental human right to life – not protected? What responsibility should the crown carry for crimes of genocide committed against its own subjects, for theft of land, rape and the interference with culture and law? Under what authority did the Advocate-General act when he authorised the hanging of members of the Milmendjeri? And why when the crown later disassociated itself from the action taken by the Advocate General was he not charged for murder? These are questions, not yet answered.

EXCLUSION / INCLUSION

Australia like other colonising states has been successful in building a white nation, one based on our exclusion and inclusion. Inclusion occurs when our level of whiteness blends with their own. In saying this I am not speaking of a desire for inclusion, but of the failed acknowledgment of our existence and our laws. The power of the state to exclude or to make invisible is a universal phenomenon experienced by other colonised peoples. Durham writes about colonialism in the United States: 'the negation of 'Indians' informs every facet of American culture. The energy and vitality for which the New World is famous comes from vampirical activities'.[32]

Survival inside the belly of the muldarbi compels Nungas to go before the state's native title processes where native title applicants are required to prove the extent to which their nativeness has survived genocide. If nativeness is not proven it is considered extinguished. If it is proven it is open to extinguishment. Native title is extinguishment. Extinguishment is a form of genocide. We have no real options, against absorption through extinguishment, and a sword, which can stab at the whim of the state. In speaking of the native title 'benefits' as spoken of by native title advocates, it is true that there are a number of native title applicants who will be spared the nightmare of a nuclear waste dump or even a space rocket launching facility and uranium mine occupying and 'extinguishing' their ruwi. While some native title applicants may find merit in the native title process and

[32] J. Durham, "Cowboys and Indians", *Third Text* 12/5 (1990), 10.

the possibility of protection of country against environmental destruction, there remains a wide discretion and power in the state to continue to do as it chooses in relation to the acquisition of our lands. Some indigenous peoples may in the short term appear more fortunate than others, and it is the appearance of their good fortune that will provide the state with its much needed positive image of native title. It is needed by the state to legitimise and promote its validation of 'white title' and its policy of extinguishment. There is a pattern in the history of dispossession of Nunga peoples, as some have fared better than others under colonialism, for example some Nungas, who were recruited as native police had the 'opportunity' to live on tenuous land settlements for assisting the colonialists in the annihilation of other Nunga peoples. Today some Aboriginal peoples will have the impact of extinguishment felt more fully than others. Most will not be able to protect their country from powerful corporations while others for the moment may secure protection over their lands. It is in the interest of the state to protect some 'indigenous places', for it is appealing to the tourist, the seeker of 'the natural and the exotic, the beauty and wisdom of the Aborigine'. While out of their sights the ugliness is glaring as the ruwi screams. Creeks and rivers radiate with the leaking spill-off from uranium mines. The creation of native title by the High Court has provided the state with an administrative means for managing extinguishment and genocide, while looking benevolent in the process.

In the genocide game we may perhaps have only the choice of how we take it. It can take the form of entering the native title process and becoming a consenting party to the genocide, where one is stamped native or extinguished, but whatever the stamp, once in the process you are open to a determination of extinguishment at a time determined by the state. Those in the process may be fed a small price until their ultimate extinguishment. While those remaining outside the process resisting absorption into native title rules, go untitled, non-consenting and perhaps here it is that we have the only possibility of freedom, and like the ancestors 'myall blackfellers' we live to die outside the boundaries of the muldarbi claimed sovereign territory. To be in a place we have always been, a creation of Nunga laws, although we gasp for breath beneath the burying layers.

POWER AND THE ILLUSIONS OF LAW

Mabo (No. 2) legitimised Cook's violent arrival, the bringing of smallpox, the poisoning of water sources, the old people massacred, raped and tortured, and placed on missionary reserves as an act of state sovereignty. In a context of great violence there is no possibility of dialogue on the

conditions of their entry. Today there is continuing violence and with it there remains also little possibility of dialogue, which is truthful and 'real', beyond the rhetoric[33] and political propaganda of the state. There has never been a dialogue. There is an assumed constituted power over Nungas, but I never came into the muldarbi's constituted order, never invited nor ever consented. Still living in the place of law, a 'non-citizen' preferring the unsettled myall frontier: in respect of the place held by the ancestors. A place of my lawful being. In a dream where there is no fear of retribution Nungas face the Australian state and ask, by what lawful process have you come into being? Who are you really? The state responds, 'international law'. 'An act of state', says the High Court, and it is as though doctrines of state supremacy conjure a magic, which absolves centuries of unlawfulness and violence against indigenous peoples. The question now *terra nullius* is 'known' to be dead – is what constitutes the state? The question is met with a silence of an unrecognised violence – a power of the state to annihilate all that is different.[34] Without answering the question the state offers a process of reconciliation, one which leaves intact the scars of annihilation, one which refuses to give restitution for the loss of country, and life, as it continues to bore even deeper into the earth and the Nunga being.

The never-ending hopefulness that we will become empowered and recognised for who we are fades post-*Mabo (No. 2).* When *terra nullius* was identified as the muldarbi, there was support for change and pulling Nungas from the belly of genocide. Instead we are now left with the illusion of change while the white man of this country breathes out a false belief that a special Aboriginal advantage was created by native title at the expense of white privilege. Similar to the myth of *terra nullius* they have created a racist muldarbi: fear and loathing of a native title right. But the racism exceeds any advantage.

Our survival of genocide is now more complex. As survivors still living to survive inside the states genocide we are left to explain why native title is a muldarbi illusion of rights. Those of us who are still standing, (we comprise less than 2% of the Australian population) now speak through a further layering of muldarbi myth illusion and racism. We try to speak to the Australian people who live in fear of a 'thousands blacks' out there, as they imagine us all carrying a 'native title right' along with its perceived threat to their own security and title to land. While the fuelling of their fears is sourced in the Australian media headlines which read, 'scheming

[33] One example being the Australian Commonwealth Government's Reconciliation process.

[34] See I. Watson, "Has Mabo Turned the Tide for Justice?" *Social Alternatives* 12 (1993), 5–8, for an early discussion on the decision in *Mabo (No. 2).*

blacks', as they accuse us of 'Aboriginal terrorism'.[35] It is difficult to communicate outside and across the muldarbi territories and to explain that native title sanctifies white people's title as the rules of native title carry their own colonialist safety net – of statutory validation and extinguishment. Communication is made more complex by the power of the frog to buy and wage a campaign through the media, fulfilling further myths, which generate fear for the security of white property rights.[36]

The sovereignty of the state claims to overpower Aboriginal laws, which go before and beyond a sovereignty that is held by a physical force of arms. For Aboriginal laws are both inside and beyond a claimed sovereignty of the muldarbi sovereign state which is unknowingly itself enveloped inside Aboriginal law. Like the community of animals where the frog became so big and controlling yet was never in a place that it could annihilate law, as it was itself always enveloped by law. While the envelopment of the powerful frog or the state may not always be acknowledged, there is no point at which this power overtakes law. Law is as I have discussed above what holds all things together and continues to run even while the tyranny and the lawlessness of the frog also journeys throughout history. The power and the sovereignty of the frog is an illusion which is always collapsed by law.

All things come within the horizon of Aboriginal law, just as the spaces occupied by state 'sovereignty' are layered and filled with law. Law it breathes slightly beneath the colonising layers, not asleep nor dying but breathing gently under the crushing and burying layers, in its call to nurture, and bring laughter and the release of power in the frog's journey. For the muldarbi in its hunt to contain and border and order, is the unfulfilled frog, unable to satisfy muldarbi desires, while law fills all spaces, as it lives in all things. Law has no inside or outside unlike the idea of sovereignty which assumes a power and an authenticity. For in law the song sings. It has no in or out. It has a solid embracing sound. Only the muldarbi perceives a holding space, one which it alludes to consume from both inside and out. But this is itself its own muldarbi illusion, just as illusory as its belief that there is no law of ruwi. A muldarbi illusion one which holds the slurping 'power' of the frog, while the community is held captive by its power to consume all. The frog's illusion is in not seeing its own vulnerability, that it is the same as all other animals, contained by laws of creation and affected in the same thirsty way when wells run dry.

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[35] P. Toohey, "Scheming Blacks", *The Weekend Australian*, September 22–23 (2001), 18.

[36] Australian Mining Industry Council, Advertisement, Age, Aug 14, (1993); Weekend Australian August 21–22 (1993).

While the muldarbi ignores laws of reciprocity and obligation, law works to dissolve difference between 'friend and enemy'. So the frog no longer big becomes smaller and multiplies and the many drink equally with others the waters of life.

IDENTITIES – 'INTERNATIONAL' AND 'OTHER'

The international identity of indigenous peoples is contained by what Isobelle Schulte-Tenckoff calls the 'paradigm of domestication'.[37] The UN precludes indigenous peoples from the possibility of our laws drawing deeper breath in the spaces of imposed state sovereignty over Nunga territories, while allowing colonialism to grow in its planned genocidal absorption of indigenous peoples into 'one' homogenous state body. The homogeneous nation is an idea that is central to Carl Schmitt's envisioned state, one which draws a powerful likeness between the genocidal acts of the German and Australian state. Although the Australian story holds a more sanitised tone, for the people disappearing in Australia are Indigenous 'primitive' 'black' peoples. Our removal from country is spoken of by the High Court as simply being 'washed away by a tide of history'.[38] The process however is not merely historical, the burying of our dead and our living goes on and continues even throughout their reconciling processes.

Indigenous peoples' claim to law and sovereignty is met as a challenge to the 'territorial integrity' of existing States, our claims are seen as posing a potential threat to world peace, as though peace was a known and lived reality that was not already in fragments. Since the invasion by Cook, Nungas have known nothing but conflict and the plundering of 'our' territorial integrity. To 'protect' states from Indigenous peoples claims of sovereignty the United Nations has responded. Erica-Irene Daes Chairperson of the UN Working Group on Indigenous Peoples (WGIP), has delivered a clear limit on Indigenous peoples rights by suggesting self-determination in relation to Indigenous rights is used in its internal character, and fall short of any implications which might encourage the formation of independent states.[39] This is the high point if we can call it

[37] I. Schulte-Tenckhoff, "Re-assessing the Paradigm of Domestication: The Problematic of Indigenous Treaties", Review of Constitutional Studies, *Alberta Law Review* 4 (1998), 239–289.

[38] Brennan J in *Mabo (No. 2)* (1992) 175 CLR 1:69. Further refusal to confront genocide is noted by V. Kerruish, "Responding to Kruger: the Constitutionality of Genocide", *Australian Feminist Law Journal* 11 (1998), 65–82.

[39] Report on the Working Group on Indigenous Populations at its 11th session, UN doc. E/CN.4/Sub.2/93, Para. 80.

that[40] from which the UN will position itself in recognising Indigenous peoples laws. The limited right to self-determination is exercised within the jurisdiction and at the discretion of the state. What will change? The past colonial dynamic will continue, and like the *Mabo* decision, there is an appearance of change in the recognition of rights to self-determination but in reality nothing changes other than the invoking of the illusion of 'rights'.

States perceive Indigenous peoples' claimed sovereignty as a threat to their 'territorial integrity', a possible enemy. But Indigenous understandings of sovereignty go beyond a desire to become a player of the same patriarchal game of power and statehood. The concept of nation and sovereignty from an indigenous perspective is different to the idea of a modern state, which is backed up by nuclear weapons, and armies on stand-by. These ideas of state sovereign power are in contrast to the idea of the wholeness of a people coming from Kaldowinyeri – the dreaming – the creative processes which created the natural world. A place where hundreds of different indigenous peoples co-existed prior to the influence and domination of the colonial state and its subsuming of us into the belly of one big frog. The indigenous nation in the eye of the state lives inside the sovereign territory of the state, as the indigenous nations are doomed to their ideas of evolution into the greater homogeneity of the dominant colonising state. From an indigenous perspective 'nation' carries its own meanings. The word 'nation' needs to be exploded and expanded to properly reflect and accommodate the philosophy of Nunga laws: expanded to include the voices of the natural world, so that the ruwi of the first nations has a voice. We are not merely on and in the land, we are of it, and we speak from this place of Creation of land, of law.

The modern state is moulded from centuries of domination and the consumption of and burying alive of smaller groups into the largeness of the state and its power to assume sovereignty. Law has no inside or outside all is one, one is all, law lives in all things, and in this place there is no search for freedom, as we have already become who we are. This is a different idea to 'advanced' or 'evolved' concepts of state sovereignty, ideas which place Nungas so low in the 'evolving order of things' that we are seen as having no law other than primitive customs that we are seen to be waiting liberation from.

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[40] Professor Rosalyn Higgins, (as she then was prior to her appointment as a Judge of the International Court of Justice), speaking at a meeting of interns at the United Nations in Geneva in July 1992, stated that state boundaries had to be maintained for reasons of world peace. More recently Tony Blair stated at the UN Conference on Racism held in Durban during August–September 2001, that indigenous peoples right to self-determination should not be recognised as a right that is held in international law.

Our law embraces all things in the universe, a different idea to the states' concept of sovereignty: 'sovereign is he who decides on the state of exception'. As law holds no outer or inner place, it is in all things, even the muldarbi's own claimed sovereignty. There is nothing, which can fall outside the realm of law, the idea of determining the exception is just that, an idea which is itself contained by law. My ancestors before and still now have never consented to the theft of our ruwi or the genocide of forced absorption into the dominant state. The state's claim to sovereignty is of muldarbi desires; desires that are killing of law and burying of those not yet ready to go. Yet law is still breathing inside the impact of the muldarbi – colonialism. To keep alive Nunganess I weave against the force to decolonise all things Nunga, peeling away the layers of violence imposed by muldarbi ways.

The burying of our dead and living continues as our questions go unanswered. Whilst, in order to gain legitimacy, the dominant culture of Australia consume us, as though they have an historic right to us, for we are 'their Aborigines' and often they see themselves as us. Yet, in their play for the one nation state they annihilate all about us that is different, to reveal a deep underlying psychosis one which perhaps triggers the insatiable unquenchable trauma and like the frog thirst. Is this the same sickness that Derrida considers ". . . an evil naturally affecting Nature." One which ". . . is divided, separated from itself." That which becomes ". . . a pathology of the community." Left to ask is what is "in question here is a clinic of the city."[41]

In my speaking of laws of creation of Kaldowinyeri, therefore, I am shot down by the agents of the muldarbi for being a romantic in describing a vision of the past that is present and is future, for my speaking of what they know to not exist other than in my own 'primitive' imaginings. Or, if found to exist, is outpaced by this modern world, as we are led to only ever know that which is force fed to us by the power of the muldarbi in all of its manifestations.

The picture conjured by the state is one of sickness, 'a clinic of the city'. A place where the healing the hope and the law are vanquished. But this is only within their own nightmare horizons, for it is law that outpaces and over powers all muldarbi things. It is how we out-think the muldarbi horizon to know the place of Kaldowinyeri that begins to alter the pattern and despair for the sick city.

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[41] Derrida, *supra* n. 17, 92.