

Marc Gumbert, *Neither Justice Nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights*. St. Lucia, London, New York: University of Queensland Press, 1984. Pp. 215, figures, diagrams, maps, photographs, bibliography, index.

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In 1976 the Australian Commonwealth took the first formal step toward giving at least some Aboriginal people legal title to at least some of their land. The Aboriginal Land Rights (Northern Territory) Act 1976 allows that Aboriginal people may claim to be the "traditional owners" of areas of unalienated crown land in the Northern Territory (NT). In pursuing their claim to land, one of several land councils acts on their behalf to present the claim to the Aboriginal Land Commissioner (a judge of the Supreme Court of the Northern Territory, appointed to this position for a set period of time). The land commissioner hears the case for claims to the status of "traditional owner"; he also hears evidence from other interested parties who may wish to argue that the granting of Aboriginal freehold title (an unusually secure form of title) may be detrimental to these other interests. His recommendation is given to the Minister for Aboriginal Affairs and it is the minister who makes the final decision as to whether title will be transferred to the "traditional owners" in the form of a lands trust. To date, no Aboriginal land claim has been wholly rejected either by the land commissioner or by the minister.

Dr. Gumbert is a Sydney barrister who has also completed studies in anthropology. He is thus particularly qualified to examine what has been an unhappy marriage of anthropology and law in the presentation of land claims. At the same time, Gumbert has not been involved as a participant (legal advisor or anthropologist) in any land claims.

Neither Justice Nor Reason is directed toward a broad nonspecialist audience. The writing is exceptionally clear. Readers who know very little about any of the main topics--Australia, law, and anthropology--will find enough information included to allow them to engage with the text. Gumbert examines the social and legal underpinnings of the Aboriginal Land Rights (Northern Territory) Act 1976 and the anthropological models of social organization underlying the presentation of claims under the act. In addition, he presents his own alternative model of Australian Aboriginal social organization and tests it against the requirements of the act as well as against evidence presented in a number of land claims.

Since this book was written a number of changes have taken place. The public goodwill toward Aboriginal land rights has faded. As more claims are presented, more precedents accrue. In many instances the precedents appear to further constrict the act. Increasing hostility in the opposition to land claims adds delays and makes claims ever more stressful for the claimants and their associates. The net effect of these changes is that the contradictions inherent in the act are becoming increasingly difficult to ignore.

The book is divided into three parts. The book as a whole has a general introduction and conclusion. Additionally, each part has its own introduction and conclusion. This structure contributes to the clarity with which complex sets of information are handled in a short space. Part 1, "Worlds in Collision," is a historical overview. It provides very brief historical surveys of the European conquest and settlement of the Australian continent, the sources and development of law and legislation in European Australia, and the development of anthropological models in Australia. In this section, and in those following, it is probable that specialists in each field will not be entirely pleased with the amount of generalization required to present a sufficient amount of information in a short space. Given the broad composition of the intended audience, I find these brief surveys to be generally accurate, exceptionally clear, and adequately impartial.

In Part 2, "Paradigm Lost," Gumbert traces the development of the concept of "horde" from its origins in Radcliffe-Brown's 1930-1931 article "The Social Organisation of Australian Tribes" through various modifications and criticism, to its collapse (according to Gumbert) in the land claim process. In this section Gumbert presents his own alternative model of Aboriginal social organization and shows that it is workable within the terms of the act. I suspect that overseas readers may be concerned that Gumbert's information is weighted to support his assertion that anthropology in Australia has been "exceptionally cloistered" (2). Granted that the topic under discussion does not constitute the whole of the discipline, I believe that his assertion in this instance is on target. Indeed, many anthropologists in Australia describe the situation less kindly than does Gumbert.

Part 3 consists of analyses of six Aboriginal Claims to Land.¹ In each case Gumbert provides pertinent contextual information as well as analysis. Each case demonstrates beautifully the uneasy fit between the legal requirements of the act, the anthropologists' models in support of the claimants, and the evidence of the claimants themselves. The inclusion of some of the land commissioner's questions to anthropologists,

and comments on their evidence, gives an illuminating view of the struggle to come to terms with this difficult cross-cultural situation. These brief case studies are fascinating to read and, insofar as I am able to determine (not having been a participant in any of the claims discussed), are well within the range of accuracy required for such brief studies.

With an outline of the book in place, it is now possible to proceed to a more detailed analysis of what I take to be the central theme of the book: the critique of Radcliffe-Brownian models of social organization and the presentation of an alternative model. The essential model to be subjected to critique is that of the patrilineal, patrilocal, exogamous band occupying a discrete bounded unit of territory to which it has exclusive rights. This was the basis of Radcliffe-Brown's "horde" (1930-1931) and, with various amendments and permutations, this model is still granted a fair degree of credence. Gumbert notes several factors that have contributed to the persistence of the model, primarily the fact that Aboriginal people in most parts of Australia were dispossessed of their means of subsistence and their control over territory, and were severely restricted in their movements. Thus, an on-the-ground description and analysis of the social organization of these hunter-gatherers was largely impossible to achieve. Radcliffe-Brown is accurately described as having been "in the worst of all possible worlds. . . . He was an empiricist without the benefit of adequate observation" (65).

The intervening years have seen modifications to the concept of "horde," some of which, in Gumbert's opinion (76), have rendered it essentially meaningless. There have also been some excellent critiques of the concept itself (notably Hiatt 1966). But in the "cloistered" world of Australian anthropology, there have been virtually no clearly innovative approaches to these questions. In fact, the only radical departure to date is that of Fred Myers (1976; 1982; 1986). It is unfortunate that Gumbert did not include Myers's work in his analysis, for he might have been able to carry his own model further. Readers who wish to pursue a more radical approach to understanding an Aboriginal construction of social relationships would do well to consult Myers (1986).

Gumbert's alternative model of social organization (83-92) is based on the concept of "seasonally labile bands recruited pursuant to a wide range of ties" (86). He notes that indigenous terms that specify different *kinds* of rights and responsibilities with respect to land (and associated ritual) do not refer to corporate groups, but rather have a range of referents with varying degrees of social inclusiveness (90). The result, in the organization of daily and ritual life, would have been societies

“comprised [of] cognatic bands in a constant state of re-formation. Each individual was equipped not with a single patrilineal affiliation . . . but rather with a unique configuration of rights and obligations stemming from his relationship to a complex set of sites, individuals, and groups” (91). Gumbert maintains that the idea of a patriline exists as indigenous ideology, but contends that “rights in land circulated throughout the whole community” (91).

In the interaction between anthropology and law that occurs in land claims, models ought not only to be accurate representations of social life; they ought also to be admissible within the terms of the act. Gumbert contends that his alternative model is both more accurate than others and equally admissible. The Aboriginal Land Rights (Northern Territory) Act 1976 specifies that “traditional Aboriginal owners . . . means a local descent group” (101; section 3 [1] of the act). As the act does not specify unilineality, it is quite possible to argue the case for a cognatic descent group, although the weight of legal precedent and “received wisdom” is not in favor of this approach. What Gumbert contends is that “the whole community” (91) is to be considered to be a group of “traditional owners” within the meaning of the act. Such an approach, apparently feasible in terms of law, would, if successful, enfranchise considerably more people than is currently the case with the highly restricted “horde” variant models that have most frequently been put forward. It is in the context of models of highly exclusive rules for recruitment to land-owning groups that Gumbert argues that the act has failed to provide justice: “Indeed, ruling as it were from the grave, the Radcliffe-Brownian concepts . . . have been the cause of ethnographic inaccuracy and even--since land rights are now, for some, a reality--an injustice” (72).

I have a few specific comments to make before proceeding to a more general critique of the book. Gumbert aligns the Radcliffe-Brown model with colonialism: “there was an homology between the economic and political background of colonialism, and its ideology which crystallized in the Radcliffe-Brown horde” (195). Without locating myself as a supporter of the rigid thinking that came to dominate these issues, I must state that I think Gumbert’s analysis fails to give Radcliffe-Brown and his successors credit for a certain resistance to colonial ideology. It must be remembered that British/Australian ideology during the major period of conquest and settlement depended on the notion of *terra nullius*--the empty continent. That a continent could be both peopled and “empty” posed a contradiction that was addressed by the assertion (still prevalent in Australia) that Aboriginal people did not *own* the land:

that they did not recognize social and geographical boundaries, did not occupy and utilize specific tracts of land, and so forth. The concept of the horde argued forcibly against this ideology. If Radcliffe-Brown was a handservant of colonialism, it was so only in an inverted sense; without colonialism such an emphasis on exclusivity might never have been sustained.

Another point is that of generalization: many, probably most, anthropologists working in Australia have come to realize that it is fundamentally unsound and unjust to try to generalize about all Aboriginal societies. Any particular Aboriginal society may utilize different structural principles in different contexts; societies differ from each other both with respect to their internal organization of context specific principles and with respect to their ideologies of structural principles. Certainly part of the difficulty in refuting the patrilineal horde model is that it clearly fits some aspects of certain social contexts in some parts of Australia. Gumbert's consistent references to "Aboriginal society" reproduce the notion of an undifferentiated other at a time when it is far more important to deconstruct this notion.

Gumbert's model is unlikely ever to be tested against social reality; it is no more falsifiable in that sense than any other model. However, it could be tested in a land claim. If that were to happen, it is quite possible that it would encounter many of the problems the other models have met. How will community be defined? What principles will be brought to bear in defining who is, and who is not, a member of a community? Gumbert contends that social boundaries are "permeable" and that rights are "overlapping and variable" (90-92). Can a European set of laws recognize such flexibility?

This last set of queries brings me to a broader issue that must be addressed. In spite of what the title of the book might be thought to indicate, Gumbert's analysis is fundamentally located within a discourse that privileges law and anthropology. His concern that Aboriginal people obtain justice within the law is passionate and articulate; it is also unreflexive.

To my mind, the lack of justice and reason go deeper than Gumbert suggests. In this review I can only mention a few of the major problems I see. My concern is that Gumbert's work be recognized for what it is not, as well as for what it is. The Aboriginal Land Rights (Northern Territory) Act 1976 produces an event in which a European judge (to date all male) decides whether or not a set of Aboriginal people are who they say they are. The Aboriginal people in question must produce for examination and cross-examination an identity that meets the requirements

of an act produced by Europeans. The onus is on Aboriginal people to "prove" their identity according to an alien means of determining truth and falsehood. The possibility exists that their proofs will be found to be inauthentic. In a number of cases some claimants, identified by themselves and by relevant others as persons with rights to and responsibilities for the land in question, have been found *not* to be traditional owners. Their identity, legitimated by every means at their disposal, has not been found to be legitimate in European law (see Gumbert's analysis of the Limmen Bight Land Claim, 188-194). For an Aboriginal claimant, then, authenticity of identity is to be determined not by one's self and one's peers, but by a culturally alien person who decides according to a set of culturally alien principles of testing evidence. Surely neither justice nor reason can be said to prevail under a system that offers "rights" only in the context of its own power to create a discourse of authenticity, to require conformity to that discourse, and to make final determinations on authenticity. It is difficult to conceive of a more cruel and elegant expression of cultural domination.

Anthropologists' role in land claims is increasingly fraught with contradictions. We are commonly thought to have something to say on these matters, as indeed we do (see Michaels 1986 for a superb analysis). But we, too, are required in the interests of a successful claim to confine our evidence to the requirements of the act. We are not in a position to alter the code, only to assist in reproducing and validating it. Certainly most Aboriginal people believe that it is in their best interest to obtain title to land; for people who have been able to maintain close ties to their land, the "carrot" is of extreme social, cultural, psychological, and economic value. The costs of the procedure are only beginning to emerge; the results are by no means all positive.

There are alternative models that are not rewrites of the same oppressive text. The South Australian Pitjantjatjara Land Rights Act (19.3.81) allocated a large tract of land to those people (unspecified) who have "interests . . . in accordance with Aboriginal tradition" (also unspecified) (104, n. 7). There is no inherent reason why this model could not be extended, although there would almost certainly be much political opposition to such a proposal.

Having offered a brief exploration of the kinds of issues a reflexive critique raises, I conclude by returning to Gumbert's analysis. *Neither Justice Nor Reason* is excellent for what it is--a conservative, compassionate, lucid, and humanitarian analysis of Aboriginal land rights as they are in the Northern Territory of Australia. Gumbert recognizes that the problems that all Australian Aboriginal people confront will not be

resolved by land rights. He concludes by taking note of the fact that the majority of the 150,000 Aboriginal people in Australia live under conditions of extreme deprivation and that only reparation and compensation can help to alleviate these conditions: "The common denominator of such reparatory measures is not mere land rights but rather, the acquisition of such different forms of means of production as will enable Aborigines to establish, once again, an economically viable measure of self-determination" (198).

With that point in mind, readers will find the book to be an excellent summary and analysis, as well as a useful reference source. I hope that Gumbert will publish something to bring readers up to date on the more recent developments in this gripping and sometimes tragic era in Australian social life.

NOTES

Since 1980 I have worked extensively with Aboriginal people in the Victoria River District of the NT. My research is oriented toward questions relating to religion, morality, and ecology. I have also been involved in land claim procedures.

1. In order of discussion, these claims are: Alyawarra and Kaititja Land Claim, Uluru (Ayers Rock) National Park and Lake Amadeus/Luritja Land Claim, Yingawunarri (Old Top Springs) Mudbura Land Claim, Anmatjirra and Alyawarra Land Claim to Utopia Pastoral Lease, Lander Warlpiri Anmatjirra Land Claim to Willowra Pastoral Lease, Limmen Bight Land Claim.

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