# The road from *Mabo*
# Towards autonomy

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***Torres Strait Island people are setting the pace in the politics of self-determination.***

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The euphoria initially generated among Aboriginal and Torres Strait Island people by the *Mabo* decision[1] has given way to tension and uncertainty. The High Court decision admits that 'native title' had been historically repressed in Australia and recognises an *inherent* right of indigenous people to their land. By *inherent* right is meant a right that existed before European colonisation. It is not something *granted* by the Crown, but flows from the indigenous peoples' original occupation of their lands. However, the wider political and legal implications of the decision remain unclear. In this 'decade of reconciliation' does the *Mabo* decision herald a turning point in the relationship between Aboriginal and Torres Strait Island people and the Australian nation? The *Mabo* case has certainly led to an upsurge in interest among Torres Strait Island people in their future political and legal status. If a right to their *land* was not extinguished by the accession of British sovereignty, does a right of *self-government* also survive?

This article discusses this issue, and others arising out of attempts by Torres Strait Island people to chart a course toward greater autonomy. 'Autonomy', following Nettheim, refers 'to any sort of status under which a people have effective political control over the matters that concern them'.[2]

## Claims for autonomy

The ideal of 'autonomy' was espoused in the 1970s during the border dispute and Torres Strait Treaty negotiations.[3] Carlemo Wacando challenged the Crown's annexation of Darnley Island in the courts,[4] and, in 1976, the Torres United Party (TUP) was formed, chaired by Wacando.[5] The TUP made a submission to the United Nations Special Committee on Decolonisation regarding sovereignty and separate nationhood for the Torres Strait Islands.[6] In January 1988, a meeting of Torres Strait Island people at Thursday Island concluded with a call for 'sovereign independence'.[7] It being Australia's bicentenary year, the independence call proved an embarrassment to the Federal Government.

After the January 1988 call for independence there was much media 'hype' and a flurry of both Federal and State Government activity, culminating in a Federal Interdepartmental Committee investigation and report on Islander concerns.[8] During 1988, an Independence Working Party was set up,[9] and other independence meetings were held both in the Islands and on the mainland. Mainland Island people formed Magani Malu Kes (MMK), an organisation to further the independence cause, and the Torres United Party re-emerged.[10]

The future legal status of the Torres Strait Islands continues to concern Torres Strait Island people. Self-government issues were discussed in 1992 at the Second National Conference of Torres Strait Island People (Rockhampton, 13-16 April), by Island representatives at the 10th Session of the United Nations Working Group on Indigenous Populations (Geneva, 20-31 July), at the 'Surviving Columbus' Conference (Darwin, 30 September-2 October),[11] at the First National Meriam Meeting in Townsville in September,[12] and in New York at the United Nations launch of the Year for the World's Indigenous People in December.

Casting these discussions in legal terms, the options for greater autonomy include:

secession and full sovereignty as an independent nation;

territorial self-government following the example of the Nunavut Territory of the Inuit in Canada, and with perhaps a *form* of self-government based on the Norfolk Island model;

statehood within the Australian federation; and

legislatively provided community-based self-government such as suggested by the Queensland Legislative Review Committee.[13]

## Sovereignty and secession

What possibility is there for the creation of an independent, sovereign nation-state for the Torres Strait? That the Torres Strait Islands form part of the State of Queensland was settled by the High Court in 1981 after Wacando challenged the 1879 annexation of Darnley Island.[14] *Coe v Commonwealth of Australia* (1979) 53 ALJR 403 also struck out a challenge to Australian sovereignty by an Aboriginal claimant. In the *Mabo case* the High Court affirmed its ruling in *Wacando* that the Torres Strait Islands were validly annexed.

Although the decision in *Mabo* has been welcomed as recognising the survival of 'native title' to land, the decision is also a clear restatement that the Torres Strait Islands are subject to the power of the Queensland and Commonwealth Parliaments. According to the majority ruling, although the Crown did not acquire 'absolute beneficial ownership' upon annexation, it did acquire 'radical title to the land and a sovereign political power'.[15] Radical title is the paramount title to the land that the Crown acquires upon a declaration of sovereignty. Although it does not automatically extinguish all existing interests in land, radical title does mean that the Crown has the *power* to extinguish them.

However, *Mabo* still leaves open the possibility that indigenous *self-government* could survive the Crown's acquisition of radical title. Although recognised by the common law, 'native title' is not a form of common law land tenure. It is title to land based on *customary* law, the laws of the indigenous people. If 'native title' has survived, why not other forms of customary law and the political *sources* of that law?

The term **sovereignty** has been powerfully used in political rhetoric by indigenous people to assert an immunity from the executive, legislative and judicial jurisdiction of the respective states 'occupying' their lands.[16] However, according to international law, sovereignty is something that only states can claim. It denotes a state's legal status as being independent from the jurisdiction of a foreign state and as being subject only to public international law. Such competing views of sovereignty are discussed by McHugh with regard to Maori claims.[17] He notes that the English jurist, A.V. Dicey, drew a distinction between 'legal sovereignty' (the Crown's indivisible power to govern exclusively), and 'political sovereignty' which is vested in the people and which legitimates the Crown's 'legal sovereignty'. The Crown's 'legal sovereignty' prevails over 'political sovereignty'. McHugh argues that, 'Maori sovereignty' cannot be a 'legal sovereignty'. It could *become* legal but only within the all-encompassing sovereignty of the Crown.[18] That is, it would be a subordinate sovereignty.

Competing views of sovereignty are sometimes resolved on the basis of whether they can be classified as 'external' or 'internal'. 'External sovereignty' is that granted to a state under international law and is the power to conduct foreign relations on behalf of any 'internal' sovereign entities. 'Internal sovereignty' can take a number of forms, for example, the subordinate sovereignty claimed by the six States within Australia's federal system, or by individual Indian nations with the right of internal self-government in the United States.[19] However, according to McHugh, the American 'dependent domestic nation' is not possible where countries owe allegiance to the Crown because they have a constitutional tradition different from that of the United States. 'Legal' and 'political' sovereignty are not synonymous.[20] Therefore, the American model could not be used in the context of the Torres Strait Islands.

The Australian Constitution does not make express provision for a State, or part of a State, to secede from the Commonwealth. Moreover, Craven shows that unilateral secession conflicts directly with the Constitution.[21]

It would therefore require constitutional amendment, under the restrictive s.128, before legal secession could proceed. Thus the likelihood of constitutional provision for unilateral secession of a State, or part of a State, is extremely remote.

Secession and full independence, in any event, is no longer sought by many Torres Strait Island people. The Chairman of the Island Co-ordinating Council, Mr Getano Lui Jr, is reported to have said: 'We do not want to secede in terms of total sovereignty; we just want to look after the delivery of services to our people'.[22]

## Territorial self-government?

The Federal Constitution makes provision for the surrender by a State of part of its territory to the Commonwealth (s.111), and for the alteration of the limits of a State (s.123). Under s.111 it is possible for the Queensland Government to pass legislation ceding the Torres Strait Islands to the Commonwealth. In *Paterson v O'Brien*[23] the High Court held unanimously that s.123 does not apply to territory cessions under s.111. Therefore, surrender by a State of part of its territory under s.111 is not conditional upon the approval of its electorate.

Of course, the mere constitution of the Torres Strait as a federal Territory does not guarantee any greater political or economic autonomy to Torres Strait Island people. Under s.122 of the federal Constitution, the Commonwealth can make laws for the government of any of its Territories. This may, or may not, include self-government legislation such as, for example, the *Northern Territory (Self-Government) Act* 1978 (Cth), or the *Norfolk Island Act* 1979 (Cth). The power conferred by s.122 is a plenary power:

> . . . sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate Territorial administrative institutions or a separate fiscus; yet on the other hand . . . wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.[24]

This is reflected in the variety of legal structures and administrative arrangements of Australia's different Territories.[25] As Jull points out, several of Australia's Territories already have unique politico-administrative institutions suited to their historical and social circumstances.[26] Henry Reynolds has also focused on the precedent for Aboriginal and Torres Strait Island people provided by the Territory of Norfolk Island[27] which is granted a degree of self-government under the *Norfolk Island Act* 1979 (Cth). An elected nine member Legislative Assembly has power to make

laws for the 'peace, order and good government' of the Territory and to raise revenue for this purpose. This may be a precedent for some form of Territorial self-government which will suit Torres Strait Island people's unique historical and social situation, and which may or may not be chosen by them through a process of self-determination. But this option would provide no protection for Torres Strait Island people living in mainland Australia and outside the Territory boundaries.

## Statehood

The procedure for creating a new State from within an existing State is in ss.121 and 124 of the Constitution. A new State of the Torres Strait must not only be approved by the Commonwealth Parliament, but also by the Queensland Parliament.[28] For the State of Queensland to give up this part of its territory will be politically difficult given its strategic significance as a border region, as well as its current, and potential, economic importance.[29] This also applies to territory cessions under s.111 discussed above.

Section 121 empowers the Commonwealth not only to 'admit' and 'establish' new States, but also to 'impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit'. Uncertainties regarding the interpretation of this provision were identified by the Constitutional Commission in its final report of 1988 as:

> (a) the extent of the Parliament's power to impose terms and conditions on the admission or establishment of new States;
>
> (b) the basis of the representation of new States in the Federal Parliament;
>
> (c) whether the status of 'New State' implies parity with existing States and, if it does, in what respects; and
>
> (d) whether the powers of a new State may be restricted in a manner different from that of existing States.[30]

These problems are currently under discussion with regard to the push toward Northern Territory statehood.[31] They are relevant in any consideration of possible future statehood for the Torres strait.

However, there are more immediate practical political and economic factors which would inhibit and make unrealistic any push toward the establishment of a new Torres Strait State. These include the problem of raising public revenue given the small population of the Islands, and the problem of creating the necessary structures of government where few at present exist. Although there is no constitutional requirement for the legislative structures of a new State to be the same as existing States, it is unlikely that the Federal Parliament would diverge from the type of structure already familiar to the Anglo-Australian legal system. Rather than allowing greater autonomy, Torres Strait Island people may experience greater constraints as they become trapped within the complexities of unfamiliar and culturally inappropriate political structures.

Whether a separate State or Territory of the Torres Strait Islands is viable or not, the requirement under ss.111 and 124 of Queensland Paliamentary approval presents an extremely difficult obstacle. It is unlikely that the State will readily relinquish its rights to the Commonwealth. It is much more likely that the State itself will in the future be prepared to grant some degree of 'self-government' under its own Constitution. The Queensland Government initiative to review its 'self-management' legislation regarding Aboriginal and Torres Strait Island people is an encouraging sign although little action has been taken on that report to date.[32]

## Community-based self-government: recognition under the State Constitution

Is there any special basis in the Queensland Constitution for Torres Strait Island people to claim self-government? Community Councils established under the *Community Services (Torres Strait) Act* 1984, derive their status from ordinary legislation but these and other future unique forms of community self-government, such as proposed by the Legislative Review Committee,[33] may be provided for in the State constitutional entrenchment of recognition for local government(ss.54 and 55).[34] This should encompass parallel Aboriginal and Islander structures *as well* as mainstream local government.

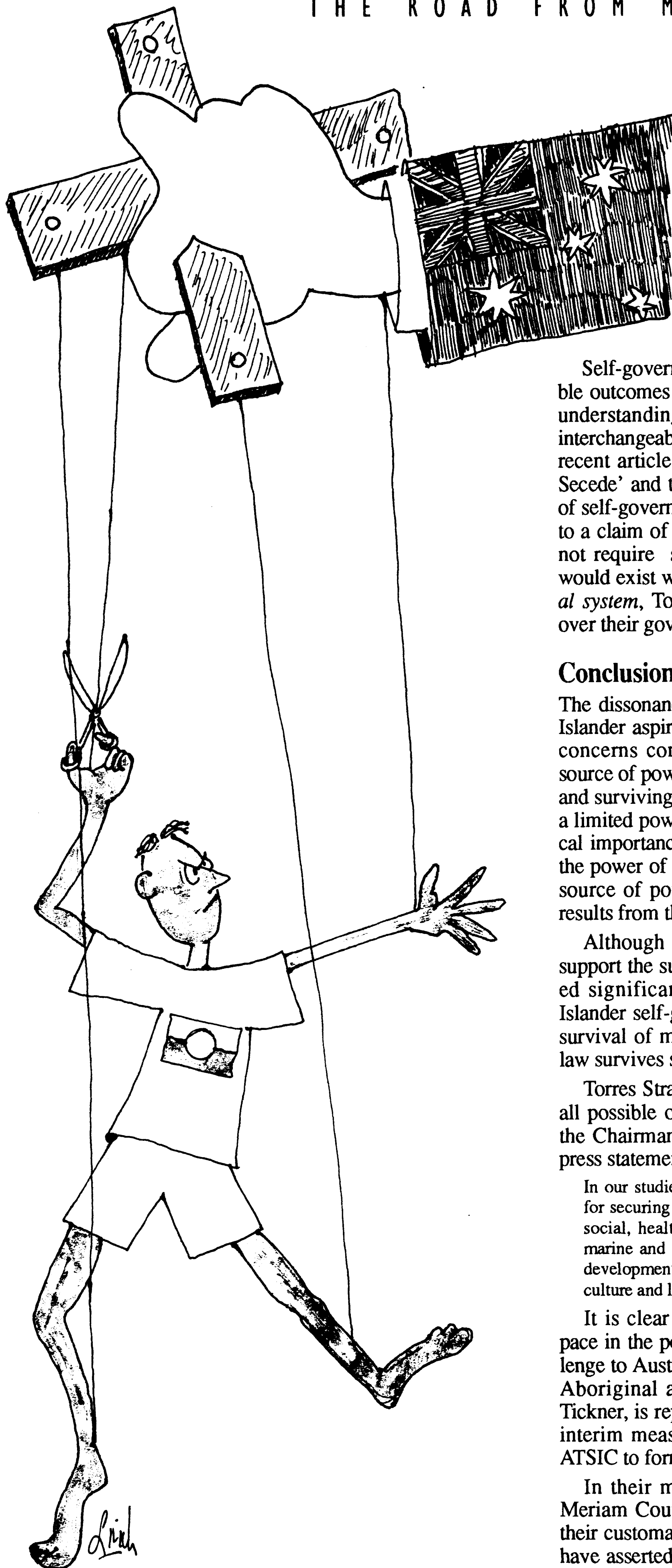
The major advantage for Torres Strait Island people in pursuing this option of self-government at the local government level, over self-government as a separate Territory or as a State, is that it encompasses mainland Torres Strait Island communities. The major disadvantage is that it rests on delegated authority and may deny the sovereignty claimed by Torres Strait Island people. At issue is whether the Queensland Government can delegate to Island people a power which they already have. Murray Island people in particular have asserted that the *Mabo* decision confirmed their *inherent* right of self-government. The Meriam Council of Elders has decreed that it will announce the composition and policies of a new Provisional Murray Islands Government in 1993. A Working Party of five people is already formulating policies.[35]

What are the implications of this for other Torres Strait Island people? The move to form a provisional government for the Murray Islands is a politically positive one not just for Murray Island people, but for all Torres Strait Island communities. It amounts to an assertion of the survival of an *inherent* right to self-government. However, in the long run, if the political goal is to achieve some form of territorial self-government, like the Inuit in Canada, then Torres Strait Island people will have to work together to forge a unity between their different Island communities. It is highly unlikely that Torres Strait Island people will gain recognition of territorial self-government as separate communities.

## Dissonance between government policy and Islander aspirations

That 'self-determination' is a contested concept is clear not only in the Australian context, but also internationally.[36] Different interpretations, as Wolfe notes, give rise to deep misunderstandings.[37]

Self-determination under Australian government policy has indigenous organisations and representatives managing government programs and shaping policy.[38] The centre-piece of federal policy on 'self-determination' is the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC is not an advisory body, nor is it meant to merely administer and manage government programs. Through its elected Regional Councils and its Board of Commissioners, ATSIC develops policies and makes funding decisions. In its report, *A Chance for the Future*, the House of Representatives Standing Committee on Aboriginal Affairs considered that self-determination meant Aboriginal and Torres Strait Island people 'having the authority, resources and capacity to control the future of their own communities *within the legal structure common to all Australians*'(my emphasis).[39] Clearly, the right to separate nationhood is not contemplated here. On the other hand, the right of self-determination, as understood and claimed by indigenous representatives internationally, is the right of each



culturally distinct people to a *process* of freely choosing both its domestic *and* international political status, including independent nationhood. Options include:

> . . . the entire range of political arrangements from complete independence as a separate state, to some form of association with an existing state, to participation in a federal system of partly self-governing regions or provinces, to complete political integration or assimilation.[40]

Self-government and independence are two different possible outcomes of the process of self-determination. Much misunderstanding is generated when these two terms are used interchangeably, particularly by the media. The headline in a recent article in the *Cairns Post* reads 'Torres Strait Bid To Secede' and the writer gives the false impression that a claim of self-government by Torres Strait Island people is equivalent to a claim of independent nationhood.[41] Self-government does not require secession! Torres Strait Island self-government would exist when, *within the structure of the Australian federal system*, Torres Strait Island people 'have effective control over their government'.[42]

## Conclusion

The dissonance between government policy and Torres Strait Islander aspirations is not merely a matter of terminology but concerns contestations about power itself. At issue is the source of power of self-determination. Is it *inherent*, pre-dating and surviving annexation of the Islands by the Crown? Or, is it a limited power *delegated* by the Crown? The issue is of critical importance because what is perceived to be the source of the power of the process of self-determination will also be the source of power of whatever form of self-government that results from that process.

Although the *Mabo* decision does not in itself expressly support the survival of an indigenous sovereignty, it has created significant momentum in the politics of Torres Strait Islander self-government. It leaves open the possibility of the survival of more than just customary *land* law. If customary law survives so also must the political *source* of that law.

Torres Strait Island people are in the process of considering all possible options for greater autonomy. Mr Getano Lui Jr, the Chairman of the Island Co-ordinating Council, said in a press statement released on 6 October 1992:

> In our studies of self-government we are looking at practical options for securing Islander land, reef, and sea tenure; managing appropriate social, health, and education services and facilities; protecting the marine and coastal environments; encouraging appropriate economic development; and maintaining and strengthening unique Torres Strait culture and language. Governing institutions will also be considered.

It is clear that Torres Strait Island people are setting the pace in the politics of self-government and are issuing a challenge to Australian governments to keep up. The Minister for Aboriginal and Torres Strait Islander Affairs, Mr Robert Tickner, is reported to find 'attractive' a suggestion that, as an interim measure, Torres Strait Island people separate from ATSIC to form their own policy making body.[43]

In their move to set up a Provisional Government, the Meriam Council of Elders have asserted that not only does their customary law survive, but also its political source. They have asserted an inherent right to self-determination and have mounted a challenge to Australian governments to recognise this right and thus provide a sound basis for genuine autonomy

for Torres Strait Island people. This right could be recognised in a non-justiciable declaratory charter of principles included in the Australian Constitution but agreement among all parties regarding the *source of power* of self-government is necessary before an appropriate *form* of self-government can be decided on.

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