CULTURAL TIMELESSNESS AND COLONIAL TETHERS: AUSTRALIAN NATIVE TITLE IN HISTORICAL AND COMPARATIVE PERSPECTIVE

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In a discussion of the early US colonial history, de Tocqueville wrote that the Americans achieved the erosion of the ‘Indian’ race ‘triumphantly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world’. It was impossible, he said, to ‘destroy men with more respect for the laws of humanity’.1

Australian native title jurisprudence appears to be teetering on the brink of a de Tocqueville-favoured disaster. Citing cultural courtesy and legal precision, the Australian courts have in a number of cases descended into a pre-occupation with ‘traditional laws and customs’ in their handling of native title proof and content – an approach that would seem to be precess tally, technically and socio-politically flawed.

The Australian approach has long been treated by critical commentators2 and indeed some notable expressions of judicial unease.3 The purpose of this article is to draw the light once again, in the current climate of political change, to the apparent error in the prevailing Australian thinking and its unfolding consequences. This short study seeks to articulate the difficulties in a new and succinct way, and against a backdrop of relevant legal principle from the United States, Canada and New Zealand. It seeks to corner some of the historical preconceptions and intellectual traditions that may have contributed to the Australian methodology. And it seeks to demonstrate (with the help of this broader context) that, while the ‘tradition’ focus may be well ingrained in the Australian legal psyche, this is one instance in which the law must not be permitted to ‘hide in shadows of its own making’.

1 Native Title: A Legal Challenge

Western courts have long been challenged by legally and morally difficult questions in the context of Indigenous land rights. The 15 year old native title doctrine in Australia has already produced a large body of complex and controversial case law. For some time the important Australian cases focused, in the alleyways of a punctured and very detailed legislative response to the muddled recognition of this new interest,4 upon commercially and politically pressing questions about extinguishment and the interrelationship of Indigenous and non-Indigenous rights.5 However, in more recent years the predominant difficulties have arisen in the context of attempts to actually define the native title interest and identify the exact prerequisites for its survival. In this regard, running through the early Australian jurisprudence6 were the makings of a restrictive ‘traditional’-focused methodology, and this has taken clearer shape in the more recent High Court cases.7 This methodology will be explored and explained further below. For present purposes, it essentially means that native title is pinned in by the notion of tradition (or, generally restricted to innominate historical uses) and is dependent for its survival upon the maintenance of that tradition. This approach builds into the doctrine an unassailable attenuation of the Aboriginal interest it was designed to protect, and an inherent intolerance of Indigenous charge.

The pursuit of legal respect for Indigenous histories and cultures, a work-in-progress in all post-colonial countries, is an unarguably valuable undertaking. However, long experience demonstrates well that the law’s patterns and projects must be carefully examined for obstructions and solicitous errors. Is it appropriate for fundamental Indigenous rights to be tightly and meticulously constrained by the notion of tradition? This is a question that dips deeply into our basic understandings of cultural identity and the relationship between colonisers and Indigenous peoples.

II The Comparative Context

A survey of the law in the US, Canada and New Zealand is enlightening on questions as to the nature of the native title interest (termed here ‘content’) and the prerequisites for its survival (‘proof’). The doctrines in these countries have been insidiously refined over the course of some 180 years, and have in truth always remained reasonably distinct from the treaty history that is often cited by Australian courts in their broad opposition to comparative work in this field.8

In the US, an interest in the nature of native title was recognised in the famous (and famously controversial) decision of Johnson v McIntosh9 on the back of established European policy and practice in North America.10 The doctrine came sharply into focus again in the US from the 1930s, with the establishment of compensation processes (particularly the Indian Claims Commission)11 that revisited historical dealings in and taking of land (including ‘Indian title’ lands). These compensatory mechanisms operated through to the 1970s.12 The Indian title principles also remained significant in respect of ‘live’ claims in areas with no significant treaty history (eg, Alaska)13 and indeed have re-emerged in recent decades in the context of challenges to historical acquisitions of Native American lands in the eastern States.14

In Canada, whose history is better known to comparative common law jurists, there was early judicial recognition of a species of native title in the late 1880s.15 However, clear confirmation of its common law existence came only in the important 1973 decision of Calder v Attorney-General of British Columbia.16 In that decision, and Guerin v R17 of 1984, the Supreme Court explored issues of extinguishment and the Canadian Government’s obligations in its dealings with surrendered lands. However, lower Canadian courts had by the late 1970s begun a preliminary formulation of principles relating to content and, particularly, proof.18 There was a burst of judicial activity in Canada in the 1990s, much debated in later commentary, that explored the recognition of ‘aboriginal rights’ in s 35 of the new Constitution Act, 1982.19 The Supreme Court examined, in this new context, both specific rights-type claims (initially in respect of fisheries prosecutions)20 and more holistic Aboriginal title claims.21 The framework laid down in these cases continues to be determinedly explored by the Canadian courts, with an important Supreme Court refinement of the specific rights principles coming in 2006.22

In New Zealand, direct judicial consideration of common law native title has been inhibited to some extent by various specific initiatives – most particularly the historic channeling of claims into a statutory conversion regime (from the 1860s),23 the more recent diversion of such claims to the quasi-judicial Waitangi Tribunal processes (from the 1970s),24 and the general settlement of Māori commercial fishery claims in the Seabed’s Deal of 1992.25 However, there was clear judicial recognition of a common law interest as early as 1847.26 And despite a long period of confusion over the enforceability of the interest,27 and then an initial contemporary judicial focus upon the Treaty of Waitangi,28 the common law doctrine of ‘customary title’ re-emerged clearly in the early 1990s29 and has been incrementally explored and developed since.30

Importantly, in these key comparative jurisdictions the notion of tradition has played a strikingly minor role in the context of Indigenous title.31 On the critical issue of content, a ‘full title’ conceptualisation of the interest (and hence a conspicuous disinterest in tradition-sourced limitations) has been ever present, but is particularly evident in the US,32 early New Zealand33 and contemporary Canadian34 jurisprudence. Correspondingly, in this long transnational legal history there has been little clear suggestion anywhere that the survival of the Aboriginal title interest is somehow conditioned upon the general survival of specific traditional laws and customs.35

There has been controversy in Canada,36 not dissimilar to that which has attended the tradition preoccupation in Australia, around the Canadian courts’ development of the specific ‘rights’ doctrine and delimitation of the content of such rights in the context of changing cultural circumstances.37 However, the target in Canada is a far smaller one – the title vs rights distinction is firmly entrenched in that jurisdiction, and in the case of specific rights (where there is no original territorial exclusivity to provide definitional assistance) at least some reference to the nature of historical uses in the definition of the contemporary interest is logically defensible. There has also been some controversy surrounding the Canadian ‘irreceivability uses’ limitation. Whilst this (incompletely explored) restriction38 does apply to Aboriginal title, it targets
uses that would be in conflict with tradition rather than non-traditional uses per se. In this way, a significantly lower restriction than that built into the tradition-based apparatus of the Australian doctrine.

There is convergent elementarism reasoning in the overseas case law that has precluded the formation of a more restrictive tradition-focused approach to native title (as distinct from specific rights — although the distinction is only explicit in Canada). Courts in the US, New Zealand and Canada have adopted a self-evidently broad conceptualisation of the title interest and a substructural focus on the establishment and survival of the interest itself rather than some pre-existing 'system' or lifestyle.42 These are some ostensible anomalies to be found in the overseas cases, particularly in what might appear to be occasional attempts by lower courts to confine the content of the Indigenous interest by reference to historical use.43 However, these have been disregarded and/or are explicable by reference to the specific context (and on occasions the incomplete recognition of that context by the relevant court).44

III The Machinery of 'Tradition'

The contention here is that the Australian pre-occupation with tradition manifests itself in (or perhaps is the product of) two excesses in the application of this country's otherwise unobjectionable 'laws and customs' methodology.45

1. overspecificity in the definition of the interest by reference to 'traditional law and custom'; and
2. over-particularity in the application of the requirement that there must be constancy and continuity in 'traditional law and custom' for the interest to survive.

A separate but contributing excess is found in the periodic adoption (or varying extents) of an overly strict approach to the very notion of law and custom. In broad terms, this additional constraint involves an assertion that only some of the activity of original Aboriginal existence qualifies for recognition under the native title doctrine: the notion of law and custom is read with a legalistic rigour such that only practices that were identifiable with and located within a system of rules attract recognition.46 It is logical and appropriate to exclude from recognition under the native title doctrine presence or use that was merely random or accidental. However, a strict application of this 'system of rules' approach is clearly untenable. In the early but notable case of Dilmun v Denue,47 for example, the indication was that establishing the existence of a culturally important traditional practice hanged down through generations would be insufficient without evidence of traditional regulation and restriction of that practice.

While the purpose here is not to explore the technical and precedential difficulties attending these aspects of the Australian doctrine, their legal fragility must be briefly noted. The seminal decision of Mabo (No 2)48 was consciously ambiguous, inconsistent and divided on the critical issues at play here,49 and its legal and factual content has too often been neglected in subsequent interpretation of the case.50 Following Mabo (No 2) there was continuing equivocation on these matters in the formative case law and in key statutory provisions,51 but strong impetus for a perpetuation of the restrictive thinking was provided by the persistently selective quoting of Mabo (No 2), the priorities and strategies of the parties themselves, and the manner in which issues were coming before the courts.52

Ultimately, there was an attempt by the High Court to theoretically prop up the methodological excesses in the more recent Ward53 and Yorta Yorta54 decisions. In Ward, a reinforcement of the overly specific approach to the definition of the interest came particularly via a discounting of notions of Indigenous control over territory, a reductionist emphasis on the statutory phrase 'rights and interests', and reference to the often cited difference of native title from general titles. In the Yorta Yorta decision, a reinforcement of the overly particular approach to the requirement of cultural constancy and continuity came via a new emphasis on the intersection of 'systems' and on the necessary survival of the Indigenous 'society'. This late theorising appears to be problematic in many respects, does not squarely address the critical questions, and has failed to prompt any consistency in the later lower court jurisprudence. More liberal approaches, sometimes quite clearly articulated, have been pursued at various times in lower court judgments and dissents,55 but these appear to have not yet offered a coherent, viable alternative.

IV Voices from the Past

As noted above, there was initially a ring of terminological inertia and legal accident in the Australian tradition restrictions, and then more recently they were propped up with somewhat strained modern legal rationalisations.56 However, there are also strong historical undercurrents in the path of legal development in Australia. Some of these are unsurprising, perhaps natural and inevitable. For example, it is clear that the tradition methodology is conveniently consistent in important respects with the earlier-forested statutory land rights methodology57 and with the long history of general statutory protection for Aboriginal 'subsistence' or 'traditional' usages. Yet some of the undercurrents are intellectual preoccupations and intellectual traditions that run deeper and are more deserving of exposure and analysis.

At the gentler end of the critique it might be noted that the courts are working in the shadow of a western intellectual tradition that has long pressed a historicalised and stylised view of Indigenous culture and that has more recently committed itself to the preservation of such culture.58 It is perhaps in part these forces that have driven an emphasis in the Australian native title doctrine upon the Indigenous past, and indeed an emphasis upon the spiritual side of Indigenous relationships with land, with consequent neglect of the self-evidently important and inherently adaptive economic side of those relationships.59 Yet this later skewed perspective may in fact have still deeper and more pragmatic historical roots — specifically, in the fact that the colonising population was one that has experienced little of the cross-cultural economic cooperation found in the colonial histories of other countries, and therefore perhaps now unwittingly resists the attribution of an economic personality to the Indigenous population.60

Beyond these issues, it is difficult to avoid the stronger criticism that the intellectual baggage of colonialism continues to play a part in this aspect of the Australian doctrine.61 Over-specificity in the definition of the native title interest, and the correlative disinclination to attribute any significance to the broader fact of occupation, gives new life to the old insistence that Indigenous culture and land use was 'backward'. The supposed backwardness of Indigenous populations was originally used in justification of their dispossession62 or the non-recognition63 of their interests. Now this persuasion appears to take the form of a presumption that Aboriginal societies were incapable of holistic utilisation and management of lands and that their occupation (even when exclusive) was necessarily less complete or less legitimate than that of other cultures.64 In strict precedential terms, this presumption may be viewed as a remnant of the long discredited 'scale of social organisation' approach to Indigenous rights,65 as it apparently rests upon the same bias towards western-type land use and social organisation.

It becomes evident then that the Australian methodology, in its resistance to the idea of Aboriginal ownership, works some revivification of the theoretically redundant notion that Australia was terra nullius — land belonging to no one.66 And it might be said, given the explicit rejection in this native title doctrine of contemporary Aboriginality, that however far Australia has progressed in dispelling the fantasy that Indigenous peoples were not here, it is certainly yet to properly acknowledge that they are here now.67

The third excess in the Australian methodology — a restrictive view on what can constitute law and custom (or the 'system of rules' approach) — would seem to be even more clearly a remnant of the redundant 'scale of social organisation' approach to Indigenous rights. There is in this emphasis upon strict rules a return to the search for 'settled inhabitants' and 'settled law', that is, for western forms of regulation and prescription.68 It smacks of a renewed scepticism about the significance and sincerity of Aboriginal land relationships, and risks a revocation of the discarded 'absence of law' perception of Indigenous society in Australia. This is an even more surprising addition to a doctrine that began with a High Court treatise on the errors of jurisprudential discrimination.69

V The Consequences of the 'Tradition' Focus

The consequences of this restrictive historicization of Australian native title are very significant. In a jurisdiction with little other common law acknowledgment of the prior existence of Aboriginal societies, the principles of native title provide the basic legal interface between the Indigenous and non-Indigenous communities. Even in countries where the law has developed other guiding principles for the ongoing post-colonial relationship (eg, via recognition of a residual Indigenous sovereignty or fiduciary type obligations),70 native title doctrine remains foundationally important. In Australia it is absolutely critical.

Over-specificity in the definition of the native title interest — the pursuit of a historicised and piecemeal definition of entitlements — builds unnecessary distinctions and complexity into Australian property law, must inevitably contribute to the continued dismantling of Indigenous relationships with land, and by disallowing contemporary
uses will hinder the participation of Aboriginal communities in the general economy. 35

Over-particularity in the search for cultural constancy and continuity sets up an unnecessary legal differentiation of Aboriginal communities based upon an uncertain test of western influence, 36 rejects the claims of Aboriginal peoples most severely affected by European settlement, 37, and tends to insitutionally derange attempts at cultural revival. 38 Such over-particularity is inconsistent with continuing external pressures on Aboriginal communities to adapt and participate, 39 and invades the internal Aboriginal society without due regard for the likelihood of misapprehension and misappropriation. 40 Moreover, it interferes with the natural processes of change in Indigenous cultures and, with sad and unacceptable irony, makes a loss of ‘tradition’ both a product and a cause of dispossession. 41 One Indigenous commentator cautioned some time ago that this approach was suffocating for Aboriginal peoples. 42

In their combined operation, the Australian excrescences entrench a stubborn open premise that little native title now exists 43 and a reductionist view of which that does. This methodology would seem to ensure the continued diminishment of native title interests and is likely to add to their future extinction. 44 It introduces unwarranted uncertainty and evidential complexity into native title processes, 45 imposing something of a sunset clause on the very concept of native title and, most disturbingly, leaves open the prospect that existing native title determinations may potentially be re-opened at some point in the future adaptation of successful claimant communities. 46

The 180 years of reserves case law on Indigenous sovereignty holds some important lessons for Australia. This jurisprudence, beneath its contextual complications, reveals that a more principled approach is possible – an approach based it seems upon a greater respect for the pre-colonial existence of Aboriginal societies and the relationships of those societies with land. The overseas history also reveals that in contemplating such legal problems Australia must be mindful of its complicity in the vacillations of legal and social theory across all jurisdictions – vacillations between assimilation and separation, between ‘civilisation’ and protection of the ‘primitive’, between idealism and pragmatism, and between racism and romanticism. 47 The Australian tradition restrictions sit somewhere on the scale of constant over-corrections, and it is likely that in this will be regrettably acknowledged. It is to be hoped that during the wait for such acknowledgment the doctrine does not ably to the point where there is little worth saving.

One practical difficulty with the prevailing Australian methodology stands out from the others. In a climate of acute concern over the economic and social problems faced by Indigenous communities in Australia, one must view with extreme suspicion a legal doctrine that places inherent Aboriginal rights and economic adaptation in a position of antagonistic opposition. This is a doctrine that appears to have lost its way in the paternalism, unilateralism and mis-understanding of earlier times. It is a doctrine that remains tethered to an old colonialism that viewed the Indigenous peoples of Australia as more in the nature of curious curiosities than functioning cultures. 48

\footnote{BA LLIB (Joint), MD (JHU). May 1994.} AAU, UL, LMII (JHU). PhD (JHU UWM). Senior Lecturer, Faculty of Law, University of Western Australia. A version of this article was presented at the conference ‘Governing by Law’ held on 12-14 December 2007, University National University, Canada. For more detailed analysis, see Simon Young, The Trouble with Tradition: Native Title and Cultural Change (2008).


Michael Dodson, 'The Wentworth Lecture: The End in the Beginning: Re(de)finding Aboriginality' (1994) 1 Australian Aboriginal Studies 2, 4. See generally Young, above n 32, 358ff.

Lavery, above n 2, [5].


For apparent acknowledgement of this possibility, see Ward (2002) 213 CLR 1, 71-2 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also Graeme Neate, 'Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Law and Customs' (Paper presented at the Native Title Conference 2002: Outcomes and Possibilities, Geraldton, Western Australia, 3 September 2002) 54ff; Lavery, above n 2, [23]. See generally Young, above n 32, 358ff.


See the reference to the 'menagerie theory' of Indian title in Felix Cohen, 'Original Indian Title' (1947) 32 Minnesota Law Review 28 at 58: "It is the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined." See also Young, above n 32, 10.

See, eg. Lisa Strelein, 'The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title