

NATIVE TITLE AS SELF-GOVERNMENT

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The recent debate over reconciliation in Australia has tended to ignore Indigenous self-government, concentrating instead upon symbolic acts of reconciliation, the protection of Indigenous proprietary interests, reparations for the abuse and forced removals of the past and improvement in the social conditions of Indigenous communities. This tendency has been accentuated by the current Commonwealth Government's resistance to measures that treat Indigenous people collectively, and its apparent preference for measures that improve specific services (eg health, sanitation, and housing) in Aboriginal communities (although the recent cuts to Abstudy raise doubts about even this aspect of the Government's commitment).

The neglect of the self-governmental dimension has not been as pronounced in the past as it is now. The development of the Central and Northern Land Councils in the wake of the Woodward Report represented an important step in Indigenous political organisation. The creation of the Aboriginal and Torres Strait Islander Commission ("ATSIC") was a very significant experiment in the delivery of services for Indigenous people by Indigenous people. Co-management structures have been used extensively in national parks. Some attention is now being paid to the legal structure of the entities that will hold and exercise native title upon the resolution of existing claims.

These experiments, however, tend to be seen as specific innovations in administrative or corporate structure, rather than as the heart of the reconciliation process. I do see them as central. Reconciliation is, at its core, a political process concerned with how Indigenous societies, as societies, are to relate to the broader Australian society. This necessarily involves the development of institutions to manage that interface. Those structures serve a role analogous to the federal dimensions of the Australian polity, establishing representative structures, defining spheres of authority, and laying down principles of interaction.

Looking at these institutions as, in effect, an instance of applied federalism, helps one to see the fundamental importance of institutional development to

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reconciliation and enables one to pursue the Indigenous/non-Indigenous relationship in a manner most conducive to orderly resolution.

I. SELF-GOVERNMENT AND NATIVE TITLE

The concern with self-government, and the concomitant structuring of institutions to cross the societal divide, is not an optional extra in reconciliation. In many ways it is built right into the foundation of the problem. This is clear from the nature of native title itself.

Native title is often approached as though it were only a matter of the absorption of a unique form of proprietary right into the general body of land law. To a certain extent this is true; native title does involve a real interest in the land. But it also implicitly involves a recognition of Aboriginal societies as societies. Its accommodation necessarily raises important questions about what institutions are appropriate to Indigenous communities in the twenty-first century and how those institutions should relate to non-Indigenous structures.

The inherent political dimension to native title is apparent, though often unrecognised, in the very nature of the common law of Indigenous title. That law has generally not attempted to define in detail the content of the native interest in land - what specific rights and responsibilities Indigenous peoples have with respect to specific tracts of land. Indeed, it has traditionally been a law of the interface, recognising the fact of Indigenous title, regulating the manner in which that title could be transferred outside the community or extinguished, but saying nothing at all about its content. That was left to Indigenous institutions. The presumed mechanism for resolving conflict over native title was through negotiations between the peoples, rather than through the enforcement of Indigenous law by non-Indigenous courts.

The relationship contemplated was of one society to another. Each society was presumed to be (within limits) the master of its own proprietary interests. The law of Indigenous title simply regulated how those two bodies of law would relate to one another.

This has not been the way in which Australian law has tended to deal with native title, at least in the early stages of its recognition. Justice Brennan's judgment in *Mabo [No 2]*, for example, clearly contemplates that Indigenous interests are absorbed into general property law, and thus are appropriate for judicial enforcement like any other property interest.¹ That is also the approach contemplated in the NTA (although that Act does operate through special institutions): the specific rights of specific owners are protected. But the self-governmental dimension is nevertheless present in the interstices of the law and has become increasingly evident in its practice.

One can see this in the very understanding of the content of Indigenous title in *Mabo*. That title is not frozen as a bundle of specific rights at the time of the

¹ See especially *Mabo v Queensland [No 2]* at 60-2, although this assumption is implicit throughout the judgment.

assertion of British sovereignty. Rather, Justice Brennan's judgment makes clear that Indigenous law has continued to develop over the last two centuries, and that it is the rights in their contemporary form that are protected, not some frozen relic of the past.² Indeed this is as it should be; it would be strikingly artificial if Indigenous interests were frozen forever at a magic date in 1788.

But if the interests do continue to evolve, that suggests that native title is more than a set of particular rights; it includes the mechanisms for the allocation of interests and the means of change present in any legal order. It is the Indigenous legal order that is recognised in the law of native title, not merely a particular individual's specific interest.

II. CONSEQUENCES FOR RECONCILIATION

If that is so, we need to ask ourselves how the law should address native title now. If we simply treat it as a set of interests that should be enforced by non-Indigenous tribunals, we are effectively wrenching the interests out of the body of law which determined their character and development, putting an end to that process of evolution. Moreover, we will have placed their interpretation in the hands of tribunals that, whatever their good faith, are necessarily going to be imperfect expositors of Indigenous law. Is that kind of displacement what the law of native title was designed to achieve? It may be, but we should be very careful before jumping to that conclusion. The results are likely to be unsatisfactory to all concerned.

It may be much better to retain the wisdom of the common law of native title, restrict the courts' role to a policing of the interface (to the extent possible), and deal with the practical accommodation of Indigenous title through negotiation and institutional adaptation. The desired result would not be enforcement of Indigenous interests by non-Indigenous courts, then, but the creation of structures (such as the Aboriginal Land Councils) that can mediate between the Indigenous and non-Indigenous legal orders, providing a sphere in which Indigenous interests can continue to develop in relative autonomy and creating representative institutions that can act on behalf of Indigenous communities. That strategy depends upon the existence of goodwill among non-Indigenous governments. If goodwill is radically absent, then the courts may have to intervene more strongly in order to give reality to the law's recognition of Indigenous title. But as long as that recognition is manifest, a strategy of negotiation and adjustment is preferable.

I should make very clear that in arguing for respect for societal autonomy, I am not arguing that we preserve some pre-contact purity to Indigenous law, or ignore the need to find workable means of managing the interface between Indigenous and non-Indigenous interests. On the contrary, finding solutions to these issues is precisely what the recognition of native title is all about. It is inevitably a constructive process by which institutions are developed to regulate

2 Note 1 *supra* at 44.

the interface, rather than the simple preservation of something from the past. Inevitably, the recognition of native title leads one to ask difficult questions about how one legal system can be conciliated with another, and what kinds of institutions are appropriate to that challenge.

That means, of course, that while judicial recognition of native title is an important start to the process, continued reliance on purely judicial approaches is likely to be intensely frustrating for all. Judges can recognise that there are real interests in land that have not been extinguished. They are much less able to develop new institutions carefully adjusted to deal with the relationship between Indigenous and non-Indigenous spheres. Those institutions must be developed, and that necessarily involves a process of political engagement and negotiation.

It is no accident that this is precisely the direction in which the parties have begun to move under the NTA. There is still considerable focus upon the detailed adjudication of the existence and nature of native title. But increasingly - and with the gentle prodding of the National Native Title Tribunal - the parties are moving towards negotiated agreements.³ This inevitably involves the development of representative institutions on the Indigenous side, so that claims may be consolidated and structures designed for the administration of the rights. The focus has begun to shift markedly towards questions of political consolidation and institutional design.

That development is important, and deserves the support both of governments at the level of policy and of scholars at the level of advice, conceptualisation and detailed evaluation.

III. CONCLUSION

The Commonwealth Government has often demonstrated real unease with the governmental dimension of reconciliation. Fierce criticism of land councils or of ATSIC suggests that the Government would much rather deal with Indigenous issues as though they merely involved the effective delivery of services to individuals or, to the extent that some recognition of native title is unavoidable, the acknowledgement of specific rights held by specific individuals.

One has to ask, however, whether this strategy is ultimately self-defeating. If we are to live in a system in which Indigenous interests in land are taken seriously and Indigenous communities have a say in the disposition of their lands, we have to pay attention to the structures that can make that recognition work. Durable solutions require the kind of carefully adjusted mechanisms that are only available through negotiations. And to have stable negotiated outcomes, one must have actors with whom one can deal. All parties, Indigenous and non-Indigenous, therefore have an interest in strong, representative and respected Indigenous political institutions.

3 A good introduction is provided by the series of "Regional Agreements Papers" published by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit.