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‘The Paradox of ‘Native Title’ as a Remedy to Historic Injustice’²

The term ‘historic injustice’ in the context of indigenous/settler relations is often used to refer to a number of injustices perpetrated on indigenous peoples, from the first act of dispossession, to massacres and the forcible removal of children (for the purposes of cultural assimilation). This paper focuses specifically on Australian attempts at redressing the historic injustice of dispossession. In 1993 the Australian government passed the Native Title Act which it suggested would right the historic wrong of colonial dispossession. This paper analyses the Australian indigenous land rights regime as a socially constructed phenomena, the product of ideals, entrenched colonial structures and the balance of power between political interests. I discuss how, during the process of rights institutionalisation, commercial lobby groups, ably aided by a receptive government and media, constructed propaganda campaigns to further their interests to the detriment of indigenous interests. I argue that the Native Title Act 1993 should be understood as an exercise in rights limitation behind a veneer of agrarian reform. The paper concludes that in this context the notion of ‘historic injustice’ fails to adequately capture the injustice of an ongoing colonial relationship and the paradoxical nature of contemporary dispossession through indigenous rights to land.

Introduction

The First Fleet of European colonisers arrived on *Gamaraigal* land on January 26th 1788. The colonisers applied the legal doctrine of *terra nullius*, meaning ‘land of no one’, to the Australian continent. The philosophical Eurocentric underpinnings of this assertion were based on John Locke's seventeenth century notion of property ownership. In his *Two Treatises of Government*, Locke proposed that property in land originated from tilling the soil, ‘mixing labour with land’ (1970). The apparent absence of such activities led to the coloniser’s assertion that the ‘natives’ had no investment in the soil and hence no legitimate claim to it. Thus, unlike the US, Canada and New Zealand, the colonisation of Australia did not entail any formal settlements, involving dialogue and treaties, between the European invaders and the indigenous people. This non-recognition of indigenous ‘ownership’ of property and

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the failure to treat with the indigenous inhabitants is commonly held to be an ‘historic injustice’ (see Patton, 2005, Waldron 1992, 2002). Following the eventual granting of citizenship rights to the indigenous people in the 1960s, indigenous political mobilisation began to campaign for a treaty with the colonisers. The treaty campaign gained significant momentum such that in 1988 Prime Minister, Bob Hawke, promised a treaty within the life of that parliament.

The treaty promise was, however, watered down into a ‘reconciliation’ process (see my papers 2003(a) and (b) on this) which began in 1991 and lasted 10 years. The preamble to the reconciliation enabling legislation suggested that the process would ‘address progressively’ the historic injustice of colonial dispossession and its legacy. Yet, the legislation contained no firm commitments to a treaty or land rights. The issue of land rights, however, was forced onto the legislative agenda by the 1992 High Court decision in *Mabo* (No 2), which recognised a form of indigenous land rights called ‘native title’. Following the decision, in a land mark speech in Sydney’s Redfern Park, Hawke’s successor, Paul Keating, stated:

Isn't it reasonable to say that if we can build a prosperous and remarkable harmonious multicultural society in Australia, surely we can find just solutions to the problems which beset the first Australians - the people to whom the most injustice has been done. And...the starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition, that it was

- We who did the dispossessing.
- We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol.
- We committed the murders.
- We took the children from their mothers.
- We practised discrimination and exclusion.

It was our ignorance and our prejudice and our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We fail to ask - how would I feel if this were done to me? (Keating, 2000)

Such public and forthright acknowledgement of historical injustice, the like of which had never before been spoken by an Australian Prime Minister, was lauded by many indigenous groups, yet it was Keating's timely comments on the *Mabo* decision that suggested the possibility of substantive change in the colonial relationship.

We need these practical building blocks of change. The *Mabo* Judgement should be seen as one of these. By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, *Mabo* establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past.... *Mabo* is an historic decision - we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians (ibid).

The vast majority of legal analysis produced in response to the *Mabo* case and the subsequent Native Title Act investigate the legal intricacies of the ensuing rights regime in isolation from the social and political processes through which it was constructed. Yet 'rights' are not simply givens, rather they are the products of social and political creation and manipulation.³ This point is underlined by Wilson (1997: 3-4), who suggests that social scientists should primarily be concerned with analysing rights as socially constructed phenomena. He writes: 'the intellectual efforts of those seeking to develop a framework for understanding the social life of rights would be better directed not towards foreclosing their ontological status, but instead by exploring their meaning and use. What is needed are more detailed studies of human rights according to the actions and intentions of social actors, within wider historical constraints of institutionalized power.'

This paper examines the rights regime of 'native title' in Australia in just such a fashion. The paper argues that in Australian context the domestic institutionalisation of international human rights standards⁴ as they pertain to

3 See the edited collection Morris, L, (2006) *Rights: Sociological Perspectives*, Routledge, and Morgan (2004) Wilson (1997).

4 I am using the term 'standards' here as indigenous rights to land are not fully entrenched in international law as yet. They are, however, an intrinsic part of the United Nations Draft Declaration on the Rights of Indigenous Peoples (UNDD): see indigenous rights to land (Article 26 and 27 of the UNDD) and consequently they have, what in legal terms is known as, strong 'persuasive authority'. Furthermore, freedom from racial discrimination is included in Article 2 of the UNDD but is also an established international norm (for a discussion of such points see Anaya, 2004). In deciding the *Mabo*

indigenous peoples is best understood as a product of the balance of power between political interests. In 1992 the High Court of Australia decided in the *Mabo* case that to deny indigenous rights to land would be unjust and contrary to contemporary international human rights standards, especially the principle of racial equality. The court was aware of, in Turner's (2001: 124) terms, the 'vulnerability' of dispossessed indigenous people and did not seek to worsen their plight by flouting the international moral code which prohibits racial discrimination. Yet, when the Government responded to the landmark case the interests of vulnerable indigenous groups were largely ignored in favour of powerful commercial interests. The net result was legalisation that sought to *limit* indigenous rights behind a veneer of agrarian reform. Thus, as Freeman (2002: 85) writes:

the institutionalisation of human rights may...lead, not to their more secure protection but to their protection in a form that is less threatening to the existing system of power... institutionalisation is a social process, involving power, (which) should be analysed and not assumed to be beneficial.

In the balance of this paper, I examine the trajectory of indigenous rights to land in a manner which goes beyond the formal, legalistic dimensions of such rights, where, as Wilson (2001: xvii) points out, they will always be a 'good thing'. In contrast to such perspectives this paper shows how the institutionalisation of 'native title' land rights is a social process bound by colonial structures and ultimately intertwined with power, elites, privilege and the actions, intentions and interests of the actors involved. The paper places the institutionalisation of native title rights in the context of political battles for control of resources which pitted indigenous peoples against powerful commercial lobby groups. It shows how, through the construction of a discourse of crisis, industry 'uncertainty' and the deliberate generation of unfounded public fear, commercial lobby groups and their political and media supporters successfully pressured the government to severely limit indigenous land rights.

case the High Court, especially Brennan J, felt the weight of the international moral code, in particular the rule against racial discrimination.

In short, the paper argues that seemingly beneficial land rights were in fact constructed in such a way as to actually *maintain* existing social, political and economic inequalities, perpetuating a colonial status quo. Far from consigning colonial injustice to history, the paper argues that the Native Title Act ensured that the relational injustice of colonialism *continues*. In this sense the paper highlights a gulf between settler state granted indigenous rights and their normative benchmark: the United Nations Draft Declaration on the Rights of Indigenous Peoples (hereafter the Draft Declaration).⁵ Indeed, the indigenous land rights debate in Australia is an example of, in Turner and Rojeck's (2001: 127) terms, 'the frequent tension between national systems of rights and international human rights'.

The Construction of 'Native Title' Land Rights

On the 3rd June 1992 the High Court in *Mabo* ruled that the doctrine of *terra nullius* was a legal fiction based on 'little more than bare assertion'. The claim before the court was that the *Meriam* people of Murray Island, living in permanent communities with social and political organisation, had continuously and exclusively inhabited the Island and its surrounding islands and reefs. While it was conceded that the British Crown (in the form of the colony of Queensland) became sovereign of the islands upon their annexation in 1879, the plaintiffs claimed continued enjoyment of their land rights and contended that these had not been validly extinguished by the sovereign. Thus, they sought legal recognition of *continuing* rights. On the 3rd June, 1992, the High Court, by a majority of six to one, upheld the claim. The court recognised that a form of indigenous title to land, which it termed 'native title', *may* continue to exist in areas where indigenous people still 'occupied' and could display a

⁵ The Draft Declaration represents the human rights of indigenous peoples and includes the right to self-determination (see Anaya, 2004).

‘continuing association with their traditional land’. Where there was possible conflict with non-indigenous interests, however, *it would be the rights of the native title holders that would yield*. Not one millimetre of non-indigenous land was at risk from the legal principles laid down in *Mabo*. In fact the native title indigenous land rights recognised by the court were extremely limited. The rights granted limited occupation only; they were not even akin to a standard lease. Only traditional ‘native practices’, as defined by the courts, would be permitted. There was no right of sale or transfer. The Court ensured that native title would operate around the fringes of white property rights and do nothing to alter the established colonial order. Despite the extremely limited nature of native title recognised by the High Court, the next section shows how commercial interests lobbied the government to ensure that when these rights were institutionalised via legislation, they would pose no threat to commercial interests and maintain existing inequalities.⁶ In short, the following sections show how, to use Peter Russell’s (2006) terms, the *political* life of the *Mabo* case diverged from the *legal* life.

Industry ‘uncertainty’ as a constructed national crisis

A crisis, like all news developments, is a creation of the language used to depict it; the appearance of a crisis is a political act, not a recognition of a fact or of a rare situation (Edelman 1998: 31).

Following the *Mabo* decision there began the construction, by powerful vested interests, of a public ‘debate’ that largely focused on hypothetical counterfactual concerns but which nonetheless successfully shaped the subsequent legislation. Indeed, the Court’s legal reasoning, in particular the limited nature of native title, was

⁶ To be sure, this is the central aim of the paper. In contrast to the many legal articles written on the *Mabo* case, this paper is concerned to analyse the broad macro issues thrown up by the judgement and the social process of rights institutionalisation that followed, rather than engage in micro legal analysis that takes little account of issues of power, social structures and political interests.

ignored by commercial interests that sought advancement of their cause via a campaign that constructed a ‘national crisis’ out of a relatively minor private concern.

Industry groups, and in the particular the mining lobby, were threatened by the case as it was conceivably possible that some of their existing land titles could be deemed invalid, as they had not compensated resident Aboriginal groups when they purchased indigenous occupied land from non-indigenous land owners. The mining lobby were further concerned by the possibility of future grants of native title hindering their hitherto unbridled claims for land development. It is worth noting at the outset, however, that given the extremely limited nature of native title⁷ as defined in *Mabo*, and the poor financial status of indigenous groups, there really was no significant danger to commercial interests. The worst case scenario for industry was that they might have to pay retrospective compensation to *proven* native title holders for land titles acquired without paying compensation prior to *Mabo* and possibly negotiate with *proven* native title holders over future developments on land subject to the doctrine.

Essentially, the concept of native title posed a minor problem for an enormously affluent industrial lobby, in that it had the potential to dent profits, but in keeping with the inherent desire of commercial interest to maximise profits it was nonetheless economically rational to for them to lobby the Commonwealth to do two things: 1) validate existing commercial titles by extinguishing native title and paying compensation on their behalf; 2) ensure that native titleholders could not veto future land development. The primary lobbying tactic for this was the transformation of a minor private concern into a ‘national crisis’. The media, as one of the key institutions that can promote misinformation, took a lead role in aiding this construction. As former minister for Indigenous Affairs, Robert Tickner (2001: 94), commented ‘the reporting of the native title debate was...abysmal. It reached its lowest point when the front page of a Sydney Sunday paper seriously reported a *Mabo* land claim over Sydney Opera House, which was without legal foundation of any kind’.

One of the major tools of the press was the ‘opinion’ poll and in the vast majority of cases the contextual framing of questions and propositions was more likely to resonate with mining than with Aboriginal interests. As Goot (1994: 134)

⁷ Claimants would have to prove traditional and continuing connection to the land to be successful.

suggests, ‘the explanation for much of this is not far to seek....over 60% of the poll items which the press paid for, or were invited to report, were sponsored by the mining industry’s peak council or produced at the initiative of an organisation with direct mining links...*no polls were paid for or conducted by Aborigines or by those whose fortunes were linked to Aboriginal interests* (my emphasis). The construction of a national crisis that was aided by the press and financed by mining companies and their support networks can be deconstructed into four interrelated layers.

1) *The ‘granting’ of native title*

Soon after the *Mabo* judgement, John Hyde, former Liberal MP and then director of the influential Institute of Public Affairs (IPA), gave an indication of what was to come from the industry lobby when he wrote: ‘the Justices of the High Court had learnt nothing from the experience of Communism. The particular title that they have “recognised” has all the worst features of property in Russia’ (in Goot 1994: 134).

The statement seemed to suggest that indigenous social organisation, which existed from time immemorial, was merely an unfortunate and problematic *creation* of the High Court. The erroneous conception of native title, as something that was being ‘given’ to Aborigines to the detriment of the nation, rather than the long overdue common law *recognition of a pre-existing inherent right*, was a necessary precursor to the construction of native title as a national ‘crisis’. If native title could be widely understood as a new phenomena that the High Court had ‘*granted*’, in error, without due consideration for business interests, it would greatly strengthen their arguments for extinguishment. This conception of native title, which was promulgated by large sections of the press and fully embraced by members of the Coalition, was crucially only the first stage in the construction of native title as a ‘national crisis’.

2) *‘Unacceptable Uncertainty’*

The second stage of this ‘crisis’ framing was the assertion that the concept of native title made existing land titles and future industrial development possibilities unacceptably *uncertain*. The issue of ‘uncertainty’ for industry was the central rhetorical pillar in the construction of native title as a ‘nation crisis’. The fact that the construction depended on an extremely tenuous legal argument did not stop it quickly

gaining credence in the press and becoming a justificatory magic mantra to be invoked whenever the argument for extinguishment was challenged.

Just before the federal election in 1993, the Australian Mining Industry Council (AMIC) produced a paper for consideration by the newly constituted *Mabo Ministerial Committee* that encapsulated the first element of the *uncertainty* argument. The paper argued that the combined legal effect of the Racial Discrimination Act (RDA) 1975, which gave legislative effect to the United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD), and the High Court's decision in *Mabo No.1* was to place at risk some existing titles, including mining interests of non-Aboriginal Australians gained after the passage of the RDA in what would otherwise have been native title land (*ibid*).

The crux of the AMIC's legal argument was that post-1975 all transactions in land had to be non-discriminatory and since many potential native title holders would not have been treated the same as other titleholders during that time (for example, they would not have had advanced notice of impending government appropriation of their land for a mining grant and would certainly not have received compensation) they were treated in a discriminatory manner. Thus, the only way to remedy the situation, so the argument contended, was to introduce retrospective legislation to override the RDA, Australia's only anti-discrimination legislation.

The underlying assumption of AMIC's position was that a defective title *could not be legitimated by the payment of just compensation*⁸ and consequently the Commonwealth had to overcome the failure of governments to recognise and respect the interests of native titleholders between the years 1975-93 when native title was not recognised and governments were understandably ignorant. Robert Tickner (2001: 100) suggests the acceptance of this argument was a disaster for the hopes of a reasoned and rational response to *Mabo*. He writes, 'one of my deepest regrets in all the native title debate is that what I regard as a nonsensical legal argument took hold and dominated the agenda of industry groups, politicians and, worst of all, Aboriginal people, even though it was not supported by the government's own legal advice' (*Ibid*). Indeed, the Attorney-General's Department suggested that all that was needed was for each state to enact legislation to extinguish native title providing that it pay

⁸ Payment of just compensation is the standard legal remedy invoked when a bona fide good faith purchaser has inadvertently purchased a defective title.

‘reasonable compensation’ to the native title holders whilst validating the previous grants.

The second element of the ‘uncertainty’ argument was the claim that the existence of native title made planning for future developments unacceptably problematic. One of the first people to invoke this logic was Norm Fussell, chief executive of Mount Isa Mines (MIM) who announced strong concern over the ‘certainty’ of the MIM McArthur River mine in the Northern Territory, a \$250 million lead-zinc-silver project approved the previous year by the federal government, which had become the subject of a native title claim. He publicly threatened to pull out of the deal if the government did not take prompt action to confirm land titles and provide the mining industry with the *certainty* it thought it had (see Tickner, 2001).

The most high profile use of the argument, however, concerned what became known as the *Wik* claim. The claim was made by the *Wik* peoples of northern Queensland and covered 35,000 square kilometres of Cape York. The claim included several areas under a mining lease to Conzinc Riotinto of Australia Ltd (CRA) and the Archer Bend National Park. In a television interview in July, CRA managing director, John Ralph, suggested that his company would defer or scrap projects worth \$1.75 billion unless the *Wik* claim issues were resolved. The company followed this up by sending letters to all government ministers stating that ‘you will appreciate that we cannot enter into any consultations with the *Wik* people until we have *an assured position* regarding title and absence of liability for any compensation arising out of invalidity” (in Tickner 2001: 110).

The crux of the argument was that negotiating in good faith and on just terms was unacceptable to business; negotiations would only be acceptable when commercial interests were *certain* of the best possible outcome. Yet, as the late Nugget Coombs (1994: 210) suggested, ‘dealing with uncertainty is what entrepreneurs are rewarded for....the Pintubi had no certainty that they would be given the right to live at Yayai. They asked the owners and no doubt negotiated. Let miners do likewise’.

3) *Commercial interests as ‘national interests’*

The final, and most crucial, stage of the construction was the promotion of the argument that it was not just industry interests that were threatened by this *uncertainty*, but also *the interests of the whole nation*. It seems that this is a relatively

easy task nowadays due to the success of corporate propaganda in western countries in the years since World War II. As Chomsky (1999: 96) writes ‘the terms, United States, Australia, Britain, and so on, are now conventionally used to refer to the structures of power within such countries: the ‘national interest’ is the interest of these groups, which correlates only weakly with the interests of the general population.

Commenting on the Australian context Coombs (1994:104) observed ‘there is currently...extensive propaganda urging expansion of investment (especially foreign capital) in mining as a stimulus to employment. It should be noted that measured by jobs per unit of capital costs...money spent in expanding the mining industry produces a minimum of jobs’. Moreover, an economic report by O’Faircheallaigh (1986) for the Northern Land Council concluded that the only significant benefit to that economy came from the expenditure *by Aborigines* and their organisations of the money paid to them by mining companies under the terms of the Commonwealth’s land rights legislation of 1975 as the rest of the capital gain disappeared overseas.⁹ Nevertheless, since the 1970’s ‘exploration rush’ the mining lobby has sought to maintain the relatively mythical link between their interests and the national interest and the *Mabo* debate was no exception.

The Northern Territory Chamber of Mines and Petroleum leader, Grant Watt, was one of the first interested parties to invoke the ‘national interest’ rhetoric, urging quick Commonwealth action to respond to *Mabo* and warning that the failure to do so would have serious consequences for mining investment *and thus for Australia as a whole*. He was soon followed by the Shadow Minister for National Development and Infrastructure, Ian McLachlan, a member of the *Coalition Mabo Subcommittee*, who stated, in a speech to the right wing Harvey Nicholls Society, that in ‘granting a new right (sic) the High Court had failed to take account of the immense damage it would do to the rights other Australians thought they had’ and had ‘left great tracks of Australia in turmoil as to title and therefore in those areas, risks the stability and

⁹ The legislation was the Northern Territory Aboriginal Land Rights Act, 1975 enacted by the Whitlam government after the Woodward Commission of inquiry.

future *development of the nation*' (Institute of Public Affairs Online Archive, my emphasis).

The press significantly aided this element of the national crisis construction. One of the more strident editorials came from the Sunday *Herald Sun*, which concurred with Mining Company Chief Executive Hugh Morgan's assessment that *Mabo* was affecting business and

cutting off *our* economic lifeblood all because some politicians and their camp followers have become slaves of the green movement and others are determined to punish *us* for crimes by the British against Aboriginals committed before we, our fathers and even our grandfathers were born (14/03/93).

Yet, financial statistics suggest that native title has had a negligible impact on general mining industry trends. In fact, 'as Manning (1997: 15) writes, 'mineral exploration expenditures revived in 1993 after a lull during the recession of the early 1990's, and since then have been running at levels to rival the boom of the late 1980's'. At the height of the debate about the economic implications of native title Noonan (in Lavelle 2001: 104) commented, 'over the next three years, 120 companies plan to spend more than \$60 billion on mineral exploration and mineral processing plants in Australia...Despite all the hot air and fevered arguments about (native title) in the lobbying forums of the country, the real world of outback mining and mineral processing is getting on with it'.

Lavelle (2001) has offered a considered reading of mining industry responses to native title and suggests that it represents opportunist 'political posturing' designed to exert control over a 'negative variable'. The ideological element to this posturing was the notion that modern societies should encourage mineral investment because it is in the 'national interest' (2001: 108). According to Lavelle (Ibid: 109), 'empirical evidence suggests that mining companies ritually criticise government policies in order to secure more favourable policy outcomes. Mining interests have in the past waged strong campaigns on other policy fronts, conveying the impression that the policies are of greater significance than the evidence suggests' (Ibid).

The major determinant for mining lobbyist action over native title was the perceived ability to control a negative variable. Industry does not target key investment determining factors, such as commodity prices, because, unlike native title, they are beyond control. Chief executive of the Western Australian Chamber of Mines and Energy, Ian Satchwell, for example stated, ‘of the issues affecting exploration (native title) is the only one we can influence in Australia. Low commodity prices and access to capital are largely outside our control’ (in Weir, 1999).

In short, the mining industry waged a propaganda campaign against native title because it was contrary to the industry’s interests but nevertheless controllable. The tactical strategies adopted closely resembled those employed against other government policies such as the prediction of industry crisis, the threat of job losses and declining investment, with disastrous consequences for the nation (Lavelle, 2001: 112).

4) *Threatening the rights of ‘other Australians’*

In this layer of the construction the political tool of the ‘opinion’ poll came into its own. Typical examples of commercial interest oriented polls were those produced by AMR:Quantum and commissioned on behalf of the mining industry¹⁰. Each of their surveys asked:

Whether you would be very concerned, somewhat concerned or not at all concerned if the effect of this *Mabo* decision were to:

- Put at risk the existing property titles of other Australians
- Discourage mining investment in Australia
- Delay or prevent economic developments

¹⁰ See for example, AMR: Quantum ‘National Opinion Survey on Aboriginal Issues’ 10-15 June 1993 commissioned by, AMIC and CME Western Australia, press release June 11, 1993

- Reduce or prevent employment opportunities in Australia
- Result in the control of some publicly owned natural resources by a minority group
- Result in large areas of Australia being claimed by Aboriginal people

The AMR:Quantum poll was of particular interest as it implicitly and subtly contained all the ingredients of the ‘national crisis’ construction so far established while introducing a new element. Indeed, it continued to emphasise the now familiar corporate rhetoric that connects mining investment and employment opportunities, with no mention of the word ‘profits’, while at the same time implying that there was a threat not just to corporate property titles but to the property titles of ‘other Australians’. This inference became known as the ‘backyards threat’ which was to add the final layer to the construction of native title as a national crisis. The AMR:Quantum finding that 89 per cent of the electorate ‘would be ...concerned’ if the property titles of ‘other Australians’ were ‘put at risk’ was a useful propaganda device but hardly a surprising result. Since threats to homes would be unpopular, getting people to fear for their homes because of *Mabo* would leave any party that backed *Mabo* with a large electoral liability’ (Goot 1994: 145).

Due to the exceedingly limited nature of the *Mabo* case the threat to private ‘backyards’ was entirely without legal foundation, yet it was frequently cited in the press and gained further credence when Coalition leader, John Hewson, utilised the erroneous logic’s dramatic impact in his *Mabo* address to the nation in the run up to the general election. It seemed that the industry lobby and the Coalition were well aware that dubious allegations about the dangers or threats a situation poses are potent avenues for influencing public opinion (see Edelman 2001:91).

The Native Title Act 1993: Rights Limitation

Governmental procedures involving controversial issues are typically designed to achieve a resolution whether or not it is fair, reasonable, or effective, though rituals and myths always suggest that it meets these criteria. In fact, the resolution virtually always perpetuates the status quo (Edelman 2001: 96).

Soon after the High Court had handed down its judgement in *Mabo* it became clear that the Commonwealth would be under immense pressure from powerful vested interests to ‘limit’ the application of native title, with many industry commentators advocating outright extinguishment. Ultimately, indigenous native title holders were not granted a right of veto over future development of their land, which, as Mr Justice Woodward suggests, renders indigenous land rights largely meaningless (Woodward 1994: 418).

The right of veto was an integral part of the Northern Territory Land Rights legislation back in 1975 and a key indigenous demand after *Mabo*, yet it gave way to the interests of a powerful commercial lobby with the aid of a constructed national crisis of uncertainty and a sympathetic press. The political spectacle that was the *Mabo* debate served to obscure a standard political compromise, which protected commercial interests and substantively preserved the status quo.

The legislation’s primary purpose was the *validation* of existing commercial titles and the provision of guarantees that future land negotiations would be conducted within the parameters set by existing power inequalities. As Prime Minister, Paul Keating, stated, ‘Aboriginal people understood that a generalised veto was never on and that there was some doubt that they even deserved a right of consultation and negotiation’ (SBS Dateline 28/07/93). The legislation responds to the agenda of powerful corporations in the mining industry and to particular state interests to the detriment of indigenous interests. Yet, the government still claimed indigenous support for the *Act*.

The government were able to produce such legislation and still claim Aboriginal backing, by primarily dealing with the Aboriginal ‘establishment’. The government made no attempt to consult widely with Aboriginal communities around the country. The bulk of the negotiating was conducted with, what became known as, the ‘A-team’ of moderate, largely government employed, indigenous ‘leaders’¹¹ who were aware that a right of veto ‘was not on’. A marginalised ‘B-team’ were depicted as ‘radicals’, out of step with the political realities, that is, they did not readily accept the validity of the constructed ‘crisis’ of uncertainty that was allegedly facing the

¹¹ Throughout my research I have frequently heard community Elders express dismay at what they see as self-appointed leaders making important decisions with governments but without the requisite community mandate.

nation. Yet, as Bennett (1999: 52) has pointed out, there is nothing unusual in such tactics, in fact, 'keeping consultations as narrow as possible is the norm for governments when dealing with competing interests'. Indeed, when dealing with contentious indigenous issues it is a common tactic for governments to consult only the 'Aboriginal leaders' in their employ (see Ibid). In reducing the consultative burden Keating was seeking to confine discussions to the fine print of his proposals and not the substance.

Such intentional contraction of the consultative net is a common tactic of governments that publicly request the input of a broad range of interests but privately seek mere justificatory ammunition for a path already chosen (see Edelman 2001 and Bennett, 1999). Indeed, Bachrach and Baratz (1962: 71) referred to such use of political power as an example of 'the mobilisation of bias' whereby some issues are organised into politics while others are organised out. By isolating the 'B-team' and failing to canvass the views of indigenous leaders across the country, Keating was essentially 'organising out' such issues as a right of veto over future developments and the related issues of indigenous political autonomy and control of resources.

When discussing the 'two-dimensional view' of power Lukes' (1980: 17) has also drawn attention to the fact that institutional procedures, the rules of the political game (in this situation the *Mabo* response consultative framework), are themselves a product of power relations and can act as a filter to the airing of issues deemed inimical to dominant interests. Keating's tactics can be seen to invoke this deployment of power.

The 'A-team' played its role for the government by accepting the Act, thereby lending credence to the claim of 'indigenous support'. Moreover, such 'indigenous support' allowed the government to 'validate' titles¹², with the tax-payer footing the compensation bill, on behalf of hugely wealthy mining interests. The existence of 'validation' provisions suggests that the *Act* is less about protection of native title and

12 'Validation' would be achieved by extinguishing native title possibilities on land that was acquired by non-indigenous interests prior to *Mabo* and by paying retrospective compensation.

more about *limitation* and *advancement* of commercial titles. Moreover, the absence of a 'right of veto' over future development guarantees the continuance of an imbalanced power relationship between indigenous peoples and mining interests, a situation which is clearly of benefit to the later not the former.

The successful national crisis construction aided the eventual, and perhaps inevitable, victory for commercial interests who achieved a tax-payer funded *validation* of existing titles and a guarantee that Aboriginal people will not be able to negotiate future developments on anything like an equal footing, even if native title were fully proven. It is perhaps naïve to think that even a Government that has displayed significant pro-Aboriginal sympathies and instigated an Official Reconciliation process (see Short, 2003a, 2003b) would do anything other than side with industry groups who deem their interests to be threatened by native title holders, since election to high office is almost impossible without the financial backing of such affluent groups. Such explanations for legislative inertia are well researched. As Murray Edelman (2001: 96) states, 'both legislatures and high executive positions are dominated by those who win support from elites by defending established inequalities...legislators are therefore rarely the source of significant changes in established conditions or inequalities, although they sometimes enact legislation that purports to provide such changes, knowing the administrators and courts are likely to interpret and implement it in ways that minimise whatever radical potential it contains'.

Edelman's analysis seems entirely applicable to the native title legislation as most native title 'claims' would now be decided by white administrators in a Native Title Tribunal. That determinations are made by such 'white' institutions highlights a more elementary problem with the *Act*, as in spite of the denunciation of *terra nullius* it firmly entrenches fundamental colonial assumptions and impositions. The assumption of legitimate settler state sovereignty, for example, results in the burden of proof for native title residing firmly with Aboriginal groups whose fate will continue to be decided by white settler institutions. The *Act* fails to adequately address the fact the settler state arbitrarily and illegitimately imposed its sovereignty on indigenous peoples, who were distinct political entities with land and sovereignty at the time of conquest and many indigenous nations still retain such status. Indeed, in order to claim native title indigenous groups, in effect, have to prove just that. They have to

prove 'traditional and continuing connection to the land' and that they still abide by 'traditional laws and customs'.

The emergence of the *Native Title Act* should thus be understood as a the Keating government's political solution to an unwanted problem created by a High Court intent on reforming some aspects of the imposed colonial structures that have dominated indigenous peoples. The Keating government, pressured by mining lobby propaganda, essentially treated the whole process as a land management issue. In contrast to the, albeit somewhat superficial, morality of the *Mabo* decision the *Native Title Act* was a political compromise in accordance with interested parties' relative *political* rather than moral weight. Thus, as Coombs (1994: 209) suggests 'it is not surprising that indigenous peoples around the world continue to deny the legitimacy of legislation and agreements which purport to recognise or grant them native title to land they believe has always been theirs. This is especially the case when a primary purpose has in fact been to validate earlier dispossessions and to ensure that remaining land continues to be subject to alienation by compulsion.' In this sense the notion of 'historic injustice' fails to capture the full extent of the *continuing* nature of colonial relations and contemporary dispossession.

Beyond Native Title: Towards a Just Relationship

As we have seen, in the states like Australia indigenous peoples become recipients of rights conferred by policymakers who firstly assume the legitimacy of settler state sovereignty and secondly act to protect colonial structures and existing inequalities often behind a veneer of agrarian reform. The assumption of settler state sovereignty is also a problem within liberal theory where, even those writers who might be considered champions of minorities, like Taylor (1995) and Kymlicka, (1991, 1995, 2000) skip over the 'first step in questioning the sovereignty of the authoritative traditions and institutions they serve to legitimate' (Tully, 1995: 53, see also Samson, 1999). Such writers, whilst recognising the importance of culture to indigenous peoples, talk in terms of participation *within* liberal institutions, and their solutions to collective disadvantage are framed in a liberal discourse of rights that is ultimately the product of force. Kymlicka, (1991, 1995, 2000) for example, concedes that indigenous peoples' special relationship to land is significant enough to justify recognition via the notion of 'group rights' and 'differentiated citizenship', but he

exposes the colonial underpinnings of such liberalism by denying indigenous peoples full political autonomy. By presuming the legitimacy of the liberal settler state's jurisdiction over indigenous nations, such an approach presupposes exactly what is in question (see Tully, 2000: 55).

Indigenous peoples at the national and international level fervently resist classification as 'minorities', emphasising their distinctness both culturally and via the issue of 'consent', which is perhaps the most unique aspect of indigenous/settler state relations. While voluntary immigrant minorities have chosen to become citizens of European diaspora nations such as those in the former British Empire, many indigenous peoples have never willingly ceded their lands or political autonomy. Indigenous peoples hold distinct moral claims as *dispossessed first nations*, whose 'forebears will usually have been massacred or enslaved by settlers, or at the very least cheated out of their land, to which they will often retain a...spiritual attachment' (Robertson 1999:183).

At this juncture the liberal politics of 'recognition' fails to award indigenous peoples the equal recognition it espouses. The discrete moral claims of indigenous peoples *as peoples* are frequently glossed over by liberal 'recognition' theorists (see Taylor, 1995, Kymlicka, 1991, 1995, 2000, Kukathus, 1992) when they combine discussion of indigenous peoples with minorities. Where this non-recognition remains the basis for the legal authority of the colonial state, far from being a matter of history the relational injustice involved is ongoing (Patton 2005:261). Indeed, indigenous authors Taiaiake Alfred and Kevin Gilbert have highlighted the *contemporary* injustice of an ongoing colonial relationship within their respective liberal 'multicultural' states despite the institutionalisation of indigenous rights to land and other 'recognition' initiatives. For Gilbert (1994) land rights, while a move in the right direction for the victims of a colonial system, fail to question the legitimacy of settler state sovereignty over indigenous peoples. Accordingly, he emphasised the necessity of negotiating a 'sovereign treaty' in Australia to grant political rights, return available land and provide freedom from the colonial reality. The indigenous sovereignty challenge is particularly strong in Australia as the 'settlement' of the continent was achieved by pure assertion and brute force: there is no negotiated agreement for the settlers to invoke when their sovereignty is challenged. According to Gilbert (1994: 67) the Australian state will never be legitimate until it gains the

consent of indigenous peoples by way of an internationally recognised legally binding sovereign treaty.

Mohawk scholar, Taiaiake Alfred (1999: 58, my emphasis), suggests that settler state granted 'rights' (such as 'native title') should be viewed as *part of colonialism and not a remedy to it* since such rights are invariably controlled and regulated by the state. Furthermore, he questions their remedial quality:

defining Aboriginal rights in terms of, for example, a right to fish for food and traditional purposes is better than nothing. But to what extent does that state-regulated 'right' to food-fish represent justice for people who have been fishing on their rivers and seas since time began (Ibid)?

To frame the struggle to achieve justice in terms of indigenous 'claims' against the state is implicitly to accept the fiction of state sovereignty and the colonial reality (Ibid). For Alfred (1999: 59) acceptance of 'indigenous rights' in the context of state sovereignty represents the culmination of white society's efforts to assimilate indigenous peoples.

Grounding settler state granted indigenous rights in the politics of difference may have produced a degree of internal autonomy for indigenous peoples within colonial systems, yet it denies indigenous peoples the right to appeal to 'universal' principles of freedom and equality¹³ in struggling against injustice, precisely the appeal that would call into question the basis of internal colonisation (Tully 2000:47). As Asch (1999: 436) observes, the underlying premise of such indigenous rights is that they are 'not to be defined on the basis of the philosophical precepts of the liberal enlightenment, are not general and 'universal' and thus categorically exclude any fundamental political right, such as a right to self-determination that could be derived from such abstract principles'.

When concerned with an internal colonial situation¹⁴ the question should not be how can we deal with indigenous 'claims' against the state, but rather how can the colonisers legitimately settle and establish *their* own sovereignty (Tully 2000: 52, my emphasis). For the settler state to gain legitimacy it thus needs to hold negotiations with indigenous peoples as 'peoples'. Indigenous peoples would be 'recognised' as

¹³ The rights are not grounded in universal principles, such as the freedom and equality of peoples, see Tully 2000: 46.

¹⁴ Where the colonising society is built on the territories of the formerly free people who refuse to surrender their freedom of self-determination over those territories. See Tully, (2000: 39).

nations equal in status to the settler state and consequently the ensuing treaties would be ‘international treaties’. Tully (2000:53) argues that such negotiations have the potential to resolve the problem of internal colonisation and describes the approach as a form of *treaty federalism*.¹⁵

This method responds to the fact that indigenous peoples have not legitimately surrendered their pre-colonial status as ‘independent political entities’. It also challenges the erroneous assumption that jurisdiction cannot be shared, advocating two indigenous principles: free and equal peoples on the same continent can mutually recognise the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination (Tully 2000:53). In essence, Tully’s formula recognises ‘prior and existing sovereignty not as state sovereignty, but, rather, a stateless, self governing and autonomous people, equal in status, but not in form, to the (settler) state, with a willingness to negotiate shared jurisdiction of land and resources’ (Ibid).

It is often suggested by politicians, media commentators and some liberal academics, that since genuine de-colonising treaty negotiations are currently off the political radar in countries like Australia, indigenous peoples should be pragmatic and accept the (colonial) ‘reality’ before them and limit their aspirations to purely *internal* solutions. Yet, as Maori lawyer Moana Jackson observes ‘the colonial mind is always inventive, and its final resort is always a political reality which either permits or denies the right to self-determination. But reality, like law, is a changing human construct’ (in Lam 2000: 62). The work of the international indigenous peoples’ movement and the broad indigenous support for the Draft Declaration which does not limit the right to self-determination to *internal* self-determination, suggests that indigenous peoples do not accept the colonial reality. On the contrary, they are mobilising to change it (see Morgan, 2004).

Conclusion

In contrast to formal legalistic perspectives, this paper discussed how seemingly beneficial native title land rights were constructed in such a way as to actually maintain existing inequalities and perpetuate a colonial relationship. The paper thus

¹⁵ Tully insists, however, that three broad principles must be adhered to for this solution to be truly legitimate, see Tully, 2000: 53.

concludes that, in this context, the frequently used term ‘historic injustice’ fails to adequately capture the *ongoing* nature of relational injustice. In this sense the paper highlights a gulf between settler state granted indigenous rights and their normative benchmark: the Draft Declaration.

The extra-governmental nature of human rights regimes has ensured that they are used to counteract the repressive capacity of states (see Turner, 1993). Thus many indigenous peoples have accepted the 1994 Draft Declaration as an articulation of their rights, rather than rights regimes, such as ‘native title’, constructed by settler states. The Draft Declaration’s rights to self-determination (Articles 3 and 31) and land (Article 26) are perhaps the most important to indigenous peoples, because of the centrality of land to indigenous culture (see Daes 1999) and because self-determination is viewed as a remedial political right of distinct dispossessed ‘peoples’ and ‘nations’.

In this context the broad interpretation of self-determination refers to the right to political autonomy, the freedom to determine political status and to freely pursue economic, social and cultural development. Consequently the right is viewed as central to a ‘just’ response to colonial dispossession and the resultant political and social subordination of indigenous peoples (see Short, 2005). In this sense the institutionalisation of indigenous land rights in Australia, which did not even include a right of veto over development let alone a political right to self-determination, is a prime example of the tension between national rights regimes and international human rights norms. Inspired by the insights of indigenous writers such as Gilbert (1993) and Alfred (1999), this paper has also suggested how the tension could be alleviated through genuine decolonising ‘nation’ to ‘nation’ negotiations along the lines formulated by Tully (2000).

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