

P.G. McHugh. **Aboriginal Title. The Modern Jurisprudence of Tribal Land Rights.** Oxford: Oxford University Press, 2011. Pp. 376. £70.00. ISBN: 9780199699414.

The recognition of aboriginal title – i.e., land rights not derived from the Crown/government but rooted solely in the use and ownership of the land by indigenous peoples since time immemorial – is probably the greatest achievement of indigenous peoples in their decade-long struggle to defend their land and culture. Since indigenous peoples define themselves as a people through their genealogical connection to certain areas, the realization of the right to own, use, and live on their ancestral territories has always been at the centre of their struggle for the recognition and enforcement of their rights. Ownership of and control over their ancestral land and its resources are not only considered a significant contribution to solving the terrible social and economic problems indigenous peoples are facing. A considerable degree of self-management and control over land and natural resources is also regarded as essential to the indigenous peoples' survival as peoples and the preservation of their distinct culture. Yet until the 1970s the rights of indigenous peoples to their ancestral lands were almost completely ignored by states and international law. The loss of indigenous peoples' control of and ownership over these lands during colonization was regarded as a historical and irreversible fact by national governments. When from the 1970s onwards courts in several common law jurisdictions began to hold that the indigenous peoples' customary tenure had indeed survived the acquisition of sovereignty by the Crown and continued to exist as a burden on the Crown's radical title to the land, the national governments were – after years of inactivity and neglect – finally forced to act and to enter into negotiations with indigenous peoples to settle the indigenous peoples' land claims. In the 1990s, United Nations human rights monitoring bodies and regional human rights courts picked up the aboriginal title idea, thereby placing indigenous peoples' issues and concerns on the international agenda and providing indigenous peoples with additional leverage against their respective governments. The recognition of inherent indigenous land rights not only enabled indigenous peoples to retain and regain ownership and control over land and resources, but it also became the platform for the recognition of other indigenous rights, in particular, the right to self-determination and the right to autonomy. Hence, through the recognition of the aboriginal title doctrine, indigenous peoples were not only brought to the attention of their respective governments, but they also became recognized as actors – and no longer as mere subjects – on the national as well as on the international level.

The book under review offers a comprehensive and detailed overview of the historical and legal development of the aboriginal title doctrine within several jurisdictions. It looks at the emergence of this doctrine through judge-made law in Canada in the 1970s, its spread to other jurisdictions, its breakthrough as a recognized common law doctrine, its further development through judicial and legislative action in the different legal systems in the 1980s and early 1990s, in particular in Canada and Australia, and its eventual decline at the end of the 20th century. McHugh explores to what extent the aboriginal title doctrine has influenced government decision-making and the development of international law, and also takes a look at its interactions with other disciplines such as anthropology and historical inquiry.

The book is divided into six chapters. In the first chapter, which serves as an introduction to the issue, the author gives a condensed overview of the historical development of the aboriginal title doctrine, its effects, and the reasons for its emergence. In the following chapters these brief statements are taken up and explored in detail.

Chapter 2 addresses the historical and legal background that led to the formation of the aboriginal title doctrine and its aftermath. It concentrates on the developments in Canada, Australia, and New Zealand with several references also to the United States. The author stresses the

decisive role of the courts in the development of the aboriginal title doctrine. Whereas the national governments until the 1970s ignored the demands of indigenous peoples to have their inherent rights to their traditional lands recognized, the courts proved more willing to initiate change. In all states it was the courts – not the governments – that first recognized the existence of inherent indigenous land rights, thus forcing the governments to act. Hence, the emergence of the aboriginal title doctrine has to be regarded as a result of judicial activism. The author gives a recollection of events and circumstances that ultimately led to the Canadian Supreme Court's breakthrough decision in *Calder v. Attorney-General of British Columbia* (1973) – the starting point of the modern aboriginal title doctrine. He also draws a comparison with the parallel developments in Australia and the Northern Territory Supreme Court's decision in *Milirrpum v. Nabalco Pty Ltd* (1971), in which the existence of an aboriginal title was rejected based on the assumption that Australia was a 'settled' colony and not a conquered or ceded one like most regions in North America. He recounts the high points of the aboriginal title doctrine in the 1980s and early 1990s, referring *inter alia* to the Canadian Supreme Court decisions in *Guerin* (1984) and *Sparrow* (1990), the constitutional protection of aboriginal rights under section 35 of the Canadian Constitution Act, 1982, and the adoption of the aboriginal title doctrine by the New Zealand High Court in *Te Weehi* (1986). The development of the aboriginal title doctrine culminated in the High Court of Australia's decision in *Mabo v. Queensland (No. 2)* (1992), in which the High Court rejected the distinction drawn in *Milirrpum* between settled and conquered or ceded colonies and held that also in Australia indigenous peoples' original land rights had survived the acquisition of sovereignty by the Crown. The author observes that this positive trend did not continue. Instead, the mid-1990s brought on a decline of the aboriginal title doctrine. Its scope and contents were steadily hollowed by legislative acts, in particular the Australian Native Title Act (1993) and Native Title Amendment Act (1998), which severed the Australian aboriginal title doctrine from any future common law developments and instead placed aboriginal title in Australia exclusively on a statutory basis. In addition, courts became reluctant to enlarge the scope of aboriginal title. The author concludes that, although the common law aboriginal title doctrine forced governments to act and enter into negotiations with indigenous peoples, and, thereby, ultimately served as a platform for the political right to self-determination, the courts at the end of the 20th century were no longer willing to increase the indigenous peoples' leverage by further strengthening their inherent rights to the land (at 104).

Chapter 3 deals with the national specifications of the aboriginal title doctrine in Canada and Australia – the busiest common law jurisdictions. Since the Australian and Canadian approaches began to diverge following the breakthrough of the doctrine, the chapter looks at the different pathways taken in these two states. To this end, four legal building blocks of the aboriginal title doctrine, which are applicable to all tracts of land, are surveyed: recognition, proof, nature and extent, and extinguishment of aboriginal title. The author stipulates that whereas according to the Canadian Supreme Court the aim of recognition of aboriginal title was to recognize the indigenous peoples' prior occupation and to reconcile it with the assertion of Crown sovereignty, the Australian courts require verification of whether the customary tenure can co-exist with common law. If co-existence with fundamental principles of the common law, especially with those which define the nature of Crown sovereignty, is deemed impossible, recognition will not be given (at 113). He then moves on to the aspect of proof and outlines the difference between Canada's 'translation approach' and Australia's 'acknowledgement approach' (at 118): whereas for the establishment of an aboriginal title under the Canadian system indigenous people only have to prove prior occupation at time of sovereignty and a continuity between present and pre-sovereignty occupation, Australian indigenous peoples not only have to prove the continuity of their original property rights under traditional law and customs but also the continuity of their community as a whole, and that through traditional laws

and customs they have a connection with the land. Hence, unlike in Canada, they have to prove not only a continued physical possession but also a continued cultural connection (at 125). The author criticizes this approach by pointing out that evidence of cultural continuity was hard to bring forward and that the determination of cultural continuity depended highly on the subjective assessment of the judges (at 125–127). Yet McHugh also argues that the Canadian and the Australian approaches have subsequently converged as a result of Canada's adoption of a distinction between aboriginal title – i.e., a right to the land itself – and mere resource-related aboriginal rights like hunting, fishing, and gathering rights in the *Van der Peet* trilogy (1996). Whereas, according to this distinction, the former is to be proven by exclusive use and occupation at Crown sovereignty plus a continuity between present and pre-sovereignty occupation, the latter requires the claimants to prove not only a reasonable degree of continuity between a modern and a pre-contact practice or custom but also that a modern practice or custom lay at the core of the community's identity, thus leaning towards the 'frozen-in-time' approach applied by the Australian courts. Since Canadian courts have subsequently held that the seasonal use of an area, e.g., for hunting and fishing, does not translate to a right to the land itself in the form of an aboriginal title but only to an aboriginal right to carry out those specific activities, the author points out that Canadian courts have *de facto* reduced potential aboriginal title areas to villages and small areas within their vicinity, hence to 'postage stamp' size (at 142). In a next step, the author looks at the nature and extent of aboriginal title. He points out that under the Canadian aboriginal title doctrine the indigenous peoples have a right to exclude, but that as a result of the *Delgamuukw* decision (1997) their right to develop the land is subject to an inherent limit. In this decision, the Canadian Supreme Court held that indigenous groups are not allowed to develop the land in a matter irreconcilable with the nature of the groups' attachment to the land, which had given rise to aboriginal title in the first place (at 147–148). Yet as a positive aspect of aboriginal title within the Canadian jurisprudence, the author mentions that the duty to consult with indigenous groups and, if possible, to accommodate their interests, has more and more moved to the centre of the Canadian aboriginal title approach, with the required level of consultation and accommodation depending on the circumstances of the case. This duty exists in all cases in which land- and resource-related activities of indigenous peoples might be adversely affected by a Crown action (at 157). With respect to the nature and extent of aboriginal title within the Australian jurisprudence, the author heavily criticizes the 'bundle of rights' approach adopted in *Western Australia v. Ward* (2002). According to this approach aboriginal title is not regarded as a right to the land itself from which other rights, like the right to exclude, are derived (as is the case in Canada), but merely as a set of rights. Therefore an aboriginal title can cover only those minerals and resources to which the indigenous peoples can prove a specific customary attachment (at 158–160). In a last step, the author addresses the possibility of extinguishing aboriginal title. He points out that in the past, aboriginal title in Canada could only be extinguished by legislation disclosing a clear and plain intention to extinguish (at 173), and that aboriginal title and other aboriginal rights are nowadays constitutionally protected under section 35 of the Constitution Act, 1982. Hence, in Canada, a unilateral extinguishment of aboriginal title and rights is no longer possible. Although they can still be infringed for various purposes, aboriginal interests are to be prioritized and the respective indigenous groups have to be consulted prior to such an infringement (at 163–164). The situation is different in Australia, where in the past aboriginal title could in whole or in part be extinguished by any legislative or executive act being inconsistent with aboriginal title, irrespective of a plain and clear intention to extinguish (at 178). Future activities on land subject to a native title claim trigger the 'right to negotiate' under the Native Title Act. This right is, however, weaker than the duty to consult under Canadian law (at 164–165).

The fourth chapter deals with the recognition of aboriginal title in other common law but also in civil law jurisdictions as a result of the developments in Canada and Australia. It also examines

the question of what impact the common law aboriginal title doctrine had on international law developments and, *vice versa*, how far developments in international law have influenced aboriginal title.

In Chapter 5, the author examines the interrelationship of the legal doctrine of aboriginal title with the disciplines of anthropology, history, and political thought. He *inter alia* looks at the problems involved with expert opinions of anthropologists, and at the questions whether an aboriginal title can and should be rooted in the past, whether collective property rights are incompatible with liberal-individualist political thought, and whether the state should be liable for reparations for lands taken away in the past.

In the sixth chapter, the author summarizes and evaluates his findings. He holds that, although the aboriginal title doctrine could not fulfil the high expectations indigenous peoples had placed on it, it nevertheless forced governments to take indigenous peoples' land claims more seriously and therefore had to be regarded as a major accomplishment in the indigenous peoples' struggle to protect their ancestral lands. He criticizes the degradation of the doctrine through more cautious or even disadvantageous court decisions from the mid-1990s onwards, which have reduced the indigenous peoples' leverage in negotiations with the government (at 329). Yet he also mentions positive signs, in particular the Canadian Supreme Court's amplification of the duty to consult and the resistance of the lower federal courts in Australia to applying the strict framework and tests for aboriginal title (at 330). Furthermore he stresses the doctrine's importance as a platform for the recognition of self-government and autonomy rights (at 334), and mentions its many positive downstream consequences like, for example, the recognition of traditional hunting and fishing rights, co-management, governance, and environmental protection (at 337). Yet, ultimately, he leaves open the question whether the aboriginal title doctrine 'change[d] the plight of tribal peoples for the better or . . . merely reinscribe[d] in another form a longstanding and negative pattern to their historical experience of relations with the Anglo-settler polity' (at 339).

The book offers an excellent overview of the common law aboriginal title doctrine. It gives a detailed and comprehensive legal and historical analysis of the development of the doctrine and its consequences, and covers the most recent developments within the relevant jurisdictions. McHugh builds upon earlier literature, in particular the influential *Common Law Aboriginal Title* by Kent McNeil (1989) and *The Land Rights of Indigenous Canadian Peoples* by Brian Slattery (1979). Yet, whereas those works paved the way for the development and breakthrough of the aboriginal title doctrine and pondered its nature, content, and scope before these issues had been decided by the courts, McHugh's book serves as a comprehensive and descriptive retrospective of 40 years of aboriginal title jurisprudence – as 'a biography of whatever happened to the likely doctrine' (at 24). Unlike other recent literature on aboriginal title, e.g., Peter H. Russell's *Recognizing Aboriginal Title* (2005), Thomas Isaac's *Aboriginal Title* (2006), or Lisa Strelein's *Compromised Jurisprudence: Native Title Cases since Mabo* (2006), which focus on particular jurisdictions or on certain aspects of the doctrine, McHugh manages to summarize the broad and complex issues connected to the common law aboriginal title doctrine as a whole into key points without disregarding important side aspects. The clear and concise structure and organization make the book easy to read. Overall, the book makes an important contribution to the field of indigenous studies and provides researchers on this issue with an enormous wealth of information and guidance.

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