Cultureless Rights:
The Cultural Framework for Indigenous Rights in the Canadian and Australian Judiciaries

by

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Abstract

The relationship between the common law of Canada and Australia and Indigenous peoples has been one plagued by the logic of dispossession and domination. For over 200 years colonial courts effectively ignored Indigenous claims to the continued existence of their rights to traditional lands and self-government.

In their respective attempts to address their own colonial histories, the Canadian and Australian courts have both begun to recognize the rights and title of Indigenous peoples to their traditional land-bases. Initially this gesture appeared to promise greater rights and freedoms for Indigenous peoples, including entitlement to self-government and the right to manage and benefit from traditional lands without the need for external authorization. Unfortunately, however, in a number of recent decisions the progress demonstrated by the courts in earlier cases has stalled, even reversed.

This thesis will demonstrate that where the Canadian and Australian courts have recognized Indigenous rights and title they have done so by applying a *culturalist framework.* I argue that this culturalist framework has served to arbitrarily circumscribe the scope of Indigenous rights to a narrowly conceived bundle of "cultural" rights which privileges the sovereignty and title of the state over that of Indigenous peoples. Because of their reliance on a cultural approach to the interpretation of Aboriginal rights, common law courts have proven to be severely restricted in their capacity to recognize rights that would translate into greater freedom and equality for Indigenous peoples. In light of this, I conclude that although the law can be a powerful tool for furthering Indigenous rights, the courts cannot be the primary source of greater freedom and equality. Because of their inherently conservative nature courts often follow precedent and generally rely on norms and rules already accepted in the greater society. For this reason, although they can protect and encourage certain rights movements, the courts must radically alter their conceptual framework before significant changes and improvements can be made to Indigenous title jurisprudence.

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Dedication

To Jewel

Introduction

The relationship between the common law of Canada and Australia and Indigenous peoples has been one plagued by the logic of dispossession and domination. For over 200 years colonial courts effectively ignored Indigenous claims to the continued existence of their rights to traditional lands and self-government.[1] James Tully has identified four major dimensions to this process of "internal colonization." [2] The first dimension was demographic destruction: the spread of European-born disease and warfare reduced the Indigenous populations of the Americas by nearly 90%. The second dimension involved the dispossession of Indigenous peoples' political rights: settlers usurped the existing traditional forms of government and subjected Indigenous peoples to their own, foreign forms of governance. The third dimension involved the domination of territory: the newcomers displaced the Indigenous population to small reserves, appropriated their territories and opened them to settlement and eventually capitalist development. And, finally, the fourth dimension sought the incorporation of Indigenous peoples into the settler society: where Indigenous resistance remained entrenched, usurpation and appropriation of Indigenous peoples' lands and governing authority were accompanied by asymmetrical negotiations and treaty-making that aimed to create relations of cooperation and 'reconciliation' to further the internal colonization process. These four processes have instilled and strengthened a relationship of "colonial domination", the result of which has been to reduce formerly self-

[1] Royal Commission on Aboriginal Peoples, *Report* (Supply and Services Canada, 1996) (Royal Commission, *Report').* Vol 1 Pt 1 Ch 6 "The Imposition of a Colonial Relationship"
[2] Tully, James. "The Struggles of Indigenous Peoples for and of Freedom." Political Theory and the Rights of Indigenous Peoples. Ed. Duncan Ivison, Paul Patton and Will Sanders. Cambridge, Cambridge University Press, 2000. 36-59. 39

determining and self-sufficient peoples to societies struggling for the right to manage their own affairs in a context free from settler imposition.

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This thesis will demonstrate that where the Canadian and Australian courts have recognized Indigenous rights and title they have done so by applying a *culturalist framework*. I argue that this culturalist framework has served to arbitrarily circumscribe the scope of Indigenous rights to a narrowly conceived bundle of "cultural" rights which privileges the sovereignty and title of the state over that of Indigenous peoples. Because of their reliance on a cultural approach to the interpretation of Indigenous rights, common law courts have proven to be severely restricted in their capacity to recognize rights that would translate into greater freedom and equality for Indigenous peoples. In light of this, I conclude that although the law can be a powerful tool for furthering Indigenous rights, the courts cannot be the primary source of greater freedom and equality. Because of their inherently conservative nature courts often follow precedent and generally rely on norms and rules already accepted in the greater society. For this reason, although they can protect and encourage certain rights movements, the courts must radically alter their conceptual

framework before significant changes and improvements can be made to Indigenous title jurisprudence.

The argument that follows is organized into four parts. In part one, I define and contrast two approaches to the interpretation of Indigenous rights: the cultural approach and the political approach. In part two, I identify several problematic features of the cultural approach in relation to Indigenous self-determination claims. To do so I examine the critiques of culturalism offered by James Tully, Patrick Macklem, Michael Murphy, Duncan Ivison and Michael Asch. In part three, I compare how the cultural approach has influenced Indigenous rights jurisprudence in the Supreme Court of Canada and the High Court of Australia. I look specifically at the cases of *Calder, Van der Peet, Baker Lake* and *Delgamuukw* in the Canadian context, and *Mabo, Ward* and *Yorta Yorta* in the Australian context. In part four, I conclude with a brief discussion on the future role of the courts in supporting Indigenous struggles of freedom and in the development of a robust conception of Indigenous rights.

1. Conceptualizing Aboriginal Rights: Cultural and Political Approaches

The culturalist framework assumes that "a normative defence of the right to self-determination stands or falls on the question of its instrumental importance to the preservation of a nation's distinctive culture."[3] In other words, the role of Indigenous rights is to protect and encourage cultural distinctiveness. Will Kymlicka has argued that institutionally accommodating such distinctiveness is essential for promoting a liberal democratic political culture in diverse societies such as Canada and Australia.

He explains:

> Cultural membership has value for individuals insofar as access to a culture (or cultures) is tied to the value of [individual] freedom or well-being… It makes salient a range of possible goals and options, and imparts meaning on these options. It animates and illuminates the possibilities of life and thus makes freedom meaningful in the first place.[4]

If the allocation of a right to self-determination can be shown to play an instrumental role in preserving a cultural framework essential for the realization of individual freedom and autonomy, then such rights ought to be seen as valuable. Self-determination is otherwise not seen as necessary in and of itself.

While there is much written on self-determination, the precise definition remains elusive.[5] As I use it here, the right of self-determination is understood broadly as a people's right to determine its own future as free as possible from external domination in all spheres of life, cultural, political, social and economic.[6] In the context of Indigenous struggles,

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[3] Murphy, Michael. "The Limits of Culture in the Politics of Self-Determination." Ethnicities. Vol 1 (2001): 367-388. 368

[4] .. :...

[5] Castellino, Joshua and Gilbert, Jeremie, "Self-Determination, Indigenous Peoples and Minorities", Macquarie Law Journal, (2003) 3. 156

[6] For further elaboration see,*Indigenous*, which: Indigenous Indigenous (*Indigenous*)See also, , whicho Shin Imai has pointed out how the Canadian government's negotiation policy on self-government compares to the approach of Canadian Aboriginal academic John Borrows: "The federal government policy recognizes that there is an inherent right to self-government and sets out what areas of jurisdiction are negotiable, with whom the government will negotiate, and how negotiated agreements are to be ratified. A major objective is to

Sheryl Lightfoot makes the important distinction that "self-determination differs from how the term was used during the decolonization movement that followed World War II."[7] That is, it "should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live,"[8] rather than as secession or independence.[9] What is important to note here is that self-determination is fundamentally a right accorded to a political community by virtue of its status as an *equal* among other sovereign political communities.

Cultural rights, by contrast, are not universal in scope (i.e., based on the principle of equality between peoples), but are rather tied to the protection of *specific* community traditions or customs.[10] These rights might include anything from ensuring access to traditional sites for ceremonial purposes, to the management of sensitive and valuable ecosystems with the aim of protecting and supporting cultural continuity. While this accommodates certain rights associated with custom and tradition, it neglects more fundamental questions of Indigenous self-determination and the legitimacy of the Crowns' sovereignty over Indigenous peoples.[11] In this way the culturalist approach leaves

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harmonize laws: 'it is in the interest of both Aboriginal and non-Aboriginal governments to develop co-operative arrangements that will ensure the harmonious relationship of laws which is indispensable to the proper functioning of the federation.' See, Imai, Shin. "Indigenous Self-Determination and the State." Indigenous Peoples and the Law: Comparative and Critical Perspectives. Eds. Richardson et al. Oxford: Hart Publishing, 2009. pp. 285-319. See also, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" ('federal self-government policy'), at www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

[7] Lightfoot, Sheryl, "Indigenous Rights in International Politics: The Case of 'Overcompliant Liberal States,' Alternatives. 33 (2008). 86

[8] E.-I. A. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination," in S. J. Anaya, ed., International Law and Indigenous Peoples (Burlington, Vt.: Ashgate, 2003). 375

[9] Lightfoot, "Indigenous Rights." 86

[10] Asch, Michael. "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution", Canadian Journal of Law and Society 17:2 (2002). 23-38. p. 27.

[11] Povinelli, Elizabeth. "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship", Critical Inquiry 24:2 (1998). 179

unquestioned and unchallenged the continued internal colonization of Indigenous peoples and their territories.[12]

The courts have yet to recognize Indigenous peoples as nations bearing rights to self-determination and underlying title, a right that has been consistently demanded by Indigenous nationalists. Such rights would ostensibly give Indigenous peoples a significant degree of liberty to run their own affairs in rhythm with their own values and aims. Courts have instead tried to accommodate Indigenous peoples within the common law by offering specific rights tied exclusively to the protection of Indigenous peoples' distinctive cultures as *Indigenous* peoples within the legal apparatus of the settler-state.[13] At the same time they have asserted that where traditional customs and laws are interrupted the rights derived from those distinct cultural practices can be extinguished.[14] Both of these strategies - first accommodation, and second, extinguishment - are contemporary strategies of colonial domination used by settler courts and states to retain their control over Indigenous peoples.

In contrast, the political approach to Indigenous rights advocated here asserts that Indigenous peoples are sovereign peoples with jurisdiction over their territories.[15] I use Tully's definition of sovereignty as one that "does not refer to state sovereignty, but rather, a stateless, self-governing and autonomous people, equal in status but not in form, to the [settler] state."[16] Seen from this perspective, Indigenous peoples meet the criteria of free peoples and sovereign nations equal in status to settler nations. Following Tully, I argue that this must be the starting point for any inquiry into the justice and legitimacy of settler

[12] Tully. "Struggles." 45
[13] See further discussion in this paper of *R v. Van der Peet* (21-22) for Canadian context and *Western Australia v. Ward* (32) for Australian context.
[14] See further discussion of *Yorta Yorta v Victoria* (30-32) for Australian context and *Delgamuukw v. The Queen* (22-23) for Canadian context.
[15] Tully. "Struggles." 52
[16] *ibid.* 53-54

governments.[17] To legitimize their sovereignty settler nations have to gain the consent of Indigenous peoples.[18]

Reconciling the colonial relationship requires that Indigenous and settler partners agree to treat each other as equal, self-governing and co-existing entities, and construct negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence. These processes are open and subject to review and renegotiation as circumstances change.[19] As Tully explains:

> Such a stance constitutes a genuine resolution of the problem of internal colonization. It shows that indigenous peoples were independent peoples or nations at the time of the assertion of sovereignty by the Crown, that this status has not been legitimately surrendered, and, consequently, the prevailing legitimations of Crown sovereignty are indefensible.'[20]

In distinguishing this approach to the culturalist framework Michael Murphy adds,

> [I]t is the democratic aspect of the claim to self-determination which confers upon a nation the right to make choices about culture and not, as culturalism entails, a nation's choices about culture which governs its enjoyment of the democratic right to self-determination.[21]

In sum, from the perspective of the political approach I support in this paper it is paramount that Indigenous peoples rights to greater autonomy and freedom be recognized as deriving from their prior occupancy and co-existing sovereignty with the settler state. From this we recognize that the proper relationship between Indigenous peoples and the settler state is one of equal, nation-to-nation status enjoined by open negotiations and mutually binding agreements.

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[17] *ibid.* 53

[18] Gordon Christie draws our attention to the contrasting views held by the Supreme Court of Canada and Indigenous scholars in this regard. He finds that the former "begins with the simple assertion that Crown sovereignty was never questioned, while Indigenous legal scholars are likely to begin with the thought that the presumption of Crown power is a fundamental puzzle in need of explication." See, Christie, Gordon. "Indigenous Legal Theory: Some Initial Considerations." In Indigenous Peoples and the Law. 2009. pp. 195-231. 207

[19] Tully. "Struggles." 53

[20] *ibid.*

[21] Murphy. "Limits." 368

2. Problems with the Cultural Approach

Settler courts continue to adapt a cultural approach to the recognition of Indigenous rights. There are at least three interrelated problems with this framework that I have touched on briefly. The first is that it undermines Indigenous rights to self-determination. For culturalism the aim is to more successfully *integrate* Indigenous peoples within settler society by means of protecting and accommodating their cultural distinctiveness, rather than recognize Indigenous peoples as equal, sovereign communities.

The second problem associated with the culturalist framework is that it leaves determining the scope and content of Indigenous rights in the hands of settler courts. Consequently the courts retain the power to decide which rights have cultural value and which Indigenous cultural practices are 'authentic enough' to warrant the protection of rights guarantees.[22] On the one hand this is a culturally demeaning relationship, as it privileges the opinions of Western 'experts' and the contentions of settler courts on Indigenous cultural matters over the knowledge and assertions of Indigenous peoples themselves. On the other hand it means an added expense for Indigenous litigants, as they are required to secure the support of external expert witnesses to legitimize their claims before the courts. Duncan Ivison highlights these problems when he writes:

> This is a deeply problematic starting point for evaluating the claims of Aboriginal peoples in countries such as Canada and Australia. For it is clear that the shared understanding of the majority nation(s) was the source of great injustices committed against them, and often continues to be so. The histories of relations between the settler state and the Aboriginal peoples they encountered and sometimes cooperated with, but usually also tried to conquer and subjugate, provide a vivid record of how discriminatory attitudes and practices became embedded in the public institutions of liberal democracies.[23]

[22] Povinelli. "Shame." 179
[23] Ivison, Duncan. Postcolonial Liberalism. Cambridge: Cambridge Press, 2002. 58

Ivison suggests that the source of the problems with the culturalist approach is that the justification of Indigenous rights "is tied too narrowly to the preservation of culture, as opposed to a bundle of claims to do with not only culture, but with interests related to land and self-government."[24] He delineates the distinction between the problematic nature of the culturalist approach vis-à-vis a more robust political approach and draws our attention to how an honest application of the latter forces us to question the legitimacy of the current rights structure. Again, he writes:

> The right to self-government is not only about the freedom to engage in various cultural practices threatened by assimilation, but also the freedom to exercise various forms of governmental authority. This raises jurisdictional claims about the constitutional and institutional structure of the state as a whole, and challenges the distribution of legislative authority between different orders of government and the administration of justice.[25]

A number of authors have made similar criticisms about the culturalist framework. For example, Michael Murphy argues that culturalism assumes that the right to self-determination is reliant upon its instrumental importance to the preservation of a nation's distinctive culture. In making this assumption, the courts obscure "crucial aspects of the claims [to greater autonomy], thereby reducing our capacity to address the challenge of nationalism [and the demands for greater self-determination] in a just and effective manner."[26] He makes it clear that this is not to say that culture is itself irrelevant, but "simply that it is a mistake to make the justifiability of national self-determination fundamentally dependant upon a nation's choices regarding its cultural distinctiveness."[27]

Rights of self-determination are in this case understood as secondary to, and only necessary if they are useful in protecting, traditional laws and customs. Patrick Macklem

[24] Ivison. Postcolonial.125
[25] *Ibid.* 127
[26] Murphy. "Limits." 368
[27] *ibid.* "Limits." 376

has taken issue with this narrow conceptualization of Indigenous rights, arguing that "it treats Aboriginal cultural difference as though it were the only aspect of indigenous difference worthy of constitutional protection, ignoring the fact that indigenous difference also includes Aboriginal prior occupancy, Aboriginal prior sovereignty, and Aboriginal participation in a treaty process." [28] Constitutional protection of Indigenous difference ought to therefore be extended beyond tradition and custom to include protection of interests associated with territory and sovereignty.[29] Macklem finds that the courts are guilty of reducing Indigenous difference to cultural difference, as though cultural difference were all that deserves recognition as differentiating Aboriginal people form non-Aboriginal people.[30]

The third problem with the culturalist approach is that it is implicitly based on the *terra nullius* thesis and therefore assumptions of Indigenous inferiority. Michael Asch has described this as racist and a violation of not only contemporary views on culture but also the liberal commitment to equality between peoples (which is what the right to self-determination is founded on).[31] He contends that, "the courts have continued to rely on 19th century racist evolutionary theory to explain the underpinning or context of these rights."[32] Asch argues that this racist aspect of the culturalist approach can be evinced in the Supreme Court of Canada's conception Indigenous rights, which refuses to define these rights "on the basis of the philosophical precepts of the liberal enlightenment;"[33] as "general and universal

[28] Macklem, Patrick. Indigenous Difference and the Constitution of Canada. Toronto: University of Toronto Press, 2001. 49
[29] *ibid.*
[30] *ibid.* 52
[31] Asch. "*Terra Nullius.*" 25
[32] *ibid.* 27
[33] *R. v Van der Peet* [1996] 2 S.C.R. 534

rights" (such as the right to self determination).[34] Rather:

> Aboriginal rights in the constitution arise solely 'from the fact that aboriginal peoples are *aboriginal*.'[35] [The Court also] argued that the purpose on the clause of Aboriginal rights in the Canadian constitution is to provide 'the means by which the prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.'[36] Therefore, as Aboriginal rights provide the means to reconcile Aboriginal occupation with sovereignty, it cannot become the means by which that sovereignty itself may be challenged.[37]

As such the rights of Indigenous peoples are not placed on the same level as those of non-Indigenous nations, but are seen primarily as means to accommodate Indigenous peoples under Crown sovereignty.

With the definitions and contrasting natures of the culturalist and political approaches to Indigenous rights in mind, I now want to demonstrate that the courts in Canada and Australia have applied the culturalist framework in their recognition of Indigenous rights.

[34] Asch. "*Terra Nullius*." 29
[35] *R. v. Van der Peet* [1996] 2 S.C.R. 534 [emphasis theirs]
[36] *ibid*. at 548
[37] Asch. "*Terra Nullius*." 29

3. Culturalism in the Courts

Over the past 40 years the courts in Canada and Australia have recognized the existence of Aboriginal title. Until the decision of the Supreme Court in *R v. Calder* in 1973 in Canada, and the Australian High Court's judgments in *Queensland v. Mabo(2)* in 1992, both countries had denied that Indigenous peoples had any legitimate claim to underlying title. The sudden reversal was potentially revolutionary, as it questioned the legitimacy of the Crowns' assertion to legitimate title and radical sovereignty, and opened the opportunity for Indigenous peoples to reclaim their rights to self-determination and title over traditional lands. Recent legal reasoning in both jurisdictions has nonetheless reflected the persistence of the three strategies of internal colonization: *terra nullius*, extinguishment and incorporation. This has been the case when courts have on the one hand recognized Indigenous rights based upon the preservation of traditions and customs, and on the other, refused to acknowledge the continued existence of rights to self-determination.

I focus on Indigenous rights in Australia and Canada because they have taken on a particular importance for at least two reasons: first, because of the sheer amount of resources at stake, including minerals, timber, agricultural land, fishing rights and cash payouts, and second, because of the high level of uncertainty surrounding the definition and application of Indigenous title. Such uncertainty means that the discussion over the protections and rights afforded to Indigenous peoples in Canada and Australia has led to a significant increase in litigation and negotiation between Indigenous peoples and the courts, governments and private interests. This has heralded a new era of Indigenous politics, one that has social, economic and political consequences for Indigenous and non-Indigenous peoples alike.

This section will demonstrate that the rights conferred to Indigenous peoples by the Canadian and Australian judiciaries have been based on the cultural distinctiveness of Indigenous peoples and not their status as free and equal peoples vis-à-vis the settler-state. Such rights are ultimately aimed at accommodating and incorporating Indigenous peoples within the dominant society, thus legitimizing past and current practices and policies of internal colonization.

3.1 Indigenous Rights in Canadian Courts

***Calder v. British Columbia* (1973)**

The Nisga'a Nation's demand for their rights to collectively use and occupy their traditional lands led to the first major, modern decision by the Supreme Court of Canada regarding Indigenous title in *R v. Calder (1973).*[38] In the court's decision, six of the seven judges agreed that Aboriginal title and rights derived form their occupation of their traditional territories before contact. Three of the judges went on to argue that Aboriginal rights had been extinguished by general legislation; three said that Aboriginal rights could not be extinguished except by specific legislation; while the seventh found that the case should not have been heard in the Court in the first place. Although the Nisga'a lost their appeal, the Court had made the significant assertion that Aboriginal rights existed at the time of contact and was divided on whether such rights had been extinguished.

The ruling implicitly overturned the *terra nullius* doctrine, which had been used to justify Crown rule of Canadian territory since settlement. In finding that Aboriginal title had existed before European contact and was therefore not derived from European laws the Court asserted for the first time that Indigenous entitlement to traditional lands and rights

[38] Tully. "Struggles." 44

was a burden upon the Crown's radical title. This effectively shifted the legal landscape of settler-state – Indigenous relations. No longer could the Crown assert bold-faced that its title to the land and its right to govern had been unquestionably established at the time of contact. Following *Calder* the government and courts, by all appearances at least, would henceforth be obliged to take into account Indigenous interests and claims to un-extinguished rights and title.

The *Calder* decision also established new guidelines for interpreting Indigenous culture. Justice Hall asserted that indigenous rights must be interpreted:

> …in the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and cultures of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species… [39]

In this statement Hall updated the courts anthropological framework, turning it away from 19th century prejudiced evolutionary thought and toward the concept of cultural relativism.[40] Courts and governments have since come to rely on the orientation articulated in his assertions in determining rights connected to culture, tradition and custom. These include for example the right to hunt for subsistence and rights to hold ceremonies on traditional lands.

At their outset, Hall and Judson's remarks in *Calder* appear to ensure the recognition of Indigenous claims to title and self-determination in basing them upon their appeals to the protection of culture and customs. But as we have seen, the culturalist argument rests on a slippery slope, one on which even the most robust definition of culture is slanted toward the already assumed legitimacy of the Crown's assertion of authority over Indigenous rights. As

[39] *Calder v. British Columbia* [1973] at 169-170
[40] Asch. "*Terra Nullius*." 27

such, despite the apparently progressive stance toward Indigenous culture taken in *Calder* and adapted by subsequent courts and governments, the Court's reliance on the culturalist approach persists and problematizes the recognition of political rights.[41] Examples from a handful of prominent cases will sufficiently demonstrate this point.

Hamlet of Baker Lake v. Minister of Indian Affairs [1979]

The first example comes from the remarks of Justice Mahoney in his *Baker Lake* [1979] decision. Justice Mahoney had the task of determining if the Inuit of the Baker Lake region in the Northwest Territories could legitimately bring forward an Indigenous rights claim. In the footsteps of *Calder* he held that one requirement was "that they (the plaintiffs) and their ancestors were members of an organized society."[42] To make his judgment on the eligibility of the Inuit's injunction Justice Mahoney delivered a description of what an organized society might look like. He then compared this with his view of the quality of Inuit culture before deciding whether or not their structures and institutions were adequately complex to deserve the recognition of the court. Justice Mahoney stated that indeed:

> The fact of the matter is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions, but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do there: hunt and fish and survive.[43]

Despite this recognition that the Inuit constituted an "organized society", in the sense used by the Supreme Court in *Calder* meaning they had institutions concerning the occupation and use of land that were significantly civilized for recognition by colonists, Justice Mahoney asserted that it was still possible for Indigenous communities to not possess

[41] *ibid.*
[42] *Hamlet of Baker Lake v. Minister of Indian Affairs* [1979], at 557
[43] *ibid.*

sufficiently elaborate institutions to require recognition of sovereignty and political rights. This reasoning has yet to be challenged in the courts since and is proof of the court's willingness to import its own understanding of cultural value onto indigenous contexts and, from this, refuse to recognize certain rights.[44]

***R. v. Sparrow* [1990]**

The culturalist logic is followed in the Supreme Court's decision in *R v. Sparrow (1990)*. The case concerned the application of Aboriginal rights under Section 35(1) of the Constitution Act, 1982. The Court specifically considered the Musqueam Band's right to fish using nets longer than permitted by the Fisheries Act. The Court found that Indigenous rights could not be infringed without justification on account of the government's fiduciary duty to Indigenous peoples in Canada. Significantly, in *Sparrow* we see once more an articulation of a position compatible with the orientation of Hall in *Calder*. However, akin to Justice Mahoney's decision in *Baker Lake*, what it gives with one hand the court takes away with the other. Initially it found that the Musqueam Nation could prove its prior occupation of the lands in question and the traditional character of the practices associated with the land:

> [t]he evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day.[45]

The existence of this traditional use of the land and its forbearance upon the vitality of certain customs is sufficient for the Crown to recognize that there is a legitimate basis for the protection of the Indigenous right to continue such activities. But the extent of the

[44] Asch. "*Terra Nullius*." 28
[45] *R. v. Sparrow* [1990] 70 D.L.R. (4th) 385 at 398.

necessary rights ends here; there is no discussion of the need for rights that would allow Indigenous groups autonomous decision making authority over the management and use of these resources beyond what is necessary to satisfy the parameters the Court has placed upon 'custom'. The Court in fact shifts direction and follows this recognition of traditional right with a reassertion of unilateral Crown sovereignty:

> It is worth recalling that while British policy toward the native population was based on respect for their rights to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vest in the Crown.[46]

This presumption that Crown sovereignty arises "from the outset" of European settlement seems to assert that the land in question was indeed *terra nullius* at the time of contact and ignores Hall's assertion in *Calder*[47] and the previous statement in *Sparrow* itself, both of which point out that Indigenous peoples practiced cultures and forms of self-government over claimed territories at the time of contact. While still recognizing the existence of pre-contact Indigenous cultures of a significant degree of sophistication, the courts have rationalized Crown superiority.

Another important aspect of *Sparrow* was the Court's remarks on the infringement of Indigenous rights. The Court laid out a test that requires the federal government to prove a valid legislative objective associated with infringement that is both "compelling and substantial". The Crown must also assure that the fiduciary duty it owes to Indigenous peoples is honoured, meaning that Indigenous rights must be given priority over non-Indigenous interests.[48] In some circumstances this would require consultation with

[46] *Sparrow* 385 at 404.
[47] *Calder* at 169-170
[48] *Sparrow* 385 at 398.

Indigenous peoples before any infringement of right can take place.[49] Together these stipulations, though showing that Indigenous title was not invulnerable to competition with other interests, provided a sturdy bulwark to protect against potential disregard. Yet in the Court's later ruling in *Gladstone* it moved to a definition of infringement that left Indigenous rights more susceptible to a diversity of interests including the amorphous content of "public interest". Chief Justice Lamer contended that, because

> Aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account that Aboriginal communities are part of that community), some limitation of those rights will be justifiable.[50]

While this does not suggest that public interest alone is sufficient for overriding Indigenous rights, Lamer goes on to assert that government allocation of resources can take into account "objectives such as the pursuit of economic and regional fairness, and the recognition of the historic reliance upon, and participation in, the fishery by non-Aboriginal groups."[51] This clearly suggests that Indigenous rights can be infringed by legislation for the general and vague purpose of "economic and regional fairness". The problem with this, which has been subsequently highlighted by Justice McLachlin in dissenting remarks aimed at Lamer's findings in *Gladstone*, is that it extended the meaning of "compelling and substantial" as defined in *Sparrow* to account for "any goal which can be justified for the good of the community as a whole, Aboriginal and non-Aboriginal."[52] She held that this

[49] *Ibid.* at 404.
[50] *R. v. Gladstone* [1996] 2 S.C.R. 723 CNLR 65 at 73
[51] *ibid.* at 75
[52] *R v. Van der Peet* [1996] 2 S.C.R 548, CNLR 177 at 304

would permit the Crown to "convey a portion of an Aboriginal fishing right to others, not by treaty or with consent of the Aboriginal people, but by its own unilateral act."[53]

The regression of the definition of "compelling and substantial" from *Sparrow* to *Gladstone* and the corresponding weakening and uncertainty of the constitutional protection of Indigenous rights is further evidence that any approach to rights that is based upon a culturalist framework, and thus relies upon the Court's opinion of Indigenous culture and tradition, is inherently susceptible to the shifting conceptions of the Court. The underlying concern is that a culturalist approach to Indigenous rights cannot provide the level of assurance, security and protection that robust rights to self-determination would.

***R. v. Van der Peet* [1996]**

The Supreme Court remarks in *R. v. Van der Peet* [1996] illuminates this dilemma as it provides a clarification of how the Court understands the goal of Indigenous rights and provides a window into the reasoning behind the Court's preference for the culturalist approach. The question before the Court was whether or not Indigenous fishing rights extended to the commercial selling of fish. In a seven to two decision the Court decided that it was not and in doing so established a test to determine if Indigenous rights existed. The Court asserted that to be an Indigenous right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Indigenous group asserting the right.[54] The justices argue that the purpose of Section 35 of the Constitution, the protection of Indigenous rights, is to provide "the means by which that prior occupation is reconciled

[53] *ibid.* at 315
[54] *Van der Peet* at 46

with the assertion of Crown sovereignty over Canadian territory."[55] The implication of this is that, because they are seen as a means to reconcile Indigenous prior occupation with Crown sovereignty, Indigenous rights are necessarily precluded from being the means by which that sovereignty itself may be challenged.[56]

The "means by which prior occupation" is reconciled with Crown sovereignty involves giving the courts the purview to judge which Indigenous practices merit constitutional protection. *Van der Peet* chips away and weakens the substance of Indigenous rights by viewing them through a culturalist lens that aims at reconciling Indigenous prior occupation with Crown sovereignty rather than questioning the dubious foundations of this relationship.

***Delgamuukw v. British Columbia* [1997]**

Special attention to the Court's culturalist approach should be paid to *Delgamuukw* as it signals the first time the Court made a direct ruling on the nature of Indigenous title. The proceedings were started by the Gitxsan Nation and the Wet'suwet'en Nation in 1984, in which they claimed ownership to 58,000 square kilometers of northwestern British Columbia, and concluded in 1997. The Court rejected the governments' position that Indigenous title is limited to historic uses of land, but also rejected the claimants' assertion that it is equivalent to inalienable fee simple estate.[57]

The key finding in *Delgamuukw* was the Court's placing of an inherent limitation on the purpose for which Aboriginal title lands can be used. The limitation is:

[55] *ibid.* at 43
[56] Asch, "*Terra Nullius*." 29
[57] McNeil, "Defining." 10.

> Lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to Aboriginal title.[58]

For example, land that was traditionally used as hunting grounds cannot now be exploited in ways that would destroy its value for hunting. Chief Justice Lamer expands this reasoning to customary uses such as those associated with ceremonies and traditional cultural practices:

> [I]f a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land is such a way as to destroy that relationship (e.g. by developing is in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[59]

The Chief Justice avoids limiting Indigenous title exclusively to historic uses, but the restriction he places on the uses Indigenous peoples are allowed to make of it today suggests that Aboriginal people may become prisoners to their past.[60] Lamer C.J. tries to dispel this fear by emphasizing that the limitation does not restrict use solely to activities traditionally associated with the land.[61] His reasoning leads to a conception of the inherent restriction on Indigenous title as one in which the present uses of traditional land are not restricted to, but they *are* restricted by, past practice and traditions. But, as Kent McNeil asks, what if they are restricted by past practices and traditions that no one wants to follow anymore? What if traditional practices have become morally repugnant to the community, or simply that those associated with the land, such as hunting, no longer provide the economic opportunities required for the community to thrive? Lamer's formulation imposes a paternalistic straightjacket by imposing restrictions on Aboriginal title in the interests of cultural

[58] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at 124
[59] *Delgamuukw* at 128
[60] McNeil, Kent. Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right? Toronto: York University Press, 1998. 12
[61] *ibid*.

preservation, restrictions that could in all likelihood hinder the community's capacity to adapt to new circumstances and capitalize on new opportunities.

The problem with the current state of Indigenous – settler-state relations in Canada lies in the fact that the Court has continued to employ a culturalist framework. The justices' remarks portray Indigenous rights as flowing exclusively from traditional practices and customs, not from the existence of a prior and fundamental right to self-determination, and limit the rights to be conferred to those that are necessary for the preservation of such traditional practices. As Kent McNeil argues, "the omission of the basic right to control one's own adaptation to modern circumstances will inevitably lead to either cultural stagnation or assimilation."[62]

3.2 Indigenous Rights in Australian Courts

Early interactions between the Indigenous peoples of Australia and European settlers and the ensuing historical relationship have been very different from those in Canada. Significantly, no treaty has ever been signed in Australia between settlers and Indigenous peoples. This has had a considerable influence on the way the High Court of Australia has defined and narrowed the definition and application of Indigenous rights since the myth of *terra nullius* was finally discarded in *Mabo* (1992). One consequence has been the sustained centrality of the Court in defining Indigenous title and developing what it can achieve. Unlike the Supreme Court in Canada, which has recently shown an aversion to dealing with fundamental questions pertaining to Indigenous rights[63], the High Court in Australia has

[62] McNeil, Kent "The Meaning of Aboriginal Title" in Michael Asch (ed). Aboriginal Treaty Rights in Canada. University of British Columbia Press: Vancouver, 1997. 144

[63] *Van der Peet*, per McLachlin J, para 313 and *British Columbia (Minister of Forests) v Okanagan Indian Band [2003] 3 SCR 371, per LeBel J, para 47*

retained a primary role for determining the fundamental nature of the recognition and protection afforded to Indigenous title.

However, despite significant historical, social, cultural and political divergences, the result of Australian jurisprudence affecting Indigenous title has, like in Canada, been a mixture of promise, hope and regression. The source of this frustration is the courts' use of the culturalist approach to Indigenous rights. The courts have consistently viewed Indigenous rights as cultural rights, and the right to self-determination as merely instrumental to the protection of traditions and customs.

Mabo v Queensland (No. 2) **[1992]**

Modern Indigenous title jurisprudence in Australia is still reverberating from the aftershocks of the High Court's historic ruling in *Mabo v Queensland [No. 2]* (1992). In it the Court explicitly rejected the doctrine of *terra nullius* and recognized the common law doctrine of Aboriginal title. The action was a test case to determine the legal rights of the Meriam people to lands on the Torres Strait Islands. By the time *Mabo* was before the High Court the judiciary was prepared to reject the standards adopted at the time of acquiring sovereignty[64] because, as Justice Brennan's saw it, there was a 'choice of legal principle to be made':

> It is imperative in today's world that the common law should neither be or be seen to be frozen in an age of racial discrimination… The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.[65]

[64] Streilen, Lisa. Compromised Jurisprudence: native title since Mabo. Aboriginal Studies Press: Canberra, 2006. 12

[65] *Mabo v Queensland [No 2]* (1992) 175 CLR 1. at 41.

The central question in *Mabo* was whether, on acquiring sovereignty, the Crown asserted radical title to all of the land or whether the Crown's title was burdened by prior Indigenous title. The Court found that because "ownership could not be acquired by occupying land that was already occupied by another",[66] Crown sovereignty did not carry with it the beneficial title to all the lands of the territory, and that the pre-existing rights of the Indigenous peoples survived the acquisition of sovereignty.[67]

This decision forced the Crown to reconsider of the consequences of settlement. *Mabo* acknowledged that Indigenous title derives its content from the laws and customs of the Indigenous peoples themselves and so, not being a creature of the common law, was not dependant on Australian laws or statutes to bring it into being, nor did it rely on express recognition by the state. According to Justice Brennan:

> Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[68]

However, this notion of the *sui generis* quality of Indigenous title would not rest easy with the Court's position on extinguishment and its preferencing of non-Indigenous interest, both of which also found their source in *Mabo*.[69]

On the matter of extinguishment, Justice Toohey argued that the nature of Indigenous title should not determine the power of the Crown to extinguish the title unilaterally.[70] The High Court decided that up until the passing of the *Racial Discrimination Act* in 1975, which protected against the unfair treatment of people because of their race, colour, descent or national or ethnic origin, the Commonwealth had the power to abrogate the rights of

[66] *ibid*. at 45
[67] *ibid*. at 41-45
[68] *Mabo* at 64
[69] Streilen, Compromised.109-110.
[70] *ibid*.18

Indigenous peoples for the benefit of settlers. Justice Brennan explained that Indigenous title was exposed "to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title,"[71] and consented to the Court's assertion that Indigenous title could be lost where the traditional connection to the land was broken, has been surrendered, or become extinct. Thus Indigenous title was extinguished by the grant of private rights in the land to the exclusion of Indigenous peoples. The Court declared that non-Indigenous private rights to the land held priority over Indigenous title because the latter, due to its *sui generis* nature, was said not to have its source in the common law, and therefore does not enjoy the same protection as a grant from the Crown and is thereby extinguished wherever there is a necessary contradiction.[72]

The most significant form of extinguishment rested in the Court's declaration that, despite the recognition of Indigenous title, the Crown maintains the power to extinguish such title without the consent of Indigenous peoples by legislation or executive act.[73] In justifying this assertion the Court reiterated that Indigenous title stems from prior occupation and as such does not require the express assent of the Crown.[74] This would appear to be a strong rending of Indigenous title, potentially placing it above the Court's purview to acknowledge any infringement or extinguishment without the consent of Indigenous peoples concerned. However, the Court has seen no inconsistency in the fact that on one hand it has declared Indigenous title *sui generis*, and on the other it continues to reserve the power to make decisions relating to title unilaterally. This contradiction has made Indigenous title more

[71] *Mabo* at 83
[72] Streilen, Compromised. 20
[73] *ibid.*
[74] *ibid.*

susceptible to extinguishment than other forms of title that are protected under the common law.

The notion of Indigenous title imparted by *Mabo* was, despite its promise and historic implications, informed by a culturalist approach. The Court remarked that in order to assert title Indigenous inhabitants would have to show a connection with the relevant land that has been maintained through unbroken acknowledgement of the laws and customs of the group. As Justice Brennan explained, if a group was not able to show that their connection to the land had been substantially maintained Native title would not only cease, but could not be henceforth revived for contemporary recognition.[75] As a result Australian Indigenous title jurisprudence has adopted the view that in conferring rights to Indigenous peoples the aim should be the protection of tradition and customs. Consequently questions of Indigenous self-determination are secondary in importance. The cultural approach adopted by the Court in *Mabo* influenced subsequent decisions and continues to resonate in Indigenous - Crown relations to date.

***Western Australia v Ward* [2002]**

In *Western Australia v Ward* the High Court revisited and redefined the extinguishment doctrine. The case involved a Native title claim brought by the Miriuwung and Gajerrong peoples covering 7900 square kilometers of land and water in the Northern Territory. Within the claim were vacant areas of Crown land, reserved Crown land, Crown land in a pastoral lease granted to the Aboriginal Lands Trust, and several small areas of freehold land. The regional court found that the Miriuwung and Gajerrong peoples could establish the requisite connection with the land and that in many instances Native title had not been

[75] Streilen. Compromised. 16

extinguished. Upon appeal the High Court's decisions concentrated on whether and to what extent Native title had been extinguished. The majority judgment simultaneously broadened the extent of extinguishment and reinforced the vulnerability of Indigenous title to later grants.[76]

The *Ward* decision construed Indigenous title and interests as deriving from traditional law and custom.[77] This had two effects. The first and most apparent was the burden of evidence placed on Indigenous groups. The Court found that failure on the part of Indigenous claimants to establish proof of laws and customs was an indication that title had ceased to exist.[78] Clearly then it would be up to Indigenous peoples to prove to settler courts that their claims were worthy of recognition, a judgment that would be made ultimately by the courts' own understanding of authentic and viable Indigenous culture and law.

Proving the continuation of cultural connections is made all the more difficult by two factors. First, such a connection, being derived from a uniquely Indigenous heritage, will in many cases be part of conceptual framework that does not exist in, and is not entirely comprehensible from, the point of view of the settler society. How are the Courts capable of discerning which cultural practices are bona-fide and deserving of protection when they are always already making such decisions through an imperfect process of cultural translation? The Court's answer to this, often to the detriment of the right of Indigenous peoples to self-identification, has been to impose its own framework for defining cultural practice. This framework in turn threatens to tie Indigenous communities to externally conceived visions of their traditional culture, holding them to understandings of their own customs that they may not share. An example of this is the majority's narrow view in *Ward* of a 'connection' to

[76] *ibid.* 59
[77] *Western Australia v. Ward* [2002] 213 CLR 1. at 15
[78] *Ward* at 26-29

land, which it attributed to the capacity to deny or restrict access to areas. This imports concepts of real property under common law rather than a connection with the land that reflects the *sui generis* nature of Indigenous title.[79]

The second is the amount of time and money that must be expended. Indigenous communities generally face high degrees of poverty and social discord, making the need to settle claims so that development and healing can begin all the more urgent. The cost of hiring external professionals and the time spent on accumulating proof is an unnecessarily punitive aspect of the claims process.

The second effect of *Ward's* conception of Indigenous title as flowing from customs and traditions is that the rights the Court are willing to confer are consequently not derived in prior occupancy nor the practices of self-determination that extended from exclusive use of the lands. This has had similar consequences in Australia as in Canada, whereby the legal assertion of Indigenous rights to robust self-determination is avoided and the question of the illegitimacy of radical Crown sovereignty eschewed.

Ward also gave occasion to a discussion on the application of the 'bundle of rights' concept versus 'interest in land' as it was seen to affect Indigenous title and its extinguishment. Although their remarks were relatively brief on the matter, the culturalist approach the justices applied has important implications. The majority explained that the possession and use of land is not found in the fact of occupation, but from rights conferred by traditional law and custom.[80] While accepting that rights derived from law and custom could be understood as full rights to ownership under traditional law, they rejected the view that the recognition of Indigenous title resulted in communal title that was equivalent to full

[79] *ibid*. at 578
[80] *Ward* at 468

ownership.[81] The potential danger of this reasoning became evident in the Court's reversion to the simplistic bundle of rights idea in their treatment of Indigenous rights to minerals, which traced specific rights to specific laws or practices.[82] In this case the High Court agreed with the judgment in *Yanner v Eaton* that,

> The rights and interests of indigenous people which together make up native title are aptly described as a 'bundle of rights'. It is possible for some of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens 'partial extinguishment' occurs.[83]

The majority determined that traditional laws and customs were not relevant to the ownership of minerals and therefore did not demonstrate an Indigenous right to ownership or use of minerals. They asserted that, "the bundle of rights possessed by the claimants never included 'rights' to take or use minerals or any practice of, or 'interest' in, doing so. There was no evidence of any traditional custom governing, let alone habit of seeking or using minerals from the land."[84] This is clearly a narrow view of the subject matter to which laws and customs might afford some degree of protection.[85]

***Yorta Yorta v. Victoria* [2002]**

The interpretation of the requirements of proof and the meaning attributed to the concept of 'traditional' by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) added to the burden placed on Indigenous groups in their attempt to assert robust rights for themselves and diluted the possible quality of those rights. At the Federal Court it was found that only the traditions and customs observed at the time of settlement

[81] Streilen. Compromised. 69
[82] *Ward* at 615
[83] *Ward* at 615
[84] *Ward* at 638
[85] Streilen. Compromised. 69-70

were understood to constitute the title that burdened the Crown and that title only survived through continued observance of these particular customs.[86] Justice Olney contended that in 1881, merely forty years after European settlement, that Yorta Yorta people had already lost their culture and their status as traditional societies, and by association had lost legitimacy to their claim to rights based upon the continued adherence to traditional customs and laws. He concluded that:

> Preservation of Aboriginal heritage and conservation of the natural environment are worthy objectives … but in the context of a native title claim the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional[87]

The court therefore asserted that despite ongoing physical presence, assertion of rights to land, maintenance of identification as a community and maintenance of a cultural identity, the Yorta Yorta people did not occupy the land in the relevant sense. The High Court based its decision upon two criteria that must be met before Indigenous title could be recognized. First, that the source of rights and interests be found in the normative rules that existed prior to the assertion of Crown sovereignty.[88] Second, that said normative system has had a continuous existence and vitality since sovereignty.[89] The Court ruled that rights and interests created after the declaration of Crown sovereignty, that were not recognized by the common law, could not be given legal effect.

[86] *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] 214 CLR 422. at 33
[87] *Member of Yorta Yorta Aboriginal Community v. Victoria and Others* [1998] FCA 1606. at 128.
[88] *Yorta Yorta* [2002]. at 37 and 38
[89] *ibid*. at 43 and 50

4. The Role of the Courts

The preceding discussion has shown that the Canadian and Australian courts have offered to recognize Indigenous title. But what is meant by 'recognition'? Lisa Streilen has written that, as the Australian High Court understands it, "native title is a common law doctrine aimed at 'recognizing and protecting' the interests of Indigenous peoples, arising from their own normative system, to the land over which they once enjoyed sovereignty and continue to assert rights."[90] The Court has therefore articulated a vision of Indigenous rights that encapsulates Indigenous systems within the common law. There is, as such, a mode of 'mediation' occurring between the two systems of law. But what form does this mediation take and what are its results? The Australian High Court has gone to pains to clarify that this does not entail a dual system of law.[91] But, Streilen comments, "the courts have struggled with the juxtaposition of recognizing the existence of a normative system, as a matter fact, and denying its authority as part of the law of Australia."[92] She cites *Commonwealth v Yarmirr* (2001) in which the majority explained that recognition does not operate under the principles of "conflict of laws", going on to note that Indigenous title requires two systems of law to operate together. They asserted that the common law doctrine of Indigenous title,

> presupposes that, so far as concerns native title rights and interests, the two systems – the traditional law acknowledged and traditional customs observed by the relevant peoples, and the common law – can and will operate together. Indeed, not only does it presuppose that this will happen, it requires that result.[93]

Comparably, in *Mabo*, the purpose of Native title was to leave room for "the continued operation of some local laws and customs among the native people and even the

[90] Streilen. Compromised. 120
[91] *Wik Peoples v Queensland* (1996) 187 CLR 1, 214 (Kirby J)
[92] Streilen, Compromised 120-121
[93] *Commonwealth v. Yarmirr* (2001) 208 CLR 1, 90 [176] (McHugh J)

incorporation of some of those laws and customs *as part of* the common law" (emphasis added).[94] Note that the common law doctrine of Indigenous title does not afford an independent source or equal degree of authority to Indigenous law. As Justice Kirby asserted in *Wik Peoples v Queensland* (1996):

> The theory accepted by this Court in Mabo [No.2] was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so.[95]

Australian jurisprudence therefore asserts that while Indigenous title is meant to "recognize and protect" Indigenous interests "arising from their own normative system", Indigenous customs and laws are destined to be "incorporated" "as part of the common law". A similar conceptualization of the meaning of recognition is found in Canadian jurisprudence. The Supreme Court has asserted that, "from the outset there was never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vest in the Crown."[96] It has also described the purpose of Indigenous title as "the means by which the prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory."[97]

The recognition of Indigenous title in Canada and Australia is therefore one that resides within the common law and already assumes the sovereignty of the Crown. As we can see from the discussion above, the courts' express purpose has not been to take over and enforce Indigenous systems of law.[98] Rather, as Jeremy Webber writes, the law of

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[94] *Mabo* at 79 (Deane and Gaudron JJ)
[95] *Wik* at 237-8
[96] *Sparrow* 385 at 404.
[97] *Van der Peet* at 534
[98] Webber, Jeremy. "Beyond Regret: Mabo's Implication For Australian Constitutionalism." Political Theory and the Rights of Indigenous Peoples. Eds. Duncan Ivison, Paul Patton and Will Sanders. Cambridge, Cambridge University Press, 2000. 60-88. 70-71

Indigenous title is seen as kind of interface between societies presumed to continue with considerable legal autonomy.[99] He continues,

> it requires respect for indigenous systems of land law. It does not absorb them… The effective consequence of indigenous title is therefore the need to manage the interface between non-indigenous and indigenous legal orders.[100]

However, as Webber has pointed out, despite the fact that the recognition of Indigenous title involves a provisional acceptance of the autonomous Indigenous legal orders, that recognition "need not imply any acceptance that indigenous societies are immune from non-indigenous governmental action. The autonomy may exist on sufferance, liable to erosion or obliteration. In that sense, indigenous societies may lack 'sovereignty'…"[101] Faced with the task of managing the interface between Indigenous and non-Indigenous law the courts' recognition of interests finally accommodates to the Crown's legal framework. As Webber remarks, there is "a measure of translation and adjustment in the very act of recognition, and this process may very well be unequal. Indigenous rights are mediated rights."[102]

This is an inevitable consequence of the court's assumption of their own legitimacy and the Crown's sovereignty vis-à-vis Indigenous title. It displays all three of the problems with the culturalist framework. Namely: the undermining of self-determination for court sanctioned cultural rights, leaving too much power in the courts to determine the scope and content of Indigenous rights based on potentially ethnocentric criteria, and outdated views on culture that contravene the principle of equality between peoples. Consequently, the culturalist approach to the Courts' mediation of Indigenous rights represents an intractable obstacle to a broader rights framework for Indigenous peoples.

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[99] *ibid*. 71
[100] *ibid*.
[101] Webber. "Beyond Regret." 63
[102] *ibid*. 66

This culturalist barrier remains a crucial impediment in Indigenous title jurisprudence notwithstanding the courts' stated intentions to give full and liberal recognition of such rights.[103] For instance, in spite of the Supreme Court of Canada's determination in *Calder* that Indigenous entitlement to traditional lands and rights was a burden upon the Crown's radical title, and despite the Court's adoption of contemporary anthropological theory into legal discourse,[104] recent rulings have shown that current judicial thinking on 'culture' and 'tradition' remains static.[105] Imai summarizes the Court's conventional approach as it is taken in *Van der Peet*:

> It is based on the view that cultural practices and beliefs can be taken apart and catalogued into 'integral' and 'incidental' value to a social group. For example, in the Supreme Court of Canada decision, *R v Van der Peet*, Lamer CJ thought that it was reasonable to ask Aboriginal groups to demonstrate that a pre-contact 'practice, tradition or custom was on of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was'.[106] He felt that it would be possible to do this while excluding those practices that 'are true of every human society.[107,108]

John Borrows has criticized the Court's approach for freezing Indigenous societies in the past:

> Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time', central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today. His test invites stories about the past.[109]

We can see a similar pattern in Australian rulings. Kent McNeil explains that,

> In Australia, reliance on traditional laws and customs and the doctrine of continuity has had a very negative impact on Indigenous land rights. Contrary to the all-encompassing native title of the Miriam People declared by the High Court in *Mabo*, in subsequent cases Indigenous claimants have had to prove rights in relation to land by reference to specific laws and

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[103] See discussion of *Calder v. British Columbia* n 52-54 and discussion of *Mabo v. Queensland* n 79-85.
[104] Asch. "*Terra Nullius*." 26-27
[105] Imai. "Indigenous Self-Determination and the State." 291
[106] *Van der Peet* at 55
[107] *ibid*. at 56
[108] Imai. "Indigenous Self-Determination and the State." 291
[109] Borrows, John. "Frozen Rights in Canada: Constitutional Interpretation and the Trickster." American Indian Law Review. 37, 43. 22

> customs at the time of Crown acquisition of sovereignty. The content of their rights is therefore defined by their laws and customs. So even if they were in exclusive occupation of land at the time, they would not, for example, have any rights to minerals if they did not have laws and customs in relation to those resources.[110]

Post-*Mabo* the High Court has therefore treated Indigenous title as a divisible bundle of rights, each arising from specific laws or customs.

The courts in Canada and Australia have circumvented their own reasoning and retracted early promises of a broad recognition of title, providing further evidence that the culturalist framework, though effective in opening legal discourse to the notion of distinctive rights, concurrently 'freezes' those rights in the past and justifies an asymmetry between Indigenous rights and Crown sovereignty.

The question remains how should we envision the future role of the courts in the recognition of Indigenous rights. It is undeniable that recognition of Indigenous title has brought many benefits. [111] Indigenous advocates acknowledge that at times it is more expedient and less traumatic to deal with the courts than taking on governments and public opinion head on.[112] Hence, the continued use of the courts, especially in Australia.

On the other hand it must be understood that in dealing with Indigenous title the common law courts have been conservative in nature, privileging precedent and supporting generally accepted norms from the greater society. Michael Asch has shown that "many judges regard the creation of new laws in the absence of relevant precedence as the task of

[110] McNeil, Kent. "Judicial Treatment of Indigenous Land Rights in the Common Law World." Indigenous Peoples and the Law. 270

[111] For a discussion of why Indigenous peoples would turn to the laws of the colonial state to develop contemporary arguments about rights see Walter, Mark D. "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada." Indigenous Peoples and the Law. 22.

[112] See "Introduction." Behrendt, Larissa. Resolving Indigenous Disputes: Land, Conflict and Beyond. Sydney: Federation Press, 1995.

legislators and believe that judges should leave the task to them."[113] He contends that only a minority of justices would be willing to reconsider the conceptual framework regarding the nature of culture as applied in law.[114] As Peter Russell comments, even in *Mabo*, which was popularly regarded as a dramatic break from established jurisprudence, "the High Court of Australia responded to the *Mabo* litigants with a recognition of aboriginal rights that was timid by international standards and fell far short of what most Aboriginal peoples… would regard as a full and just understanding of their rights."[115] The reason why this was the case in *Mabo* and in the recognition of Indigenous title in Canada is due to the courts' insistence that such recognition be constructed within the common law. As Justice Brennan put it in *Mabo*, the "recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture the skeletal principle of our legal system."[116] This insistence on the mediation of Indigenous title with the common law implies that Indigenous title does not represent a major break with common law precedence and refrains from questioning the legal authority of the state.

For this reason Indigenous peoples are understandably wary of a rights discourse or relying on the courts, themselves settler institutions that have played an integral part in the internal colonization described in the introduction.[117] As Ivison notes, "Western discourses of rights and sovereignty have been used to dominate indigenous peoples as much as to

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[113] Asch, Michael and Bell, Catherine. "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation." Aboriginal and Treaty Rights in Canada: Essay on Law, Equality, and Respect for Difference. Vancouver: UBC Press, 1998. 20-27. 21
[114] *ibid*. 25
[115] Russell, Peter. Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism. Sydney: UNSW Press, 2005. 197
[116] *Mabo* at 43
[117] Ivison. Postcolonial. 164

liberate them."[118] However he also acknowledges that the prevalence of rights language and the influence rights has over law-making and political discourse means that many Indigenous peoples will continue to reach for it to press their claims. He cautiously asserts that, "the success of this strategy, however, will depend on the development of effective mechanisms to enforce and promote the interests to which their rights refer."[119]

Asch has suggested that one such effective mechanism would be to reject the current culturalist approach in favour of an approach that better reflects contemporary knowledge about the nature of human social groups. This approach would mean, "adopting the proposition that all human beings…live in societies and that societies are always organized with respect to all aspects of their social life including, specifically, the ownership of land and jurisdiction over territory and society members."[120] One implication of this would be that the burden of proof would be placed on those parties who would challenge this premise in a specific instance, thus shifting the onus away from Indigenous occupants. Another implication of this would be to enable the courts to refocus their attention to what he considers the essential legal question: How did settler-states and common law legal norms legitimately acquire ownership and jurisdiction over Indigenous peoples and their lands?[121]

Macklem has suggested that another effective mechanism would be to respect the formal equality of Indigenous peoples. This requires the courts to reconceptualize their vision of sovereignty in regards to Indigenous title by recognizing their legal position as prior sovereigns to traditional lands. He asserts that the sovereignty should be seen as a

[118] *ibid*. 164
[119] *ibid*. 165
[120] *ibid*.
[121] Asch. "*Terra Nullius*." 31

malleable form of political recognition,[122] one that makes space for multiple allegiances, co-sovereignties and co-existence.[123] As a part of this new rubric, the courts' interpretive framework should be to aim to understand what parties would have agreed to under equal bargaining terms.[124]

The fact remains that for the time being these legal possibilities are constrained and it is as yet impossible to say when or if they will ameliorate. Under these circumstances Indigenous assertions of self-government will persist, despite facing great difficulties in developing the institutions and mechanisms required to effectively exercise and enforce such rights.[125] In this case, as Ivison puts it, "as much as it is ultimately up to them to take responsibility for re-developing and reasserting these capacities…non-indigenous institutions will be required to help too."[126] Presently the most prevalent of such institutions are the Land Councils in Australia and the Treaty processes in Canada, both of which have been criticized for perpetuating colonial relationships and failing to ensure that all participants have equal and free say in how these processes occur. [127] Ultimately working toward better terms for Indigenous title must be a process shared by Indigenous and non-Indigenous alike, with the responsibility of the latter resting largely in their duty to negotiate in good faith with the former. An integral part of this process will be ensuring that

[122] Macklem. Indigenous. 124
[123] *ibid*. 154
[124] *ibid*. 156
[125] Ivison. Postcolonial. 165
[126] *ibid*.
[127] See, Alfred, Taiaiake. "Deconstructing the BC Treaty Process," Balayi: Culture, Law and Colonialism 3, 2001, for criticisms of the BC Treaty Process and, Behrendt, Larissa. Achieving Social Justice. for criticisms of the Australian Land Councils.

indigenous communities are involved in the conceptualization and execution of such initiatives.[128]

[128] Imai has termed this a 'community-based process' in which the community is given "the space and time to identify its needs, its priorities and the way in which it wishes to proceed. The proposals put forward by the community may not fit neatly into the bureaucratic boxes created by the government departments. But that is the challenge that progressive governments must take up." See Imai. "Indigenous Self-Determination and the State." p. 307

Conclusion

The courts' decisions in Canada and Australia have continuously failed to protect a robust version of Indigenous sovereignty. Rather than recognizing the pre-existing sovereign nature of Indigenous nations, the courts have treated Indigenous cultural difference as though it were the only aspect worthy of constitutional protection, ignoring the fact that Indigenous difference includes prior sovereignty and complex social practices.[129] Failure to recognize and protect interests associated with sovereignty and negotiation processes, not those solely based in custom and tradition, has led to the curtailment of more fundamental political rights. I have argued that the courts' application of a culturalist framework arbitrarily restricts the scope of Indigenous rights to cultural rights by assuming the sovereignty and title of the state over Indigenous peoples. The culturalist framework, despite courts utterances otherwise, still rests on an outdated understanding of Indigeneity that freezes Indigenous rights and title in the past, and implicitly on the *terra nullius* doctrine. Equating Indigenous distinctiveness with cultural difference, no matter how broad the terms, always already assumes the authority of the courts in handing down decisions to Indigenous groups about the authenticity and legal weight of their own cultures on the one hand, and the entrenchment of the settler-state as a normative given on the other. With the foundations of the latter being based in the dispossession of Indigenous lands, the legitimacy of which is doubtful and the central issue of many Indigenous grievances, the blinders inherent to the cultural approach are entirely unsuitable. Macklem summarizes this argument:

[129] Clarke, Jennifer. "Australia: The White House with the Lovely Dot Paintings whose Inhabitants have 'Moved on' from History?" Indigenous Peoples and the Law. p. 81. Clarke notes that such "occasions are also troubling for their emphasis on national redemption and transcendence, without altering in any fundamental way the allocation of resources produced by colonization."

> This approach ignores the possibility that an inquiry into the constitutional significance of indigenous difference requires an exploration not only of whether the Canadian state ought to respect Aboriginal cultural difference but also whether and to what extent the state is entitled to treat Aboriginal people as subject to Canadian sovereignty.[130]

Justice in the pursuit of a better conceptualization of Indigenous title and in the renewal of Indigenous–non-Indigenous relations, which must no longer based in the denial, extinguishment and incorporation strategies of internal colonization, therefore relies on the refusal of the culturalist framework and a commitment to recognizing Indigenous rights as deriving from their status as sovereign, prior occupants owed equal status in negotiations concerning title and rights.

[130] Macklem. Indigenous. 61

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