INDIGENOUS LAND RIGHTS IN THE UNITED STATES, CANADA, AUSTRALIA AND NEW ZEALAND

Indigenous peoples exist in all parts of the world. They are population groups which predate the present state formation and the immigration of other peoples.[1]

The situation is particularly clear in "settler" states, such as Argentina, Canada and Australia. In settler states a non-indigenous national population was created by colonial migration. In other states the colonial process resulted in a mixed-blood national population, as in the Philippines, Mexico and much of Latin America. In both situations the indigenous populations are recognized as "indigenous". Other modern states are a consolidation of previously separate political units. Sometimes a larger state absorbed a weaker neighbouring area, as with the expansion of Japan and Norway over the Ainu and Saami areas on their northern borders. Sometimes the state brings together a number of previously separate entities, often after a consolidation of states in the colonial period, as in India, Indonesia and Nigeria. In these situ-

[1]The term "indigenous" has become the standard terminology at the United Nations and in current literature. It is increasingly used in relation to "tribal", "native" or "minority national" groupings in Asia by scholars and by the peoples in question. See, for example, R. H. Barnes, Andrew Gray, Benedict Kingsbury, *Indigenous Peoples of Asia* (Association for Asian Studies, 1995); Colin Nicholas, Raajen Singh, *Indigenous Peoples of Asia: Many Peoples, One Struggle* (Asia Indigenous Peoples Pact, Bangkok, 1996); Don McCaskill, Ken Kampe, *Development or Domestication? Indigenous Peoples of Southeast Asia* (Silkworm, 1997).

ations the states have not always recognized that they have "indigenous" peoples.[2]

This paper examines developments in the four classic common law settler states: the United States, Canada, Australia and New Zealand.[3] In these states it is accepted that the peoples we are dealing with are "indigenous" peoples, and that their legal and political situation differs from that of other minorities. We want to know the extent to which rights based on their prior control over their lands and peoples are recognized.

The History In The Four Settler States

The colonization of the United States, Canada, Australia and New Zealand was often genocidal in character. Indigenous peoples faced catastrophic population decline and massive losses of lands and resources. In areas where majority settler populations became established, indigenous communities survived as enclaves, often on defined "reservations". In "frontier" areas indigenous peoples were able to survive as majority populations with largely uncontested use of the land, areas like "bush Alaska", the Australian desert, the Canadian arctic.

National and international enterprises moved into these frontier areas in the years following the second world war. All over the world governments and industry co-operated on projects to build hydro-electric dams, explore for oil and gas, mine for uranium and other minerals, and expand logging operations. In the face of this new colonial

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[2]Norway, Sweden, Finland and Russia recognize the Saami as indigenous. Japan has begun to recognize the Ainu as indigenous. India and Indonesia have actively rejected the term "indigenous" for any of their peoples in United Nations meetings. Malaysia was created by the consolidation of a number of separate polities. The numerically dominant Malay population is an old population. Nevertheless indigenous or native minorities have survived both in peninsular and eastern Malaysia.

[3]Other examples of settler states are Uruguay, Paraguay and Chile. Other Latin American states typically have a mestizo majority population. Singapore is also a settler state, with a Chinese population gaining a majority status in a Malay area. Taiwan has small indigenous communities, predating the Taiwanese population.

expansion, the legal procedures, patterns or assumptions that had been involved in the earlier displacement of indigenous peoples were no longer adequate. Often they had never been extended to the frontier areas, leaving the issues of indigenous land rights unresolved. In other cases the explanations that denied indigenous rights in earlier periods were no longer legally or morally credible.

The frontier disputes, along with a new concern for human rights and state legitimacy, prompted a reassessment of indigenous rights to land and autonomy. State legal systems had to move away from strictly colonial assumptions and create a new jurisprudence, one that recognized both the indigenous and colonial legal traditions. It was unacceptable to support rules that made Canadian Indians trespassers on their own lands, or that would allow the Meriam Islanders in Australia to be driven into the sea. These examples of untenable outcomes, taken from judicial statements, were designed to show the need for the recognition of some range of indigenous rights. The new jurisprudence that emerged does not claim to be new. It takes certain ideas or practices from the colonial history, reassesses them and gives them contemporary force. It articulates principles of recognition, reconciliation, partnership and pluralism. The reformulation is not yet complete. My accounts of developments include very recent developments, some not yet resolved.

The United States

The early colonial period in New England was characterized by extensive warfare and the use of treaties to formalize relations between settlers and Indian tribes.[4] Competing ideas about Indian rights were litigated in the early 19th century. In a famous set of cases, often called the Marshall decisions after the Chief Justice who was their primary author, the United States Supreme Court set out certain basic propositions.[5] I summarize them as follows:

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[4] See Francis Jennings, *The Invasion of America* (North Carolina, 1975).

[5] See *Johnson* v *McIntosh* (1823) 21 US 543; *Worcester* v *Georgia* (1832) 30 US 17; Burke, "The Cherokee Cases; A Study in Law, Politics and Morality," (1968-69) 21 *Stanford Law Review*, 500.

(1) The framework for relations between the settler colonies and the tribes derived from international law. The British had gained a position from which they could exclude other colonial powers from the area and the Indian tribes were prohibited from dealing with any other colonial power. The British, and, after them, the United States, could gain jurisdiction and lands from the tribes by way of treaties.
(2) The tribes were "dependant domestic nations", with rights to their traditional territories and a degree of political autonomy.
(3) The treaties had legal force under the provisions of the United States Constitution and were equal in status to treaties with foreign states.
(4) While the Constitution of 1787 did not expressly give jurisdiction over Indian tribes to the national government, the Supreme Court ruled that Congress had a "general power" to legislate over Indians. In the context of the Marshall decisions this general power allowed Congress to protect the tribes from the competing interests of local settlers represented by state governments.

This framework, involving the ideal of the orderly acquisition of lands from Indians by treaty, changed by the end of the 19th century. The western expansion of settlement provoked a series of "Indian wars". The "general power" of Congress over Indians allowed the bilateral framework of the treaty process to be supplemented, and, in time, replaced by the unilateral legislative power of the United States. Congress ended treaty making with the tribes in 1871.[6] In 1883, 1886 and 1903 the United States Supreme Court upheld the power of Congress, by legislation, without Indian consent or treaty, to take jurisdiction from Indian tribes, to break treaties and to interfere with Indian rights to reservation lands.[7] Many tribes were "removed" further west. Reservation lands were "allotted", a process which led to the loss of

[6]For accounts of United States treaties, see F. P. Prucha, *American Indian Treaties* (California, 1994); D. V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago, 1982).

[7]*Ex Parte Crow Dog* (1883) 109 US 556; *U.S.* v *Kagama* (1886) 118 US 375; *Lone Wolf* v *Hitchcock*, (1903) 187.

the best agricultural and grazing lands. It was later said that this massive loss of reservation lands laid the foundations for twentieth century Indian poverty in the United States.

There was some reversal of these trends in the "Indian new deal" in the 1930s. Allotment of reserve lands was stopped. Lands were added to reserves. Tribes were able to reorganize and resume some functions of governments.

Attacks on the system returned in the years after the second World War. Under the federal "termination" policy many Indian communities lost "federal" protection, and came under the legal systems of the individual states. From 1946 to 1977 an Indian Claims Commission awarded very limited compensation to tribes for lost lands. No lands were restored to tribal control. No rights or jurisdiction could be recognized in the Claims Commission process. So while land claims were recognized, they gave as little support for continuing indigenous rights as possible. A simple pay-off of claims was compatible with termination.

By the end of the 1960s, the termination policy was completely discredited, and the United States gradually moved back to policies which enhanced tribal powers of self-government and addressed certain rights claims. The discovery of oil and gas on the north slope of Alaska created legal and political pressure to resolve indigenous rights in that state. There were no treaties for Alaska. The system of Indian reservations and tribal self-government had never been extended to the area. Indian claims had the possibility of delaying the development of the oil and gas fields. The result was the *Alaska Native Claims Settlement Act* of 1971, which authorized compensation of almost one billion dollars and granted large areas of land to special native owned corporations. The settlement recognized Indian rights and Indian control, but involved "termination" (for special Indian rights were to end after 20 years) and assimilation into American capitalism (with Indians becoming shareholders).

The tribes with reservations had their autonomy and jurisdiction enhanced by "self-determination" legislation in the 1970s. The *Indian Child Welfare Act* of 1978 ensured that tribal courts would have jurisdiction over children of the tribe, whether the child or the child's parents were living in the reservation community or not. The Supreme Court upheld tribal powers to tax non-Indian assets on the reserva-

tions. This power to tax, like other tribal powers upheld by the courts, was said to be an unextinguished element of traditional Indian sovereignty.[8]

Disputes over traditional land rights in the United States are understood to have been resolved by a combination of treaties, statutes, awards of compensation by the Indian Claims Commission and special settlements like the ones in Alaska and Maine. The most obvious area where a legal settlement of some kind is not in place is in the state of Hawaii. Perhaps the major resource rights issue in recent years, other than land, has been that of fishing rights for the tribes in Washington State. After extensive litigation, the tribes gained rights to up to 50% of the commercial catch, a right flowing from the judicial interpretation and enforcement of 19th century treaties.

The frontier is gone in the United States. Some kind of legal response to indigenous land rights is in place in the whole country, with the exception of Hawaii. Indian tribes are important parties in resource development issues only to the extent that the resource development is taking place on reservation lands (or settlement lands in Alaska). The idea that the tribes constitute a third order of government in United States federalism, with separate powers, is accepted. Tribal governments have extensive civil jurisdiction, but very limited criminal law power.[9]

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[8] *Merrion* v *Jicarilla Apache Tribe* (1982) 102 S Ct 894.

[9] Because the Indian population in the United States is heavily regional, concentrated in the South-West, the idea of Indian "sovereignty" (as tribal powers are described in United States judicial decisions and legislation) is not well known in many parts of the country. The rise of on-reserve casinos in the last fifteen years has been the most visible sign that the reservations are separate jurisdictional entities. Two recent special background articles in the New York Times, under the series title "Parallel Nations," demonstrated (a) the legal reality of Indian sovereignty, (b) the lack of general understanding of the idea in the United States, and (c) the efforts of some politicians, at both the state and national level, to limit Indian powers of self-government. See Timothy Egan, "New Prosperity Brings New Conflict to Indian Country," *New York Times,* Sunday, March 8, 1998, 1; Timothy Egan, "Backlash Growing as Indians Make a Stand for Sovereignty," *New York Times,* Monday, March 9, 1998, 1.

Canada

The patterns of warfare and treaties in New England before the American revolution included the northern areas which are now the Canadian provinces of Nova Scotia and New Brunswick.[10] Up the St. Lawrence River was the colony of New France. The French had signed no treaties with the Indians.[11] After the French were defeated, British colonial power was unchallenged. The *Royal Proclamation of 1763* tried to control the westward movement of settlers, in order to respond to patterns of Indian resistance on the frontier. The *Proclamation* said that:

> ...the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been ceded to us are reserved to them, or any of them, as their hunting grounds...

This suggested British suzerainty, with the tribal areas being some kind of protectorate. The *Proclamation* set out the procedures for negotiating treaties to acquire Indian territories.

Treaties were used in the areas taken up for settlement after 1763, initially what is now southern Ontario. Land cession treaties were not negotiated for New France or the east coast colonies, where settlement

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[10]The treaties in what are now New Brunswick and Nova Scotia are primarily about sovereignty and political allegiance. They do not cede traditional territories. They are concerned with trading relationships and have promises on hunting and fishing rights. See L. F. S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (UBC, 1979).

[11]There are factors which may explain the lack of treaties in New France. The Indian tribes were actually recent occupants of the area, having replaced another Indian population. Both the French and Indian populations were small, minimizing competition over land. The Indians were partners in the fur trade, an activity in which they were to retain the use of their hunting territories. Indian affairs, in particular the creation of reserves, was in the hand of Roman Catholic religious orders, not the colony as such. See C. Jaenen, *Friend and Foe: Aspects of French-Amerindian Cultural Contact in the Sixteenth and Seventeenth Centuries* (McClelland & Stewart, 1976).

had already occurred.[12] Land cession treaties cover Ontario, Manitoba, Saskatchewan and Alberta, parts of British Columbia and the Indian areas of the Northwest Territories. The major treaties were completed by around 1920. Adhesions to treaties were signed by individual bands into the 1960s. Unlike the United States, treaty making was never formally ended.[13]

The treaty system was obviously incomplete. There were no treaties for most of British Columbia, none in Yukon, none in the Inuit areas of the Northwest Territories, no treaties in Quebec, and no treaties in the Indian and Inuit areas of Labrador. The treaties in Nova Scotia and New Brunswick did not cede the traditional territories of the tribes. Half of the country was covered by land cession treaties. Half was not.

There was another problem. The treaties in the fertile belt of southern Canada envisaged a new agricultural economy for Indians. To this end reserves were to be established on the formula of one square mile per family of five. Once this formula became established it was extended into the northern areas, as far north as the Arctic Ocean, where it made no sense at all. Reserves were never established in the Northwest Territories, in spite of the treaty promises. This failure to fulfil basic treaty provisions made it hard for Canada to claim that the treaties had ended traditional land rights in the north.

The central institution of Indian policy in both Canada and the United States has been the reserve system, with its protected land base and the recognition of chiefs and councils.[14] Reserves were established in all parts of southern Canada, whether land cession treaties had been signed or not. Reserves were not established in the north for either Indians or Inuit. As in the United States there was substantial land loss

[12]Generally speaking, the treaties in Nova Scotia and New Brunswick had not ceded traditional lands to the British, being more concerned with political allegiance and trading relations.

[13]Treaty making has been revived as the method to settle claims in British Columbia.

[14]The reserve system was a system of indirect rule, in which local leaders were recognized, sometimes created, in the process of establishing "bands" and reserves.

from the reserve system in the years after reserves were established, weakening severely the economic logic of the system.[15]

The contradictions and oddities in the Canadian system did not seem to be much of a problem, as Indian populations declined and Indian resistance faded. As elsewhere, the apparent political calm ended in the period after the second World War. Indians had survived, and in both the United States and Canada were fast growing populations, whose claims to decent treatment were difficult to dismiss. Indian poverty was documented in the 1967 report "A Survey of the Contemporary Indians of Canada". Indian rights litigation began, arguing for legal recognition of the hunting and fishing rights promises in the treaties. In the 1960s Indians lost most of these cases.

The national government, in the 1969 "White Paper", sought the termination of the reserve system.[16] Claims to treaty and aboriginal rights were dismissed as trivial or without legal substance. While the reserves were usually rural ghettos of poverty and unemployment, the national policy statement seemed aimed at eliminating what little it was that Indians had under their control. Indians resisted the White Paper, as Indians in the United States resisted "termination" and Maori in New Zealand fought against the changes in Maori land law of 1967. The "unorganized minority", as Canadian Indians had been called, was coming to life. The national government, embarrassed by the Indian opposition to the White Paper, began funding a set of new political organizations, representing Indians, Metis and Inuit. The funding program, the most generous of its kind in the world, continues for national organizations such as the Assembly of First Nations, the Congress of

[15] Lands were lost in a variety of ways. There were "surrenders" by bands of reserve lands, sometimes under dubious conditions, sometimes as a result of clear pressure from government officials. Lands were "cut off" from reserves in British Columbia under special federal legislation. As well, the full allocation of reserve lands was often not set aside on the prairies, giving rise to a modern set of "treaty land entitlement" claims.

[16] The title of the document was "Indian Policy". A "white paper" in the British Tradition is a statement of government policy or intentions. On the white paper, see S. Weaver, *Making Indian Policy* (Toronto.)

Aboriginal Peoples and the Inuit Tapirisat, as well as organizations at the provincial and regional levels.[17]

The courts began to support Indian claims. In the remarkable *Calder* decision in 1973, the Supreme Court of Canada split evenly on the question whether one of the non-treaty tribes in British Columbia retained ownership over its traditional territories. There were differing theories in the judgements on the exact legal basis for upholding aboriginal title to land. The most quoted passage in the judgements simply linked land rights to the prior existence of organized societies:

> ...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means...[18]

No support from international law, colonial practice or domestic law was invoked. The judge rejected the argument that Indian rights could only be enforced if they had been given positive recognition in some way (such as being in an area covered by the *Royal Proclamation* of 1763). The approach which based rights simply on the prior existence of the Indian tribes, without any doctrinal theory or textual support, has been repeated in later cases and represents the basic Canadian approach to indigenous rights.[19] It has led Professor Brian Slattery to suggest that an "intersocietal" law is at work, drawing elements from the pre-existing indigenous legal systems and from British, French and Canadian law. The debate on indigenous rights moved from the question whether the Canadian legal system recognized aboriginal title to land

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[17] The Assembly of First Nations represents Indians with legal connections to the reserve communities, commonly called "status Indians", or in some parts of the country, "treaty Indians". The Congress of Aboriginal Peoples represents off-reserve Indian and Metis people. Inuit Tapirisat represents Inuit. As well, at the national level, there is the Native Women's Association of Canada.

[18] *Calder* v *British Columbia* [1973] SCR 313, 328.

[19] *Guerin* v *Canada* [1984] 2 SCR 335, and later cases. The *Royal Proclamation* of 1763, as well, referred back simply to prior occupancy of the lands by the tribes, without any claim to be applying rules of international law, colonial law or traditional English property law. The quoted statement is quite consistent with the Proclamation and the treaties.

to the question whether the aboriginal title of particular indigenous peoples had been extinguished or limited in some manner since the establishment of colonial sovereignty in the area in question.

The larger context of the *Calder* litigation was a series of disputes over major development projects in northern areas, notably the James Bay hydro-electric project in northern Quebec and the Mackenzie Valley natural gas pipeline in the Northwest Territories. The United States Congress had just enacted the *Alaska Native Claims Settlement Act* to remove barriers to the production and sale of oil. It was becoming clear that these major frontier projects required settlements with indigenous peoples before they could go ahead.

In 1973 the Canadian government announced a policy of negotiated settlements of aboriginal title claims in northern Quebec, British Columbia, the Yukon and Northwest Territories. In 1975 Canada and Quebec signed the James Bay and Northern Quebec Agreement with Cree and Inuit leaders, the first comprehensive land claims settlement in modern Canada. In the period it was often compared to the settlements in Alaska and in the Northern Territory of Australia. The Quebec settlement established the way in which major change would occur in the Canadian system - a negotiated settlement of claims to land and self-government that ended the application of the *Indian Act*. Since 1975 there have been settlements in the Naskapi area of Quebec, in the Yukon, in the Inuit areas of the Northwest Territories and two of the tribal groups in the western Northwest Territories.

From 1978 to 1982 Canada was involved in protracted discussions on constitutional change. While the driving force for change was the need to accommodate French-Canada, the *Constitution Act* of 1982 had very significant provisions on indigenous rights. Section 35 (1) reads:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Supreme Court of Canada ruled in 1990 that this section meant that Indian aboriginal rights to fish on the West Coast were constitu-

tionally protected, in spite of the fact that they had been heavily regulated for one hundred years.[20]

Efforts to deal with traditional land rights in British Columbia moved very slowly after the developments of 1973 and 1982 because of the refusal of the provincial government to join in land claims negotiations. A direct result was the blockades of logging roads and the related protests in the mid-1980s. Those events led to a series of court cases in which pre-trial injunctions were granted blocking logging operations in specific areas until aboriginal title issues were resolved by the courts or through negotiations. In the leading case, involving a stand-off between Indians and loggers on Meares Island, one of the judges of the British Columbia Court of Appeal commented:

> The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid. They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area. They too have drawn the line at Meares Island. The Island has become a symbol of their claim to rights in the land.[21]

And later:

> It has also been suggested that a decision favourable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.[22]

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[20] *R* v *Sparrow* [1990] 1 SCR 1075.

[21] Mr. Justice Seaton in *MacMillan Bloedel* v *Mullin* [1985] 2 CNLR 58 at 69.

[22] *Ibid* 73.

Five areas in the province were subject to pre-trial injunctions blocking logging until aboriginal title issues were resolved.

Trial level judgement was given in the major test case, *Delgamuukw v. British Columbia,* in 1991. The judge held that aboriginal title to land had been extinguished, across the board, by the introduction of general land law in the colony in the 19th century. In spite of this holding, he found an obligation on the part of the province to take Indian land use patterns into consideration in making decisions on natural resource use in the province. This odd compromise was appealed.

Before the appeal was heard an agreement was signed between British Columbia, Canada and the First Nations Summit to establish a Treaty Commission to facilitate the negotiation and settlement of indigenous rights claims in British Columbia. It was clear that the governments did not consider that the trial judgement in *Delgamuukw* provided any stable resolution for the legal, political and social issues involved. As well, it was now clear that the uncertainty caused by the demonstrations and the injunctions had frightened off substantial investment. Business interests wanted governments to get on with the job of negotiating settlements with the tribes. The disputes were bad for business. The issues needed to be resolved.

The Supreme Court of Canada decision in the *Delgamuukw* case in late 1997 strongly rejected the approach of the trial judge. The case was sent back for a new trial, mainly on the basis that the trial judge had dismissed as unreliable the aboriginal oral tradition evidence. The Court stated clearly that aboriginal title to land was a property right, with a clear economic component. It was equivalent to Indian rights to reserve lands. Nevertheless, provincial governments had the power to impair aboriginal rights in a variety of ways, but only with requirements of consultation and negotiation and with clear obligations to compensate the aboriginal people. The Supreme Court stressed the desirability of negotiated settlements of claims. The decision sharply increased the need for negotiated settlements.

Some significant cases occurred during the years that *Delgamuukw* was in the courts. In the *Westbank* case, an Indian band sought a pre-trial injunction prohibiting logging in an area traditionally used by the

band for trapping fur-bearing animals.[23] The judge held that the immediate logging would not have a significant or long-term impact on the trapping activity. He said that logging in future years could have such an impact, and might be blocked. It appears he expected the treaty process to resolve the issues. In the *Halfway River* case a judge invalidated a forestry cutting permit, issued under the provincial *Forest Act*, on the basis that Indian interests in the area in question had not been adequately considered. He held that the cutting permit would infringe upon the Indians right to hunt and on their preferred manner of exercising their traditional rights.[24] In the *Haida Nation* case the British Columbia Court of Appeal held that aboriginal title to land was an "encumbrance" on the provincial governments title to forest lands, a ruling that would restrict the governments ability to issue logging licences.[25] In the *Paul* case a New Brunswick trial judge held that the Micmac Indians had a treaty right to harvest timber off their reserve lands.[26]

The first agreement in principle to settle a tribal claim in British Columbia was signed in March, 1996, between British Columbia, Canada and the Nisga'a Nation. Under the agreement a self-government system will be established, including the possibility of a Nisga'a court. Compensation of $190 million will be paid over a period of years. The Nisga'a will own over 2,000 square kilometres of land, a bit less than ten per cent of their traditional territories. Nisga'a will control timber extraction and forest management on their lands. The Nisga'a will be able to purchase a forestry licence for lands outside the settlement lands. As well the Nisga'a have gained specified fishing rights, both for community use and commercial sale.

In 1996 the Royal Commission on Aboriginal Peoples issued a massive report on aboriginal policy and aboriginal rights. It proposed a new national commitment to partnership and a rejection of assimi-

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[23] *Westbank First Nation* v *British Columbia* [1997] 2 CNLR 221, Curtis, J., British Columbia Supreme Court.

[24] *Halfway River* v *British Columbia* [1997] 1 Canadian Native Law Reporter 45 (British Columbia Supreme Court).

[25] *Haida Nation* v *British Columbia* [1998] 1 CNLR 98.

[26] *R* v *Paul* [1998] 1 CNLR 209.

lation. In January, 1998, the federal government issued a Statement of Reconciliation and a Statement of Renewal, responding to the Royal Commission's report. These statements were the result of six months of negotiation between federal officials and representatives of the Assembly of First Nations. The first statement has been referred to as an apology, though it does not use that word:

> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal Culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.

The second statement looks to a "renewed partnership" between Canadians and Aboriginal peoples. It speaks of strengthening Aboriginal communities and economies. It hopes for a less adversarial future, in which Aboriginal governance can be enhanced.

Australia

Settlement proceeded in Australia without treaties or the recognition of prior rights. A rationale developed for this approach which drew on Blackstone's Commentaries on the Law of England, an important historic legal textbook. Australia, by Blackestone's analysis, was a "settled colony". It had been "waste and uncultivated". The land was "terra nullius", land owned by no-one. The actual reasons for non-recognition were quite different. Aboriginals were organized in small kinship based hunting groups. Their political units were too small to resist colonial encroachment. Aboriginal people did not have the population density and tribal level organization of the indigenous peoples of New Zealand and North America.

The process of settlement was particularly brutal. In Australia punitive raids against Aboriginals continued well into the twentieth century. Populations sharply declined, and aboriginal policy was described as "smoothing the dying pillow". While North American Indians were also seen as a "dying race", conditions were much bleaker in Australia.

The federal constitution of 1900 prohibited any national legislation concerning Aboriginals. This contrasted with the Canadian *Constitution Act* of 1867, where centralized jurisdiction was designed to protect Indians from local settler interests. The idea of protection by means of centralized jurisdiction featured in the Marshall decisions of the United States Supreme Court and in the 1837 Report of the Select Committee of the British House of Commons on Aborigines. But in Australia Aboriginal policy was the responsibility of the individual states. Reserves were established and administered by various state level laws, typically called the *Aborigines Protection Act*.[27] The Australian reserve systems did not have indirect rule local governments, as in Canada and the United States. Instead of Aboriginal councils, there were government appointed boards to administer the system.

Aboriginals survived and the population began to grow. The need for reform was clear. In 1967 the constitution was amended by referendum to allow the national government to legislate about Aboriginals. The hopes for progressive change were initially frustrated. In the first period the national government did almost nothing with its new power.

Resource development issues hit in the north. A large bauxite deposit was discovered on Aboriginal reserve land in the Northern Territory. The national government excised the land from the reserve. Royalties were not paid to the local Aboriginal owners, but into a government fund for Aboriginal programs in the whole territory. The traditional owners challenged the project. The trial judgement in 1972 was remarkable.[28] It took the claim very seriously. The judgement

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[27] In 1869 Victoria enacted the *Aborigines Protection Act*. Similar legislation was enacted in Western Australia in 1886, in Queensland in 1901, in New South Wales in 1909 and in South Australia in 1910. See Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (UBC, 1995) p 18.

[28] *Milirrpum* v *Nabalco*.

had long sections analyzing the expert evidence of elders and anthropologists. Mr. Justice Blackburn ruled that the Aboriginal people had very clear legal systems of land ownership. He analyzed in detail judicial decisions from the United States, Canada, New Zealand and Africa. But, in the end, the Aboriginal plaintiffs lost disastrously on all points. The judge held them to a promise to show continuity of land holding patterns from 1788, when the British first arrived near Sydney. The judge confirmed the application of the Blackstone analysis. Of course it was true, he said, that the lands were not actually unoccupied. It was only in a legal, not a factual way that they had to be considered unoccupied. The findings of fact and of law were so overwhelmingly negative that the decision was never appealed.

Demonstrations were becoming more common, with support from students and trade unionists. The Gurinji in the Northern Territory camped on traditional lands that were part of the vast cattle station of Lord Vestey. In 1972 activist Aboriginals established a tent "embassy" in front of the parliament buildings in Canberra. There were well publicized Aboriginal demonstrations against mining at Nookanbah in Western Australia. The dispute prompted Aboriginal leaders to take their case to the United Nations Commission on Human Rights in Geneva.

The Labour Party came to power under Gough Whitlam in 1972, promising land rights. The initial promise was the recognition of land rights in the whole country. That had to wait for twenty years. Whitlam scaled down his focus to an initial project in the Northern Territory, where the national government had complete jurisdiction. He appointed a commissioner who devised a model involving (a) the transfer of the ownership of existing reserve lands to the traditional Aboriginal owners, (b) the establishment of elected Aboriginal land councils to administer the new system on behalf of the traditional owners, and (c) a claims process to gain title to available traditional lands outside the reserves.[29] On the volatile question of mining, particularly

[29]Land claims were heard by a judge, initially Mr. Justice Toohey, acting as Aboriginal Land Commissioner. In his hands a culturally sensitive and flexible process was established that functioned with great success in hearing claims and reporting to the relevant national minister, who usually confirmed the conclusions. Mr. Justice Toohey was later appointed to the Australian High Court and was one of the judges in the *Mabo* case.

uranium mining, Aboriginal people were given a veto. The veto could be overturned only by a decision of the national cabinet that the mining was in the national interest. Aboriginal people were able to gain control over perhaps 50% of the lands in the Northern Territory. The rest of the land continued in non-Aboriginal hands and no compensation had to be paid to Aboriginal people for the loss of those lands.

The 1976 *Land Rights (Northern Territory) Act*, while devised by the Whitlam Labour government, was enacted by the conservative government of Malcolm Fraser, the government that succeeded Whitlam. Reform of Aboriginal policy had come to be accepted by elites in the various national parties, though the Labour party had gained the strongest image of support for Aboriginal rights. The legislation was copied, without the land claims features, by legislation in South Australia, Victoria, New South Wales and Queensland. In spite of a commission report favouring such legislation, the model was rejected by the government in Western Australia, a state where mining interests were politically powerful.

In 1984 Prime Minister Hawke repeated Gough Whitlam's earlier promise of national land rights legislation. In 1988, in the context of the Australian bicentennial, Hawke promised a national treaty. But there were political and legal hurdles to implementing these promises.

The missing element in the state land rights systems, a land claims process, led to the now famous decision of the Australian High Court in *Mabo* v. *Queensland* in 1992. Though the case actually involved islands that had been confirmed as indigenous lands of the Torres Strait Islanders, the litigation was the occasion for the High Court to reassess the legal framework of Aboriginal rights in the whole country.

An initial ruling in 1985 dealt with legislation by the state of Queensland declaring that any traditional rights to the islands had been extinguished. The High Court ruled that this legislation was invalid because of conflict with the national *Racial Discrimination Act*. It was racial discrimination, the court ruled, to pick out Aboriginal land rights for separate extinguishment. The *Racial Discrimination Act* had been enacted by the Whitlam government in 1975 and had been used against Queensland Aboriginal policy once before. It was to play a crucial technical role in the *Mabo* litigation, protecting Aboriginal lands from extinguishment without compensation.

The main rulings of the multiple judgements in the *Mabo* decision can be summarized as follows:

(1) The Australian common law recognizes a native title to traditional lands. While Australia was a settled colony, the doctrine of "terra nullius" does not apply to Australia. The Blackstone framework was not abandoned, but substantially modified.
(2) Governments in Australia have the power to extinguish Aboriginal title to land by specific legislation or by grants of interests in land. General land legislation is not sufficient to extinguish Aboriginal title.[30]
(3) Since the 1975 *Racial Discrimination Act*, Aboriginal title cannot be extinguished without compensation.

The High Court had delivered the national land rights system that had been promised by Whitlam in 1972 and by Hawke in 1984 and 1988. It fell to the Labour Party government of Prime Minister Paul Keating, Hawke's successor, to respond to the *Mabo* ruling with the *Native Title Act* of 1993, designed to establish an orderly system for the resolution of Aboriginal title claims.[31] As in the Northern Territory legislation of 1976, non-Aboriginal rights to land are confirmed, and no compensation is required to be paid to the former Aboriginal owners for the loss of those lands. A land claims process has been established for those areas where non-Aboriginal land rights have not fully displaced Native title. Because Aboriginal groups in the more densely populated areas will not be able to claim significant lands, the government pledged to establish a fund to purchase lands for Aboriginal peoples.

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[30] In *Wik* v *Queensland* (1996) 141 ALR 129, the High Court ruled that pastoral leases, which cover 42% of Australia, do not necessarily end Native title to land. They would only extinguish those incidents of Native title which are inconsistent with the pastoral lease. After 1975, compensation would have to be paid for any extinguishment of Native title by fresh pastoral leases. See Kent McNeil, *"Co-Existence of Indigenous Rights and their Interests in Australia and Canada"* [1997] 3 CNLR 1.

[31] The national legislation was upheld against competing state legislation in *Western Australia v The Commonwealth* (1995) 183 CLR 373 (High Court).

In the *Wik* decision the Australian High Court held that pastoral leases did not necessarily end Aboriginal native title rights. This ruling was highly controversial, and a new conservative national government introduced legislation essentially designed to reverse the Wik decision. As of writing, the legislation was stalled in the Australian Senate.[32]

New Zealand

The New Zealand story begins with a single document, the Treaty of Waitangi of 1840. The Treaty is recognized as the founding charter for New Zealand and is the central text in all discussions of Maori rights.

The Treaty has three short articles. The Maori chiefs ceded "sovereignty" to the British.[33] The Queen confirmed and guaranteed Maori rights to lands, forests and fisheries, with the British having the exclusive right to purchase those rights from the Maori. In the third article, the Queen extended to the Maori "Her royal protection and imparts to them all the Rights and Privileges of British Subjects." The Treaty committed the British to the recognition of Maori land rights. The contrast to Australia is striking. The Maori had a much denser population and a greater capacity to resist colonial entry, particularly if the different tribes could unite against the colonizer.

On the face of it, it appeared that the treaty would be followed by subsequent treaties or agreements on specific areas of land. But after some shifts in policy, the Maori Land Court was established to handle the transfers of land from Maori customary law to colonial law. Parallel bodies exist in Papua New Guinea, Fiji and various Oceanic jurisdictions to do the same task. But in the United States, Canada and Australia the only bodies which are at all similar are those in Australia estab-

[32]Litigation that might have blocked the new legislation, involving the development of Hindmarsh Island near Adelaide in South Australia, was decided by the High Court in April, 1998. The Court refused to interpret national powers to legislate for Aboriginals as protective only.

[33]There is also a Maori language version of the treaty. The two texts apparently vary, particularly on some of the implications of the transfer of "sovereignty" in the English text. On the treaty in general see C. Orange, *The Treaty of Waitangi* (Allen & Unwin, 1987).

lished under the 1976 *Land Rights (Northern Territory) Act* and the 1993 *Native Title Act*. Those bodies can examine questions of ownership on the basis of traditional land law. They make decisions that establish Aboriginal ownership in areas where competing grants have not extinguished prior rights. In New Zealand the rulings were made to end Maori rights. The Maori Land Court identified the traditional owners of particular lands so that their interests could be sold to non-Maori. A leading Maori scholar called the Maori Land Court system a "veritable engine of destruction for any tribe's tenure of land, anywhere".[34]

The status of the Treaty was litigated in the 19th century. Early decisions relied on the Marshall decisions from the United States, and held that the Treaty of Waitangi, in confirming Maori land ownership, had not asserted anything new or unsettled.[35] But a later case, *Wi Parata*, became the leading authority.[36] It held that the Maori were savages, without rights. It said the treaty was a nullity, because the Maori had no standing to treat. But it also said that the treaty, as a treaty in international law, could not be enforced in domestic courts without legislative implementation.

The Treaty, with its solemn guarantee of Maori land rights, was followed by rapid land loss, fraudulent transactions and the land wars of the 1860s. After the land wars, major areas were confiscated from tribes as punishment for rebellion against the Crown. Maori tried to unite to resist land loss, establishing a king and a parliament. But tribal differences could not be overcome. The land confiscations were so blatantly aimed at grabbing agricultural lands that the government, early in the twentieth century, gave limited compensation to the tribes from whom land had been taken. In the 1920s it also consolidated some Maori lands into corporations to ease, a little, Maori land loss.

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[34] I. H. Kawharu, *Maori Land Tenure* (Clarendon, 1977) p 15.

[35] *Regina* v *Symonds* (1847) New Zealand Privy Council Cases 387 (New Zealand Supreme Court, Auckland).

[36] *Wi Parata* v *The Bishop of Wellington* (1877) 3 NZJR (NS) SC 72 (New Zealand Supreme Court, Wellington). On the *Symonds* and *Wi Parata* decisions see F. Hackshaw, "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi," in I.H. Kawharu, *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford, 1989) p 92.

In 1867 the government established four Maori seats in parliament.[37] This is one of the best known examples of special representation of an indigenous people in the organs of government. It integrates Maori as a minority. It has no relationship to ideas of self-government, tribal sovereignty or autonomy.

Some Maori lands survived, continuing to come under Maori customary laws. The Maori lands, even when Maori communities were located on those lands, were not protected "reserves".[38] There was no system of indirect rule, under which Maori councils could function as some kind of recognized local community government. The only tribal level bodies recognized were tribal trust boards, established to manage annuity payments, paid because of the land confiscations.

The Maori population grew, and the Maori are now about 12% of the national population, a much higher percentage than in Australia, the United States or Canada. Maori also urbanized earlier and more massively than indigenous peoples in the other jurisdictions. Today about one third of the Maori people live in the city of Auckland.

Modern Maori activism began around amendments to the *Maori Affairs Act* in 1967. In 1975 a massive land march trekked through the North Island down to the capital city of Wellington. The militant occupation of Bastion Point in greater Auckland in the early 1980s could not be peaceably resolved. A major police action was necessary. The Bastion Point claim went to court. A long and detailed judgement canvassed the history of the area, rejecting the Maori claim. Once again the courts had proven that they gave nothing to Maori.[39]

A non-judicial forum, the Waitangi Tribunal, was established by an activist Maori Minister of Maori Affairs in a Labour Government

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[37] With electoral reforms in the 1990s, the number of Maori seats increased to 5. Traditionally the four Maori seats were held by Maori who were members of the Labour Party. In contrast, the leadership of the New Zealand Maori Council tended to be members of the National Party. These patterns have broken down in recent years.

[38] Maori lands continued to come under Maori land law, which meant they were owned by families. Owners could sell their lands without the agreement of the tribe or the sub-tribe as a whole.

[39] Litigation in relation to the bed of the Wanganui River and Ninety Mile Beach in the 1960s had also been unsuccessful.

in 1975, as a response to the land march. The Tribunal was advisory only. The Chief Judge of the Maori Land Court was the Chair of the Waitangi Tribunal. There was great historical irony in this linking of the new Tribunal with the old Land Court, with its oppressive history. But the Court had finished its historic work of bleeding Maori of their lands. There was not much Maori land left and the court had become protective of remaining Maori rights. Still the initial performance of the Waitangi Tribunal proved that it was as useless as the regular courts.

The Tribunal was inactive for most of a decade. After the first Maori was appointed as Chief Judge of the Maori Land Court, the Tribunal was reborn. It upheld Maori fishing rights that were being threatened by a large government promoted industrial plant. The unlikely happened. The Tribunal decision, together with financial problems and pressure from environmentalists, led to the cancellation of the project. The Tribunal quickly came to occupy the role that the courts had rejected. It gave reasoned, literate, and scholarly opinions, taking indigenous rights seriously and giving meaning to the Treaty. The Tribunal came to be highly respected, even called the "conscience of a nation".

The courts, perhaps spurred by the praise for the Waitangi Tribunal, began developing a new jurisprudence. It had become common for statutes to say that they were not to infringe on rights guaranteed by the Treaty of Waitangi. The Court of Appeal began giving those references substantive content. It ruled, in the first major case, that the government could not sell state assets without ensuring that the sales would not adversely affect Maori land claims.[40] In another case the court stopped a major government attempt to restructure the commercial fishing industry. The decision lead to a major settlement of Maori fishing claims, with substantial commercial fishing rights assigned to a Maori controlled corporation.

The result of these changes in New Zealand has been the development of a new framework for relations between Maori and Pakeha and the negotiation of comprehensive land claims settlements for

[40] *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

particular tribal groups. The Waitangi Tribunal has been the main instrument for the development of the new framework. It has interpreted the Treaty as establishing a partnership between Maori and Pakeha (the commonly used Maori term for non-Maori). In now common language, the Maori are the people of the land, the *tangata whenua*, and the Pakeha are the people of the Treaty, whose rights to be in New Zealand depend on the Treaty. The Tribunal has given preference to the Maori language version of the Treaty, under which the Maori tribes retained their "*rangatiratanga*". This term is now interpreted to encompass Maori autonomy or self-government. The Tribunal has documented Maori land loss, laying the foundations for a reallocation of resources. It speaks of the Maori regaining a proper tribal endowment, to serve as an economic base. It has condemned the historical work of the Maori Land Court, not just the confiscations. In a recent report it equated the two processes:

> In all, the Muriwhenua claims are about the acquisition of land under a show of judicial and administrative process ... There is little difference between that and land confiscation in terms of outcome, for in each case the long-term economic results, the disintegration of communities, the loss of status and political autonomy, and despair over the fact of dispossession are much the same.[41]

Two comprehensive regional settlements have occurred recently: the Tainui settlement in 1995 and the Ngai Tahu settlement on the South Island in 1996.[42] Under these agreements, the tribes are recognized as owners of lands and as the bodies to handle compensation payments. The settlements do not have provisions on self-government. In 1994 New Zealand announced that it wanted to complete the land claims process by the year 2000 and cap compensation at one billion dollars. Neither goal seems likely to be achieved.

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[41] Muriwhenua Land Report (Wai 45), March, 1997, 7, quoted in S. T. Milroy, "Maori Issues" [1997] *New Zealand Law Review* 247, 252.

[42] Legislation implementing the Ngai Tahu settlement was enacted in April, 1998. The tribe gains 2,300 acres of land. The compensation package is worth $50 million dollars Canadian. The tribe received an apology, as did the Tainui.

As in Canada some cases have emerged in which courts and tribunals require that government agencies hold adequate consultations with Maori communities before land use decisions can be taken.[43] In New Zealand this fits within the ideas of partnership and mutual respect mandated by the Treaty.

Conclusions

In the four classic common law settler states discussed in this paper indigenous peoples lost the control of most of their traditional lands in areas of intensive European settlement, retaining only small enclaves. Only in Australia was this done in a way which completely denied pre-existing rights. Indigenous rights to land in frontier areas were typically left unresolved until the last thirty years.

Contemporary law in the four states recognizes indigenous land rights to community lands (which are often "reserves") and to those parts of traditional territories where indigenous rights have not been extinguished.[44] The legal explanation for this recognition is not uniform. In the United States it is traced back to international law. In Canada it traces back to pre-contact indigenous systems, which survive in a plural or intersocietal legal framework. In Australia the recognition of native title is now held to be part of Australian common law. Canadian courts have increasingly borrowed this terminology from the Australian cases. In New Zealand recognition of land rights is linked to the provisions of the Treaty of Waitangi. In all these cases, of course, the actual nature of the traditional land rights, the legal content, the boundaries and the owners, are determined by rules that come from outside the common law, from outside the law of the settlers.

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[43] See S. T. Milroy, "Maori Issues" [1997] *New Zealand Law Review* 247.

[44] The rules on what can legally extinguish indigenous land rights are incompletely worked out in the four jurisdictions. To further complicate the situation, the exact content of indigenous land rights has not been determined in these jurisdictions, apart from areas covered by comprehensive settlements. An exact definition seems to have been assiduously avoided in all of the litigation to date.

In all cases the recognition is of the customary law of the particular indigenous people, however the rules may be phrased by the courts or in legislation.

It is striking that the recognition of customary land rights has not been linked to any general theory on the recognition of customary law. Debates on "customary law" in the four states have tended to be on issues not related to land. Customary adoption laws have been upheld in two jurisdictions in Canada, though without any general analysis of the survival of customary law in other fields, such as criminal law or land law.[45] The debate on "customary law" in Australia largely focused on criminal law and traditional punishments.[46] Recent cases have suggested that customary law in Australia may be limited to native title.[47]

In all four jurisdictions there has been some movement to ideas that indigenous and tribal minorities require an adequate resource base if they are going to have the choice of surviving and developing as distinct peoples. In this sense, elements of a minority rights analysis have been introduced into the historical-legal framework of land claims.[48] So far this has not been conceptually problematic, for the minority rights analysis has been aimed at establishing the proper elements for a claims settlement, not yet as itself establishing a claim.

In all four jurisdictions there has been some movement beyond seeing the claims simply in terms of land, to seeing them in terms of self-government, self-administration, tribal sovereignty or autonomy. The terms vary, sometimes for reasons that have little to do with indigenous issues. Because of the active secessionist movement in the province of Quebec, the government of Canada refuses to use terms

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[45]The decisions are in the Northwest Territories and British Columbia. See *Re Deborah* (1972) 5 WWR 203 (NWTC.); *Casimel* v *I.C.B.C.* [1994] 3 CNLR 22 (BCCA). See also *Manychief* v *Poffenroth* [1995] CNLR 7 (Alberta QB).

[46]The Law Reform Commission of Australia did an extensive report on the recognition of Aboriginal customary law, which has not been implemented.

[47]*Coe* v *Commonwealth* (1993) 118 ALR 193; *Walker* v *New South Wales* (1994) 126 ALR 321 (both decisions of the High Court).

[48]This is clearest in New Zealand in some of the reports of the Waitangi Tribunal. In Canada it is a major theme of the 1996 report of the Royal Commission on Aboriginal Peoples.

like "self-determination" or "sovereignty" in relation to any groupings within the country. In contrast the United States freely uses those terms to describe domestic indigenous policy. The jurisdictions that have had a system of indirect rule have moved fairly decisively to embrace ideas of tribal sovereignty or self-government, that is the United States and Canada. Innovation in Australia and New Zealand has been largely limited to land rights and compensation, though there is discussion on ideas of self-government and self-administration.

Issues of human rights and state legitimacy have led the United States, Canada, Australia and New Zealand to revise significant parts of their legal traditions. States are attempting to decolonize their relations with indigenous minorities by extending some formal legal recognition to the indigenous legal traditions and by working out new allocations of resources and power. While not without problems and setbacks, this work of creating new rules is now a shared project of judges, legislators and political leaders.

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