

Realising the right of Indigenous peoples to development through common law recognition of Aboriginal resource rights

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The underdevelopment of Indigenous communities worldwide is well known. The poverty endured by Indigenous peoples in developed countries, such as Canada and Australia, is a particular concern. These Indigenous communities have higher rates of infant mortality, lower life expectancy and higher incarceration rates than do non-Indigenous populations. Alcoholism is endemic. The fundamental human rights of Indigenous peoples in Canada and Australia have not been adequately protected. This paper explores the content of Aboriginal title in both jurisdictions.

Introduction

The United Nations Declaration on the Right to Development (the Declaration) establishes that the right to development is an inalienable human right, by which all peoples are entitled to contribute to and enjoy economic, social, cultural and political development. According to Art 1(2) of the Declaration, the right to development 'implies the full realisation of the right of peoples to self-determination, which includes ... the exercise of their inalienable right to full sovereignty over all of their natural wealth and resources'. In other words, Indigenous peoples must have sovereignty over natural resources on their traditional homelands in order for their fundamental human rights to be realised. Aboriginal rights in land and incidental resource rights should be given full recognition so that the right of Aboriginal peoples to development can be realised. The most effective way for Aboriginal rights, and particularly resource rights, to be fully realised is by the recognition of Aboriginal title as an interest in land akin to ownership.

This paper will explore the content of Aboriginal title in both Australia and Canada and will discuss the extent to which each jurisdiction recognises Aboriginal title as a comprehensive right in land, akin to ownership. The jurisprudence in Australia and Canada relating to individual Aboriginal rights that do not amount to an interest in land will be outlined. It will be argued that both jurisdictions have moved towards an approach which narrows and 'freezes' the content of Aboriginal rights. Finally, the discussion will draw on minority jurisprudence and academic critique to formulate

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an alternative approach to determining native title, aimed at full recognition of Aboriginal peoples' right to development.

It is important to note that the common law recognition of native title in both Australia and Canada depends upon a number of conditions, including the requirement of continuity. An examination of these conditions is outside the scope of this discussion. For the purpose of this paper, it is assumed that all other prerequisites for the common law recognition of Aboriginal rights are present. This discussion is concerned with the content of Aboriginal rights. Aboriginal rights in this context include Aboriginal rights and title in Canada and native title in Australia.

Australia

Content of native title rights akin to ownership

Sovereignty over natural resources, referred to in the Declaration, requires the full recognition of the rights of Indigenous peoples to their land by the colonising legal system. The recognised content of title in land must be broad enough to enable Indigenous peoples to exercise sovereignty over the use of natural resources, including the right to regulate and obtain economic benefit from these resources. At common law, ownership or an estate in fee simple is the most comprehensive private interest in land. Native title must be given content analogous to a fee simple interest in land in order for Indigenous communities to enjoy the broadest range of common law property rights.

In 1992, the common law of Australia recognised the native title rights of Indigenous Australians for the first time. In the landmark decision *Mabo (No 2)*, the High Court, by a majority of six to one, accepted that the common law of Australia recognises pre-existing native title rights. Brennan J wrote the leading judgment. He held that although the Crown acquired radical title over the colonised territory of Australia upon the assertion of sovereignty, the pre-existing rights and interests in land of the Aboriginal people remained as a burden on the Crown's radical title. In particular, he stated:

Native title has its origin in and is given its content by the traditional laws acknowledged by and 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. [*Mabo*, 1992, at 79.]

The majority of the High Court in *Mabo* held in obiter that native title could amount to a right analogous to ownership at common law. Brennan J found that the Meriam

people were entitled 'to possession, occupation, use and enjoyment of their land' as against the whole world (*Mabo*, 1992, at 79). In their concurring joint judgment, Deane and Gaudron JJ held that native title 'may be a community title which is practically equivalent to full ownership' (*Mabo*, 1992, at 88).

The recognition that native title could comprise rights equivalent to full ownership was followed in *Wik v Queensland*. Gummow J for the majority found that the nature and incidents of native title vary from case to case. He held that native title rights fall along a spectrum, with rights to access the land to perform specific activities such as hunting or gathering at one end and 'at the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein' (*Wik*, 1996, at 169).

The approach taken by the High Court in *Wik* and *Mabo* implies that Aboriginal groups will have native title akin to ownership over lands which can be properly considered their traditional homeland. Traditional homelands are those lands occupied by Indigenous groups to the exclusion of other groups, from which they derived their livelihood and to which their attachment was greatest. This approach implies that if Indigenous claimants can show that the land was their traditional homeland in accordance with their traditional laws and customs, the courts will recognise rights akin to ownership.

The acknowledgment that native title amounts to possession akin to common law ownership where an Indigenous community occupied land exclusively is consistent with the common law doctrine of adverse possession. Adverse possession is an interest in land acquired by exclusive occupation and use. Once an interest in land has been acquired by adverse possession, the possessor is entitled to put the land to any use. This use will be subject to relevant common law limitations such as those imposed by the law of nuisance, and to legislative restraints created by zoning laws, building codes and the like, as would a fee simple interest. Moreover, as possession of the surface also entails possession of the subsurface, the possessor would generally be entitled to mineral rights (McNiel 1997, 136). Thus, if native title can be characterised as being similar to common law adverse possession, it will include similar rights to those attaching to a fee simple interest.

However, in the decade between *Mabo* in 1992 and *Western Australia v Ward* in 2002, there was a paradigm shift in the way the High Court of Australia determined the scope of native title rights. This shift is demonstrated by an analysis of *Ward*. In *Ward*, Gleeson CJ for the majority held that a finding that the claimants' predecessors occupied the claim area at sovereignty does not, without more, identify the nature of the rights and interests those predecessors held over that area under traditional law

and custom. Gleeson CJ also held that occupation alone is an insufficient basis for concluding that there was native title over the claimed area (*Ward*, 2002, at 39).

Instead of exclusive occupation, the majority in *Ward* affirmed the 'bundle of rights' approach to native title (*Ward*, 2002, at 40). This approach requires that an application for a determination of native title must state the nature and extent of the native title rights and interests in relation to the determination area (*Ward*, 2002, at 30). In other words, the native title rights and interests claimed must be itemised; each right or interest must be shown to arise from the group's traditional laws and customs; and each must be individually proven as a matter of fact.

Rather than recognising native title as an interest in land similar to ownership arising from prior occupation, the High Court has reduced the content of native title to a 'bundle of rights' to perform certain activities on particular areas of land. Professor Bartlett argues that by requiring claimants to itemise and prove individual rights in this way, the High Court has transformed the identification of traditional homelands into an extraordinarily technical exercise, preoccupied with the minutiae of traditional laws and customs and their acknowledgment and observance (Bartlett 2003, 16). This approach denies the full recognition of native title rights.

The 'bundle of rights' approach to determining the content of native title necessarily impacts upon the quality of native title. The High Court has moved away from examining the occupation of land by Indigenous groups with reference to the traditional laws and customs of the society. Instead, each individual incident of native title must be claimed and proved. It is therefore more difficult for Aboriginal claimants to obtain native title rights to exclusive possession, occupation, use and enjoyment enforceable against the whole world.

It is possible for the common law to recognise that exclusive occupation gives rise to comprehensive native title rights in land without itemising each individual incident. The High Court in *Mabo* recognised that if a society existed, it would inevitably have a system of laws or customs (Bartlett 2003, 19). If an organised Indigenous society existed, occupied and survived on the land for millennia, it is beyond doubt that there was a normative system related to that occupation.

Express recognition of resource rights

The 'bundle of rights' approach used by the High Court to determine the content of native title means that resource rights are considered individually. Australian courts have recognised the native title rights of Aboriginal peoples to hunt, fish and gather

food. Although the courts have been willing to recognise these traditional subsistence rights, they have balked at recognising exclusive rights to resources.

In *Ward*, Lee J of the Federal Court decided at trial that native title holders had the right to use and enjoy resources on the land; the right to control the use and enjoyment by others of resources; the right to trade in resources; and the right to receive a portion of any resources taken by others (*Ward*, 1998, at 639).

Kirby J, in his minority judgment in *Ward*, agreed with Lee J and held that 'resources' is an imprecise term which is broad enough to include all things on the land which can be used. This may include minerals and petroleum, along with all other natural resources on the land. Kirby J stated:

The asserted native title right to the use of 'resources' in the area illustrates the ease with which the narrow interpretation of s 223(1) of the NTA would remove the beneficial operation of the NTA to accord full recognition to the interest and aspirations of native title holders. [*Ward*, 2002, at 159.]

Kirby acknowledged that comprehensive native title rights, including resource rights, were necessary for the full recognition of the interests of Indigenous peoples.

However, the majority of the High Court rejected the inclusive approach advocated by Lee and Kirby JJ. The majority was not prepared to find that the Aboriginal claimants had a right to mineral resources. The court found that there was no evidence that the Indigenous claimants traditionally exploited minerals, except that they dug for ochre. Gleeson CJ for the majority found that ochre was not a mineral. To reach this conclusion, he used the definitions set out in the *Mining Act 1904* (Cth) and the *Petroleum Act 1936* (Cth) (*Ward*, 2002, at 113). By using modern definitions of resources, the majority refused to recognise that the claimants had mineral rights arising from traditional law and custom.

The approach taken by the majority in *Ward* precludes native title claimants from exercising rights to exploit resources if they did not exploit the same resources traditionally. More broadly, activities sought to be recognised as incidents of native title must be 'traditional', meaning they must have been performed by the Aboriginal community prior to sovereignty. The claimants were denied mineral rights because the High Court held that minerals were not exploited prior to sovereignty, and ochre, which was used traditionally, was not considered a mineral. This approach has been criticised as a frozen, rather than dynamic, approach to rights recognition (see Bartlett 2003; Borrows 1997–98; Morse 1997; and Rotman 1997). This narrow approach to determining the content of

Aboriginal rights is also emerging in Canadian jurisprudence, as will be discussed further below.

In *Mabo*, the majority of the High Court specifically rejected a frozen approach to determining native title rights. Brennan J held:

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under traditionally based laws and customs as currently acknowledged and observed. [*Mabo*, 1993, at 61.]

Similarly, Deane and Gaudron JJ held:

Traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations did not extinguish the title in relation to that land. [*Mabo*, 1993, at 110.]

Professor Bartlett critiques the 'museum mentality' of the Australian courts that has emerged since *Mabo* (Bartlett 2003). He claims that particularisation of rights is likely to have the effect of restricting evolution of native title rights, as was demonstrated in *Ward* with respect to mineral rights. Bartlett further claims that particularisation of rights led to a list of 'frozen' rights in *Daniel v Western Australia*. In this case, Nicholas J found:

The ... applicants camp from time to time and for that purpose build shelters (including boughsheds, mias (may as) and humpies) and live there. I do not consider the evidence establishes the activity extends to building houses other than shelters. [*Daniel*, 2003, at [260].]

Thus, the court held that the right of the Aboriginal applicants to build houses had not evolved. The Aboriginal community had a right to construct traditional structures on the land, but not to erect modern housing.

This museum mentality emerged again in *De Rose v South Australia*. Here, the use of supermarkets by Aboriginal claimants was considered. O'Loughlin J of the Federal Court held:

Hence, there is always a possibility that usage of a supermarket might be one of several indicia, which, when added together, might lead to the conclusion that such developments could be part of a number of instances of 'modernization' that would, collectively, indicate a break with traditional laws and customs. [*De Rose*, 2002, at [500].]

Kirby J rejected the frozen rights approach. He preferred the approach taken by North J of the Federal Court of Appeal (dissenting) in *Ward*:

In relation to the capacity of the common law to recognize change and development in traditional laws and customs, I prefer North J's approach. It supports the recognition of historical uses of resources, such as ochre. It also includes other minerals. It envisages the extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance. [*Ward*, 2002, at 159.]

The courts in Australia have used the 'bundle of rights' approach to narrow and freeze the nature and incidents of native title, thus denying Indigenous groups the right to modernise and develop. The narrowing of the content of native title in this way is a continued denial of the human rights of Indigenous groups in Australia, and particularly the right to development. The content of Aboriginal title should be determined by the fact that the Aboriginal people in question were in occupation of the land as a distinctive society at the relevant time, not by the specific uses they happened to be making of the land at that particular historical moment (McNiel 1997, 134).

The result for Indigenous Australians is that native title rights may include rights to take certain resources that were traditionally taken from the land for the purposes of sustenance. However, by denying comprehensive rights similar to ownership at common law, the Australian courts inhibit the rights of Aboriginal groups to exploit and regulate resources on their land. The High Court of Australia has systematically narrowed and frozen native title rights since *Mabo*. In doing so, the court has dealt a blow to the aspirations of Aboriginal peoples for economic and political development.

Canada

Content of Aboriginal rights

The human rights position for Indigenous peoples seeking to realise their right to development is somewhat better in Canada than in Australia. In 1982, Aboriginal rights in Canada were given constitutional protection. Section 35(1) of the

Constitution Act 1982 (Canada) protects existing Aboriginal and treaty rights. The Supreme Court of Canada interpreted s 35(1) in *R v Sparrow* and held that the section should be construed in a purposive way. The court found that a generous, liberal interpretation of the words of the provision was necessary to give effect to the purpose of the affirmation of Aboriginal rights (*Sparrow*, 1990, at 407).

R v Van der Peet is the seminal case for determining the scope of Aboriginal rights. Lamer CJ determined that Aboriginal rights are recognised by the common law because when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures, as they had done for centuries (*Van der Peet*, 1996, at 303). The test for determining Aboriginal rights was enunciated as follows:

... in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [*Van der Peet*, 1996, at 310.]

The aim of the recognition of Aboriginal rights was the reconciliation of prior occupation by Aboriginal people with Crown sovereignty (*Van der Peet*, 1996, at 313). Lamer CJ found that the only fair and just reconciliation is one which takes into account the Aboriginal perspective, while at the same time taking into account the perspective of the common law (*Van der Peet*, 1996, at 312).

Aboriginal title

Aboriginal title in Canada is a particular type of Aboriginal right in land. The source of Aboriginal title in Canada was set out in *Calder v Attorney-General of British Columbia*, decided in 1973. Judson J held:

The fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. [*Calder*, 1973, at 156.]

Aboriginal title arises when the land can be considered integral to the distinctive culture of the Aboriginal group. Lamer CJ held that occupancy is the critical element which will determine whether a group has Aboriginal title (*Delgamuukw*, 1997, at 247). If the claimant group can show that they occupied the land prior to sovereignty, and that this occupation was exclusive, the land will be considered 'integral' to the First Nation (*Delgamuukw*, 1997, at 253).

In *Guerin*, the Supreme Court of Canada described the First Nations peoples' rights to land as rights of occupancy and possession. This was further developed by the

Supreme Court in *Delgamuukw*. The court found that Aboriginal title is a right in the land, and as such is more than a right to engage in specific activities on the land. Lamer CJ held that Aboriginal title confers a right to use the land for a variety of activities, which do not themselves need to be Aboriginal rights. The land cannot be used in a manner which is inconsistent with the nature of the attachment to land which forms the basis of the group's Aboriginal title (*Delgamuukw*, 1997, at 240).

Recognition of resource rights

The Supreme Court of Canada specifically held in *Delgamuukw* that Aboriginal title extends to resource rights. As mentioned above, once title is shown, the Indigenous claimants have a right in the land itself. They can do any activities on the land, provided they do not sever their connection with the land. The court specifically held that this includes the exploitation of mineral rights:

Aboriginal title also encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation in some way, which is certainly not a traditional use for those lands. That the content of aboriginal title is not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive aboriginal societies has wide support in critical literature. [*Delgamuukw*, 1997, at 245.]

Aboriginal title in Canada gives rise to the possibility of uses of land other than traditional uses, including comprehensive resource rights, where the connection to the land is sufficiently 'integral' to ground Aboriginal title. However, the approach taken by the Supreme Court of Canada to the determination of Aboriginal rights which are less than full title rights has been criticised. Despite the rhetoric about the importance of giving s 35 Aboriginal rights a broad interpretation, and the consideration of Aboriginal perspectives, the *Van der Peet* test has been subsequently applied in a way that narrows and freezes the recognition of Aboriginal rights in Canada in a manner similar to Australian jurisprudence.

The first issue with the application of the *Van der Peet* test is the initial step which requires that the right being claimed be characterised at the 'appropriate' level of specificity. For example, in *R v Gladstone* the Supreme Court characterised the Aboriginal right asserted by the appellants as a right to attempt to sell herring spawn on kelp (*Gladstone*, 1996, at [22]). The right has been characterised narrowly, rather than as a broader right to fish. A similar approach was taken in *Pamajewon*, where an asserted right to self-government was re-characterised by the Supreme Court as a right to conduct high-stakes gambling on the First Nation's reservation.

This narrow characterisation limits the scope of individual Aboriginal rights. The result for First Nations claimants is uncertainty about the scope of Aboriginal rights that do not amount to Aboriginal title. Claimants must demonstrate that each individual activity performed was integral to their distinctive culture. As in Australia, this increases the burden of proof on First Nations claimants. As Rotman states:

By reducing broad Aboriginal and treaty rights like self-government or fishing to specific practices in cases such as *Pamajewon* and *Van der Peet*, the judiciary divorces those rights from the larger context within which they both originated and continue to exist. [Rotman 1997, 3.]

The second problem with application of *Van der Peet* is that the courts have required that the contemporary activity be capable of being characterised as 'traditional'. For example, in *R v NTC Smokehouse*, the Supreme Court denied the Aboriginal claimants a right to fish commercially. The majority held that a claim to an Aboriginal right to exchange fish commercially places a more onerous burden on the appellant than does a claim to an Aboriginal right to fish, or to exchange fish for money or goods. The court decided that the claimant must demonstrate that, traditionally, the exchange was on such a scale as to be characterised as commercial (*NTC Smokehouse*, 1996, at 537). The court examined the practices of the First Nations claimants prior to contact with Europeans. At this time, the practices of the First Nations group must be able to be characterised as 'commercial' for a contemporary commercial right to exist.

The reasoning in *NTC Smokehouse* has been applied in other Aboriginal rights cases (see, for example, *Gladstone* and *Pamajewon*). Thus, the Supreme Court of Canada has adopted a frozen rights approach, similar to that taken in Australia, by requiring the exercise of modern Aboriginal rights to be able to be characterised as 'traditional'. Bruce Clarke criticises this approach:

Aboriginal people can live today as a continuing manifestation of a culture which demonstrates and values, for example, autonomy, self-sufficiency, competency, consensus-building and respect for nature and other people. That does not mean that they need to do so while wearing furs. [Canadian Bar Association 2003, 7.]

Professor McNiel affirms this criticism and claims:

Every society changes and adapts as new circumstances arise and technological innovations are made ... Societies that are unwilling or unable to adapt are unlikely to survive. [McNiel 1997, 134.]

The courts in Australia and Canada are denying the human rights of Indigenous populations by using the requirement that they be characterised as 'traditional'. If Aboriginal rights were fully respected, they would not be confined within the strictures of traditional uses of the land (Bartlett 1993, 36). Aboriginal people made the fullest possible use of the land consistent with their mode of living. Merely because other uses might be made of the land in a more settled industrial and technological society should not limit their ambit of rights (Bartlett 1993, 41). In order for the right of Indigenous peoples to development to be realised, they must be allowed to have sovereignty over their land and natural resources.

Self-regulation of resource rights

For Indigenous peoples in both Australia and Canada, regulation and conservation of the environment were vital to their survival. Indigenous societies in both Australia and Canada had complex systems for caring for and conserving the environment. The right to development, as set out in the Declaration, contemplates the right to self-determination — including full sovereignty over natural wealth and resources for Indigenous peoples. Traditional laws and customs related to the regulation of the environment were central to Indigenous peoples in both Australia and Canada. Thus, the common law of both Australia and Canada should recognise that the content of native title includes the right of Indigenous peoples to regulate resources on their land. The possible recognition of rights to self-regulation has not been explored by Australian courts. However, it has arisen in the Canadian context.

In *Sparrow*, the Supreme Court of Canada said:

The Aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of fisheries. [*Sparrow*, 1990, at 417.]

In this quote, Lamer CJ acknowledged the importance of the relationship between Canada's Indigenous peoples and the land. In *Sparrow*, the Supreme Court of Canada contemplated that the relationship of First Nations peoples to the land imposed upon the government a duty to inform. Informing Indigenous peoples about the regulations to be imposed upon them does not give effect to the Aboriginal rights that arise from this fundamental relationship.

Since *Sparrow*, Canadian courts have recognised the right for First Nations to regulate certain internal matters, such as the adoption of children (*Casimel*, 1993). However, in *Pamajewon*, the Supreme Court declined to find a broad right to self-government

protected by s 35(1). The majority in *Pamajewon* applied the *Van der Peet* test for determining Aboriginal rights. In this case, the right to regulate gambling which was at issue was held not to be sufficiently 'integral' to deserve protection under s 35(1).

Although the First Nations' claims failed in this particular case, the decision suggests that if the *Van der Peet* integrality test can be satisfied, First Nations may have a right to regulate particular aspects of life. This is the argument put forward by Walter, M'Gonigle and McKay. They suggest that the traditional regulation by First Nations of salmon fisheries would satisfy this test and should receive protection as an Aboriginal right (Walter, M'Gonigle and McKay 2000).¹

Walter, M'Gonigle and McKay advance another theory for the recognition of an Aboriginal right to self-regulation. They suggest that rights to self-regulation may arise as incidents of other Aboriginal rights. They argue that:

A particular right of self-government may arise from establishment of an environmental aboriginal right which in turn might imply a right of governance as to the scope of that right. [Walter, M'Gonigle and McKay 2000, 215.]

This view is supported in part by the decision in *R v Côté*. In this case, the Supreme Court of Canada held that:

... to ensure the continuity of aboriginal customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to the younger generation. [*Côté*, 1996, 408.]

This seems to depart from the previous authority that the practice (in this case, teaching hunting techniques to younger members of the First Nation) must satisfy the test of being integral to the distinctive culture. *Côté* suggests that rights incidental to other Aboriginal rights (that satisfy the *Van der Peet* test) may also be protected under s 35(1). If incidental rights, such as the right to transmit teachings from generation to generation, are protected, it is conceivable that the First Nation may have a right to regulate resource usage where they have a right to exploit resources.

¹ Note that this argument was considered to have merit in the New Zealand context. In 1992, claims for full recognition of Maori customary rights in exclusive fisheries led the New Zealand government to implement the *Waitangi Fisheries Act* and Sealord Settlement Deal, which have given Maori peoples exclusive property rights in a proportion of New Zealand's fisheries, as well as the right to regulate aspects of the resource. See Meyers and Cowan (undated).

The courts in Canada have avoided determining the existence of an Aboriginal right to self-government. However, the two approaches outlined above suggest that there may be alternative means for Indigenous claimants to obtain recognition of an Aboriginal right to regulate resources. In Australia, however, the situation is different. There is no jurisprudence to suggest that Aboriginal claimants will have a right to regulate resource usage. This is partially attributable to the trend in Australian jurisprudence to deny native title resource rights. As a result, Indigenous claimants in Canada have more prospect of realising their right to development than do those in Australia, although the situation in Canada is far from perfect.

An alternative approach

Minority jurisprudence and academic critique in both Australia and Canada provide some hope that an approach focused on the relationship of Indigenous peoples to their homelands, and their survival on those homelands, is possible. This approach has been suggested by minority judges and academics as an alternative to the activity-specific approaches of the majorities in both jurisdictions.

Professor Bartlett suggests an alternative approach to the recognition of native title rights, suggesting that courts focus on the survival and continued existence of Aboriginal communities. He says:

If a traditional indigenous group or society sustained themselves and used the land to the exclusion of other groups or societies, it might properly be asserted that it possessed complete rights over the land. The giving of full respect to the exclusive rights over the land would require acknowledgement of the 'full beneficial ownership' of the group or society. [Bartlett 2003, 30–31.]

Kirby J in his frequent dissent has advocated a broader approach to the content of native title rights, suggesting that rights akin to ownership should be recognised. This would in turn enable the exploitation of resources on the land. Kirby J rejected the majority view, which requires itemisation and proof of each element of native title. In *Ward*, Kirby J held that the object of the *Native Title Act 1992* (Cth) is the recognition of native title, rather than setting out a list of activities permitted on, or in relation to, lands or waters. In advocating a broader approach to the content of native title, Kirby J states:

Nonetheless, because of the principle of equality of the rights of all Australians before the law, where a native title claim is otherwise established as conferring possession, occupation, use and enjoyment of the land and waters to the exclusion of others, there is in my view a presumption that such right carries with it the use and enjoyment of the minerals and like resources of the land and water. [*Ward*, 2002, at 160.]

The views expressed by Kirby J and Professor Bartlett suggest that more emphasis should be placed on the existence of a society and the survival of that society, with reference to the use they made of their traditional homeland. Once it has been established that the group sustained themselves on a particular area of land, rights akin to ownership should be recognised. This would include the right to use the land in any way, and to exploit resources on the land.

This rationale can also be applied to the determination of Aboriginal rights where the claimants do not satisfy the requirements for title to land. In *Van der Peet*, L'Heureux-Dubé focused on the importance of the practice or tradition to the survival of the Aboriginal society:

Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a and means of living as an organized society will fall within the scope of the constitutional protection under s 35(1). [*Van der Peet*, 1996, at 344.]

She also stated:

All practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving protection of s 35(1). [*Van der Peet*, 1996, at 345.]

The advantage of this approach is that it does not narrow Aboriginal rights as does the *Van der Peet* characterisation test and the 'bundle of rights' approach. Nor does it freeze rights. It is a broad approach focused on the continued survival and development of Indigenous peoples. It conceives of broader rights to be recognised if the activities performed contributed to the survival of the community.

An approach that focuses on survival should take account of continued survival of the community. Aboriginal rights should be allowed to evolve over time. In order for Indigenous societies to survive and develop in the modern era, they must be allowed to be self-determining and to exploit the resources on their homelands for economic benefit, using modern practices if desired. They must also be given the freedom to regulate these resources in accordance with their internal priorities.

Conclusion

The situation in Canada regarding the content of Aboriginal title is more favourable for Indigenous claimants than that in Australia. The Supreme Court of Canada recognises that Aboriginal title gives rise to an interest in land similar to ownership.

Title arises from exclusive occupation by the First Nation. First Nations are allowed to undertake a range of activities on the land, including exploiting resources.

In contrast, the courts in Australia have moved away from examining prior exclusive occupation of Indigenous groups in land as a basis for granting rights to land similar to ownership. Instead, the High Court has advocated a 'bundle of rights' approach, requiring claimants to itemise and prove all incidents of native title.

The jurisprudence surrounding the content of individual Aboriginal rights in Australia and Canada has evolved into an activity-specific approach. This involves reducing broad rights to specific practices. This specificity and the accompanying evidentiary requirements have led to the emergence of a frozen rights approach.

If the right to development of Indigenous peoples in Australia and Canada is to be given effect, Indigenous peoples must be allowed to modernise. They must be encouraged to strive for self-determination and economic independence. By focusing on protecting activities necessary for the continued survival of Indigenous societies, the common law may move towards giving full effect to the human rights of Indigenous peoples.

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