9

Constitution as Dialogue: Legal Pluralism and the American Experience

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Legal pluralism has been described as 'a key concept in a post-modern view of law'[1] and has even recently been cited as the 'most convincing and workable theory of law'.[2] Its main premise is that there are spaces of normativity that are not necessarily consistent with the widely acknowledged boundaries of existing legal orders – as such, it detaches the idea of the legal from the formal institutions and procedures of the nation state. More importantly, such an approach both stimulates the memory and facilitates the recognition that there is an *outside*, that the legally monist form with which we have so long been presented is, in fact, not the only one that exists.

Australia's renowned *Mabo* decision paved the way for its arguable categorisation as a legally pluralist jurisdiction, that is to say, one in which more than a single normative order is recognised.[3] The term 'recognised' is used deliberately here, as this was the term employed by Brennan J in his judicial statement and is the concept that serves as the foundation of the statutory definition of native title.[4] Brennan J declared that 'common law … recognises a form of native title which … where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, *in accordance with their laws and customs*, to their traditional lands'.[5] This 'recognition' can be said to operate both as a top-down system and as a foundational support. From the top-down perspective, the Australian legal order *recognises* the Indigenous entitlement and *creates space* within itself to facilitate the fulfilling of this entitlement. From the foundational perspective, the Indigenous laws and customs here function merely to provide a basis upon which the dominant Australian law – in either

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1 Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Post-modern Conception of Law' (1987) 14 *Journal of Law & Society* 279, 297.

2 Sionaidh Douglas-Scott, *Law After Modernity* (Hart, 2013) 23.

3 For more on recognition in terms of native title in Australia, see Kirsten Anker, *Declarations of Interdependence* (Ashgate, 2014) Ch 2, 27-62.

4 *Native Title Act 1993* (Cth) s 233.

5 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 23 (Brennan J). Emphasis added.