Books

INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA by Patrick Macklem, University of Toronto Press, Toronto, 2001, ISBN 0–8020–8049–9

Patrick Macklem's important new contribution to the examination of Aboriginal rights raises issues of Indigenous difference, the Canadian constitution and the redefinition of justice between Indigenous and non-Indigenous Canadians. These issues have importance beyond the context of North America. Although the legal and constitutional recognition of Aboriginal difference is not entrenched in the Australian constitution, negotiations over the meaning of Indigenous rights within a revised Australian national consciousness are of the highest importance in this country. There is a growing momentum in Australia towards widespread legal reform including the recognition of Aboriginal and Torres Strait Island peoples as the first nations of Australia, the negotiation of a treaty or treaties between Indigenous and non-Indigenous Australians and the possible entrenchment of Aboriginal rights in the Australian constitution. Renewed discussions over a Bill of Rights for Australians must also address issues of Aboriginal rights. More and more often Canada is looked to as a potential model for reform in Australia.

Macklem highlights what he describes as 'four complex social facts' that 'lie at the heart of the relationship between Aboriginal people and the Canadian state'.[1] These are:

1. Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life.
2. Prior to European contact, Aboriginal people lived in and occupied vast portions of North America.
3. Before European contact, Aboriginal people not only occupied North America, they exercised sovereign authority over persons and territory.
4. Aboriginal people participated and continue to participate in a treaty process with the Crown.[2]

From these four 'facts', which for Macklem constitute Indigenous difference, the author builds a compelling case that equality, including the just distribution of constitutional power, is enhanced by the construction and support of this difference.[3]

Three of Macklem's four 'facts' are undeniable given even the most cursory examination of Canadian history and current debates over Indigenous rights (as in

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1 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001) at 4.

2 Ibid.

3 Id at 5.

for example the ongoing treaty process in British Columbia). However, his 'fact' of Indigenous sovereignty over territory and persons in North America prior to European contact is a more difficult and complex argument relying on a reinterpretation of the legal invention and development of 'sovereign authority'.

In Chapter 4 the author correctly compares and contrasts the idea of sovereignty as an external concept (from international law) and as an internal matter (in the distribution of authority within a nation-state). Sovereignty in international law has tended to be defined in a way inimical to Indigenous interests. This is a product of both colonial history and the exigencies of a relatively sparse legal discussion on the meaning of sovereignty within international law. The contribution of Indigenous international scholars has more recently forced a fuller inclusion of Indigenous perspectives.[4] As Macklem points out, internal sovereignty has historically been examined in a much more complex and interesting way. This is particularly so in a federal context such as Canada where sovereignty is constitutionally distributed between at least eleven different 'authorities' (the ten provinces and the federal government) and arguably on an even wider basis, including the constitutional recognition of Indigenous 'self-government'. A similar complexity exists in Australia.

But it is difficult to see sovereignty as a 'fact' in the sense that Macklem seems to be suggesting. Rather, sovereignty is a legal construct based on social 'facts' of greater or lesser acceptability at different periods of time. For example, Antony Anghie argues that the creation of concepts of sovereignty in international law depended on pre-existing sociological perspectives, or 'facts', gradually accepted by Europeans from the 15th to the early 20th Century. These 'facts' gradually consigned almost all the non-European world to a zone of 'non-sovereignty' in a legal sense by the height of the colonial period before and after the First World War. These social understandings were based on European ideas about religion, political and social organisation, culture, land use, agricultural and industrial productivity, etiquette and behaviour. European sociological perspectives would seem to have preceded the application of principles of sovereign authority as a matter of international law. As Anghie points out however the definition itself is a result of self-serving preconceptions about the nature of non-European and European societies that justified and furthered the colonial project. The most important distinction was the significance given to agricultural land use as opposed to hunter-gatherer or pastoral ways of life. The colonial project was 'in fact' a means of denying the 'fact' of sovereign authority to all but a few European centres of power from the 15th to the 20th Century.[5]

The recognition of sovereignty for Indigenous peoples in Canada has largely come out of the treaty process, both in the creation of treaties between European

4 See S James Anaya, *Indigenous Peoples in International Law* (1996); Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; Ian Brownlie, *Principles of International Law* (5th ed, 1998) at 125-167; Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accomodation of Conflicting Rights* (1996).

5 Anghie, id.

governmental institutions (the Crown) and Indigenous nations, and in their continuing interpretation. This is perhaps the most interesting aspect of Macklem's study for Australians. Canada consists of a complex web of treaties between Indigenous peoples and Europeans dating back to the 17th Century. This process is ongoing, as Macklem points out. By continuing to engage in tripartite discussions between the federal government, the provinces (where necessary as in British Columbia or Quebec) and individual Indigenous nations, an implicit recognition of Aboriginal sovereignty remains a feature of Canadian national and constitutional identity. This is something that Australia has yet to embrace.

But the treaty process is itself fraught with difficulties. Most recently, a change of government in British Columbia has put the treaty process in that province into some doubt as the newly elected provincial government pursues a policy of a referendum on the treaty-process to be put to all British Columbians. Depending on the question put, and the outcome of this referendum, the tripartite discussions may well be in danger of collapse. Some Aboriginal groups have chosen not to engage in the treaty process, while others have pursued policies denying the acceptance of a self-government model based on a delegated municipal authority. There is a strong argument among some Aboriginal groups in Canada that any negotiation or acceptance of European authority is a denial of Aboriginal rights.[6]

One of the most interesting examples of the recognition of Aboriginal difference within the Canadian constitutional context, based on a long and complex treaty negotiation process, is the formation of the new Canadian territory of Nunavut.[7] Macklem unfortunately says almost nothing about this.[8] 'Nunavut' is an Inuktitut word (the language of the Inuit people of the far North) meaning 'Our Land'. It is both a major land rights settlement treaty between the Inuit people and the Crown (in right of Canada) signed on May 25 1993, and a new Territory carved out of the existing Northwest Territories.

The new territory of Nunavut came into existence on April 1 1999.[9] It covers the northern 20% of Canada's land and sea mass, including the island archipelago of the Canadian High Arctic. The treaty provides for the recognition of Inuit control over land and resources; priority rights over wildlife; a share of royalties

6 See for example Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999).

7 As in Australia, a 'territory' consists of a geographical region in which legislative authority is delegated from the federal to the territorial government. This is different from the ten Canadian provinces which, like states under the Australian constitution, have separate constitutionally-protected sovereign authority. Nunavut is different however from other territories in both Canada and Australia in that it is based on the Nunavut Land Claims Agreement which is a treaty recognised under s.35 of the Canadian Constituton. Nunavut therefore does have 'sovereignty' in the form of constitutionally protected treaty rights to self-government. This makes Nunavut unique and distinct from (in Canada) either the Northwest Territories or the Yukon, or (in Australia) the Northern Territory or the ACT.

8 See at 270.

9 Jose Kusugak, 'The Tide Has Shifted: Nunavut Works for Us, and It Offers a Lesson to the Broader Global Community' in Jens Dahl, Jack Hicks & Peter Jull, *Nunavut: Inuit Regain Control of Their Lands and Their Lives* (2000) at 20.

from oil, gas and mineral development on Crown lands; large capital transfers; and a major trust fund set aside for training and development. In this sense it is not dissimilar to other modern treaty settlements in Canada from the James Bay Cree in northern Quebec in 1975 to the Nisga'a settlement in British Columbia in 1998. What is new about this agreement is that it also stipulated for the formation of a self-governing territory to be administered by the people of Nunavut (both Inuit and non-Inuit) based on the models already existing in the Northwest Territories (which remained after Nunavut's separation) and the Yukon. This self-government is based on the delegation of legislative authority from the federal Parliament in Ottawa to territorial legislative, executive and judicial branches of authority in Nunavut itself. The new capital is Iqaluit (formerly Frobisher Bay) on eastern Baffin Island.

Since April 1999 the people of Nunavut have elected a legislative body, created an effective territorial civil service, enacted legislation and regulations specific to Nunavut, created a unified court system based in Iqaluit (with regular 'circuits' to outlying communities) and begun the process of change to the political, economic and social infrastructure necessary for the people of Nunavut to function as a self-governing entity within the Canadian Confederation. It is the first significant change to the distribution of constitutional power in Canada since the incorporation of the province of Newfoundland in 1949, and the first full Canadian experiment in Indigenous self-government. It is in fact unique, the closest parallel being the administration of Greenland (under Danish authority), Nunavut's nearest neighbour.

What is most challenging for this newest centre of territorial and political sovereignty in Canada is the marriage between a Parliamentary and judicial system based very much on the English common law model, and the uniquely northern way of adapting this model to suit the needs of the majority of the population, 85% of which is Inuit. The traditional Inuit world-view is known in Inuktitut as *Inuit Qaujimajatuqangit,* usually shortened (for the benefit of non-Inuktitut speakers) to 'IQ'. IQ has been summarised as follows:

- It is practical common sense based on teachings and experience passed on from generation to generation.
- It is knowing the country; it covers knowledge of environment (snow, ice, weather, resources) and the relationship between things.
- It is holistic — it cannot be compartmentalised and cannot be separated from the people who hold it. It is rooted in the spiritual health, culture, and language of the people. It is a way of life.
- *Inuit Qaujimajatuqangit* is an authority system. It sets out the rules governing the use of resources; respect; an obligation to share. It is dynamic, cumulative and stable. It is truth.
- *Inuit Qaujimajutuqangit* is a way of life — wisdom is using knowledge in good ways. It is using the heart and the head together. It comes from the spirit in order to survive.
- It gives credibility to people.

- *Inuit Qaujimajatuqangit* comes from a wide diversity of experience in nature, ranging from teaching and apprenticeship, to hunting and gathering, to absorbing the feel of wild animals and plants, and listening to legends and stories.... To begin to understand *Inuit Qaujimajatuqangit*, a non-Inuk person is required to stop, listen, re-think, and be prepared to encounter an entirely different way of perceiving nature and social structure of Inuit.[10]

In a sense Macklem's thesis on the acceptance of Indigenous difference as constitutionally significant is being tested most acutely in Nunavut where Euro-Canadian and Inuit understandings of governance, law, authority, justice and good relations between individuals and communities are being created in an uneasy co-existence. There is no clear consensus on the meaning or incorporation of 'IQ' in Nunavut, even among Inuit people. 'Difference' is a contested site involving real and often painful choices made by individuals and groups on a day-to-day basis. The legal and constitutional significance of difference involves the deepest challenges possible to Euro-Canadian and Inuit concepts of sovereignty, law, power and social relations. Macklem's book, although providing an excellent discussion of these issues, seems often to have difficulty escaping from its own inevitable Euro-Canadian bias.

An excellent companion to Macklem's book that focuses on the reflections of an English author with a long experience among Indigenous peoples in Canada and elsewhere is Hugh Brody's *The Other Side of Eden: Hunters, Farmers and the Shaping of the World*.[11] Brody proposes a deep and fundamental distinction between Indigenous and non-Indigenous cultures with a particular reference to Inuit ways of living on 'the land'. He examines the central myth of Genesis in Judeo-Christianity as the foundation of Euro-Canadian culture — a culture of agricultural land use and urbanisation, patriarchal control, expansion, and the abstraction of legal and other concepts to suit aggressively mobile social structures. Indigenous cultures on the other hand focus on very specific and detailed knowledge of the land within an indefinite and cyclical conception of time. Inuit culture, for example, has been relatively stable over long periods of time and also remarkably successful in providing a subsistence life for the people who live in the High Arctic. The basis of this success is a close attention to the particularities of land, weather, animals, plants, the sea and the spirit-world. Survival depends on patience, humility, sharing and co-operation. Although apparently 'nomadic', Brody argues forcefully that Indigenous cultures are not normally expansionist and are closely attached to a specific land or country. It is agricultural and industrial societies like those of Western Europe, Canada and Australia that are truly 'nomadic', restlessly shifting from one continent to another. Inuit society traditionally bears little resemblance either in governance, language or social relations to the farming and industrial peoples of 'the South'. Although linguistic translatability is possible (according to Brody) cultural differences are profound.

10 Nunavut Social Development Council, *Inuit Qaujimajatuqangit*, Appendix III (Nunavut, 2000).

11 Hugh Brody, *The Other Side of Eden: Hunters, Farmers and the Shaping of the World* (2000).

This brings us back to the central problem of sovereignty. The meaning of this concept both internally in Canadian (and Australian) constitutional law, and externally in international law, is based on Brody's Genesis model — of an expansionist, mobile, agricultural society based on war and the appropriation and settlement of land. Its fundamental component is territory and the settlement and control of territory by agricultural and industrial societies. 'Sovereignty' as a legal concept must move beyond this model to incorporate the 'other side of Eden' — the Indigenous side. Macklem, in his definition of difference, does not adequately account for the profound challenge that this difference presents to Canadian constitutionality. In a sense the Canadian constitution is based on a model of sovereignty inimical to Inuit and Indigenous 'difference' of any kind. Macklem proposes what is essentially a liberal democratic pluralist model of accommodating difference that may in fact be not that far removed from the more assimilationist constitutional models of the past — models that still operate to full effect in Australia. Unless 'difference' as a legal concept is capable of bridging the fundamental social and cultural 'facts' of Indigenous and non-Indigenous history on a basis of mutual respect, then its constitutional significance will remain debatable and perhaps of little real effectiveness. Nunavut is perhaps the most acutely interesting example of how this difference might be negotiated and reclaimed in a process that could transform and enrich both Inuit and non-Inuit participants. This example, so far to the north, is one that should be of most compelling interest to Australians as they debate these issues in the coming years.

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