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Book Review: Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism, by Peter H. Russell

BOOK REVIEW

RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM BY PETER H. RUSSELL (TORONTO: UNIVERSITY OF TORONTO PRESS, 2005) 470 pages.[1]

BY JACINTA RURU [2]

Recognizing Aboriginal Title is one of the more powerful works published in the area of Indigenous land rights. Written by Peter Russell, Emeritus Professor of Political Science at the University of Toronto, the book's inspiration lies in Australia's groundbreaking Aboriginal title case, *Mabo v. Queensland (No 2)*,[3] and the man behind the case, Eddie Koiki Mabo—or in Russell's own words in dedicating this book to Mabo, "a shit-disturber *par excellence*."[4] But the book does much more than describe the man and the case; it also provides a magnificent insight into the political and legal landscapes (both historical and contemporary) that Indigenous peoples have had to reckon with principally in Australia, but also in New Zealand, Canada, and the United States.

Mabo is the case that revolutionized (or at least should have revolutionized) Australian Aboriginal law. In 1992, for the first time in the history of Australia, the High Court held that in accordance with the common law doctrine of Aboriginal title, a parcel of land (the Murray Islands) is one that the Indigenous owners (the Meriam people) are entitled to possess, occupy, use, and enjoy exclusively. The significance of the decision lies in overruling a past "unjust and discriminatory"[5] application of a legal doctrine—namely an assertion that Australia was

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[3] (1992), 175 C.L.R. 1 (H.C.A.) [*Mabo*].

[4] Dedication, *supra* note 1.

[5] *Mabo*, *supra* note 3 at 42.

terra nullius prior to European arrival—and reconsidering it in light of the "values of justice and human rights ... which are aspirations of the contemporary Australian legal system."[6] This new spin on an old law became "Australia's top political news story," as Russell learned when he began reading through a "trolley load of files"[7] upon his arrival in Australia a year or two after the *Mabo* decision. Fascinated, Russell embarked on a mammoth research task and, ten years later, published this fine book.

The book had its genesis in seeking to better understand why imperialism played out differently in Australia than in British North America and New Zealand, why Australia was comparatively so late in recognizing its Indigenous peoples, and whether judicial recognition would similarly be a catalyst in propelling Indigenous resistance to colonialism in Australia as it has been in Canada. Russell wanted to know who Eddie Mabo was, what led him to pursue this seemingly impossible lawsuit, and how important he was to Australia's rejection of the *terra nullius* doctrine. The book thus interweaves two narratives:

> [O]ne is the story of Eddie Mabo, the islander legal warrior; the other is the story of imperialism, colonization, and the efforts of Indigenous peoples in the contemporary period to get out from under the colonialism imposed on them by the English-settler democracies.[8]

The book is divided into four parts, with a total of twelve chapters. In part One, entitled "Setting the Stage," the first chapter introduces Eddie Mabo's life prior to the litigation; the second chapter introduces the themes of Western imperialism; and the third chapter returns to Eddie Mabo and his early involvement in Aboriginal politics. Part Two contains a more thorough discussion, which seeks to uncover why Australia differed from Canada, New Zealand, and the United States in its colonization of its Indigenous peoples, and it provides a comparative insight into how society became more aware of Indigenous peoples' rights after the Second World War. Part Three

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[6] *Ibid.* at 30.

[7] *Supra* note 1 at 4.

[8] *Ibid.* at 10.

focuses on the period leading up to the *Mabo* case (with each chapter still reflecting a comparative analysis). Chapter six discusses the land-rights movements of the 1960s and the 1970s, and chapter seven details the lengthy litigation process up until January 1992, the date of Eddie Mabo's death—some four months prior to the High Court's verdict. Part Four (specifically chapter eight) focuses on the High Court's decision in *Mabo* and its consequences. Chapter nine looks at the immediate political reaction to the case in terms of the passing of the *Native Title Act 1993*.[9] The next chapter explains the impact of this piece of legislation on the courts, and in particular the ramifications of *Wik Peoples v. Queensland*,[10] the first major Aboriginal title case to be decided after *Mabo*. Chapter eleven considers the contemporary political and legal situation in Australia in an international context, and chapter twelve concludes with a consideration of the lasting effects of *Mabo* and subsequent interpretations of the case by the judiciary.

Russell's book is comprehensive, exploring the political and legal history of Australia in an international context, attempting to uncover, for example, why the pattern of colonization was so extreme in Australia. By telling the *Mabo* story in a political and legal context, acutely aware of the developments in the other English-settler dominated countries (Canada, New Zealand, and the United States), this book surpasses most other attempts to bring together an interdisciplinary and comparative insight into Indigenous peoples' experiences with colonization. For example, the edited books in this field, while instrumental, consist of chapters that are mostly written with one country in mind, albeit united under certain themes.[11] In many ways, Russell's book more aptly brings to life the comparative dynamics of what was, and is, really transpiring in the four countries with a legal tradition derived primarily from English common law.

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[9] (Cth.).

[10] (1996) 187 C.L.R. 1 (H.C.A.).

[11] See Paul Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (Auckland: Oxford University Press, 1999); Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

The only other recently published sole-authored book that does a more comprehensive job is legal scholar Paul McHugh's *Aboriginal Societies and the Common Law.*[12] McHugh's book is, as Professor Benjamin Richardson has stated, a "weighty tome" that "verges on the magisterial in its comprehensiveness and depth of analysis."[13] While McHugh's and Russell's books have different intentions, if pressed to choose between them I would categorize McHugh's book as a good reference and Russell's book as a good story. Moreover, Russell's book can be more squarely placed in the category of activist literature for Aboriginal rights than can McHugh's.

However, the beauty of Russell's book is not simply how well the story is told or how seamlessly the transition is made in telling the story of resistance to colonization from the individual, national, comparative, and international perspectives. The attractiveness of this book to the legal academy lies also in the power of Russell's political gaze on law. To narrowly classify it as a "must read" for those interested in Indigenous peoples' legal rights would be a mistake. This book contributes to a growing literature that challenges fundamental notions of the neutrality of law, and Russell has no qualms about describing certain judicial precedents as legal magic. For example, he states: "The initial assertion of sovereignty by the European power or its successor state is regarded by the judges of these states as an 'act of state' (a nice piece of legal magic!) whose legitimacy they will not question."[14] He describes the judgments of nineteenth century U.S. Chief Justice John Marshall as performing a "wondrous feat of legal magic by equating discovery with conquest."[15] Russell reflects: "What

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[12] P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York: Oxford University Press, 2004). Another significant book in this field is Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

[13] Benjamin J. Richardson, Book Review of *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* by Paul G. McHugh (2005) 4 Indigenous L.J. 241 at 241.

[14] *Supra* note 1 at 32. Russell is, of course, not the first to use the expression "legal magic." See *e.g.* Moana Jackson, "The Face Behind the Law: The United Nations and the Rights of Indigenous Peoples" (2005) 8 Y.B.N.Z. Juris. 10.

[15] *Supra* note 1 at 93.

is striking about Marshall's judicial decisions is not that they were so political but that they were so *transparently* political."[16] Russell acknowledges that Justice Marshall had the intellectual honesty and courage to recognize this, and he goes on to state the following, in what is one of my favourite passages in the book:

> We will find a similar honesty and courage in the opinions the justices of the Australian High Court render in the *Mabo* case, but we will also see how badly this quality is received by a legal and political community that continues to believe that judicial decisions, even on great issues of constitutional justice, should float down from an apolitical legal heaven.[17]

Russell assesses this Australian experience in a comparative light and discusses one of the more recent obvious examples where this occurred—the 2003 decision of the full bench of New Zealand's Court of Appeal in *Attorney-General v. Ngati Apa*.[18] In this case, the court held that the judiciary has the jurisdiction, pursuant to statute and the common law doctrine of Aboriginal title, to hear claims from Maori that they still own specific parts of the foreshore and seabed. The fallout was immediate, including attacks on the justices who decided *Ngati Apa*, accusing them of unwarranted judicial activism.[19] Parliament subsequently enacted legislation to annul the decision: the *Foreshore and Seabed Act 2004*[20] declared that land under salt water is Crown land. And thus, as Russell correctly states: "[D]ecisions of high courts upholding Aboriginal rights in settler democracies will be ineffective if they go against the tide of opinion and outlook in the dominant society."[21]

An important theme running through this book thus asks what the appropriate role of the courts is in seeking reconciliation. Russell concludes that in the case of *Mabo* "a measure of justice" was achieved,

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[16] *Ibid.* at 97 [emphasis in original]. See also Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42 Osgoode Hall L.J. 271.

[17] *Supra* note 1 at 98.

[18] [2003] 3 N.Z.L.R. 643 [*Ngati Apa*].

[19] See *e.g.* E.W. Thomas, "So-Called 'Judicial Activism' and the Ascendancy of Judicial Constraints" (2005) 21 N.Z.U.L. Rev. 685 (especially at 695-704).

[20] (N.Z.), 2004/93.

[21] *Supra* note 1 at 98.

and "[t]hat is about all Indigenous peoples can expect from these courts."[22] In citing his earlier work, Russell states:

> At their best, my people's courts can prod, provoke, and, yes, on their *very* best days, inspire my people and our political leaders to work for a just relationship with the peoples we have colonized. But justice will only come through the political agreements my people and Indigenous peoples in freedom construct together.[23]

Russell's gaze and critique of law and the role of courts is not exactly unique. Several scholars disapprove of what occurred, both historically as well as in the courts post-*Mabo*.[24] Russell himself acknowledges and stresses that this book is not a legal book per se, and it would therefore be folly to criticize it from a legal standpoint. Russell simply achieves what he set out to do, and along the way ties together cutting-edge issues that offer an interesting reflection on contemporary society. Russell concludes that it is politics that matters in the end. Many would agree.

It is this project—the political one—that many of the Australian academics supportive of Indigenous peoples' rights have turned their energies to in the quest for reconciliation. The notable recent books, all published after Russell had completed his book, include the following: *Honour Among Nations? Treaties and Agreements with Indigenous People*,[25] *Treaty*,[26] and *Settling with Indigenous People: Modern Treaty and Agreement-Making*.[27]

Returning to one of the pressing questions Russell confronted at the outset in writing *Recognizing Aboriginal Title*—which is why

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[22] *Ibid.* at 381.

[23] *Ibid.* [emphasis in original].

[24] See *e.g.* Richard Bartlett, "An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Claims in the South: *Yorta Yorta*" (2003) 31 U.W.A. L. Rev. 35; Sean Brennan, "Native Title in the High Court of Australia a Decade after *Mabo*" (2003) 14 Pub. L. Rev. 209; Noel Pearson, "The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*" (2003) 7:1 Newcastle L. Rev. 1; and Maureen Tehan, "A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*" (2003) 27 Melbourne U.L. Rev. 523.

[25] Marcia Langton *et al.*, eds. (Melbourne: Melbourne University Press, 2004).

[26] Sean Brennan *et al.* (Annandale, N.S.W.: Federation Press, 2005).

[27] Marcia Langton *et al.*, eds. (Annandale, N.S.W.: Federation Press, 2006).

Australia was at the other end of the colonization spectrum—he answers:

> They could not comprehend or respect that these people, so different from themselves, had an ancient and valuable civilization of their own with its own law, its own political economy, and its own permeating sense of spirituality. This blindness has endured and remains to this day the most fundamental barrier to developing a decolonized relationship with Indigenous peoples in Australia.[28]

This observation made me think of another wonderful non-law book, *Dancing with Strangers*,[29] which begins:

> This is a telling of the story of what happened when a thousand British men and women, some of them convicts and some of them free, made a settlement on the east coast of Australia in the later years of the eighteenth century, and how they fared with the people they found there.[30]

Again, this is a book that was probably published after Russell finished his manuscript, but one that should also be added to the "must read" list. Surely it is one which Russell has since pondered.

Recognizing Aboriginal Title deserves close and thoughtful reading by a wide audience in the legal academy and profession.

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[28] *Supra* note 1 at 75-76.

[29] Inga Clendinnen, *Dancing With Strangers: Europeans and Australians at First Contact* (Melbourne: Text, 2003).

[30] *Ibid.* at 1.