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Book Review: Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights, by Garth Nettheim, Gary D. Meyers and Donna Craig

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INDIGENOUS PEOPLES AND GOVERNANCE STRUCTURES: A COMPARATIVE ANALYSIS OF LAND AND RESOURCE MANAGEMENT RIGHTS BY GARTH NETTHEIM, GARY D. MEYERS & DONNA CRAIG (CANBERRA: ABORIGINAL STUDIES PRESS, 2002)[1] 489 pages.

BY BENJAMIN J. RICHARDSON[2]

Indigenous Peoples and Governance Structures is an important, welcome work, devoted to the complex problem of organizing indigenous peoples' participation in the governance and management of their traditional lands and resources. The authors adeptly cover a potpourri of international experience on this problem, investing the subject with promise, while a sensible, careful analysis gives it great clarity. The result is a book as conceptually helpful as it is practically useful. It takes us beyond the amorphous concepts of aboriginal sovereignty, independence, autonomy, and self-government that have enjoyed wide currency in recent literature,[3] to the nuanced details of how such concepts are being translated into workable institutional structures in specific contexts.

What is apparent through this volume is that despite their enormous diversity—some 300 million members worldwide in more than 70 countries—indigenous peoples face common challenges and recurrent problems in attempting to move beyond recognition of land rights to the

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[3] See S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996); Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

advancement of structures and institutions for land management.[4] Some countries and indigenous communities have had more experience in addressing this problem than others, and the book takes stock of, and evaluates, these experiences (principally in North America, Scandinavia, and New Zealand) with reference to how they might be applied in Australia. The book's stated purpose is "the crafting of governance structures for Indigenous Australians so as to facilitate interaction with non-Indigenous governments and structures while, [*sic*] remaining as close as possible to Indigenous structures and processes."[5]

The book is the result of a research collaboration between Professor Gary Meyers, from Murdoch University; Professor Garth Nettheim, from the University of New South Wales; and Associate Professor Donna Craig, from Macquarie University (who is also a member of the IUCN's[6] Specialist Group on Indigenous Peoples and Environmental Law, and who, in 1996, began the first large-scale investigation of this issue). Over three years of research, with the assistance of Australia's Native Title Tribunal, the team canvassed examples of Aboriginal land management and case law in other countries as a comparison to the Australian situation. The resulting book is a weighty volume of case studies. Its first half canvasses, in separate chapters, the experiences of, and lessons from, different countries and communities, providing in each case an overview and compact analysis of the indigenous land-holding and governance structures. The remaining half-dozen chapters consider specific institutional issues (primarily in an Australian context), including legislative provision for corporations and councils, and the role of negotiated agreements.

The authors' work is clearly important not just in an Australian context, but also to an international audience. They glean a range of information and ideas that will help move debates about indigenous peoples' rights beyond the context of native title and tenure, to indigenous self-government and involvement in the management of native title lands and waters. Inspiration and guidance for this task is said to come from standards established by international law, as well as the practices and experiences of other states. In a variety of jurisdictions, the book finds a discernible movement addressing how indigenous peoples can influence

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[4] For maps and population estimates, see United Nations Commission on Human Rights, *Transnational Investments and Operations on the Lands of Indigenous Peoples: Report of the Centre on Transnational Corporations,* U.N. Doc. E/CN.4/Sub.2/49 (1991).

[5] *Indigenous Peoples and Governance Structures, supra* note 1 at 9.

[6] IUCN - The World Conservation Union, formerly known as the International Union for Conservation of Nature and Natural Resources.

conservation policy and natural resources development, and benefit directly from such land use decisions. The authors appropriately identify international legal standards as part of this movement. For example, the United Nations' *Draft Declaration on the Rights of Indigenous Peoples* stresses in Article 31 that "indigenous peoples, as a specific form of exercising the right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including [...] economic activities, land and resources management," and adds in Article 33 that, "indigenous peoples have the right to promote, develop and maintain their institutional structures."[7]

This book highlights that the key to progress toward a relationship between indigenous peoples and the state that is truly post-colonial is recognizing the rights of indigenous peoples to participate in the management of their lands through institutions and processes that reflect their cultural values and economic needs. Recognition of native title involves accepting the existence of organized societies in occupation and management of specific areas. What has been missing from some judicial understandings of native title (for example, *Delgamuukw v. British Columbia*)[8] is that native title also entails the existence of organized societies capable of exercising quasi-governmental jurisdiction over such lands. Certainly, since indigenous peoples generally have a collectivist conception of rights to land, they need a degree of self-government to administer the natural resources in accordance with cultural traditions.

As the authors acknowledge, Canada's experience in forging governance structures for indigenous communities and lands is extensive. The transformation in the way governments in Canada have responded to First Nations' claims has been extraordinary given that as recently as 1969 the Trudeau government's *White Paper on Indian Policy* referred to Indian claims to land as "so general and undefined that it is not realistic to think of them as specific claims capable of [legal] remedy."[9] This transformation began with the Supreme Court's clear recognition of aboriginal rights in the 1973 *Calder* case,[10] continued through the constitutional entrenchment of

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[7] See *Draft Declaration on the Rights of Indigenous Peoples* as Agreed Upon by the Members of the Working Group at its Eleventh Session, contained in United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities; *Report of the Working Group on Indigenous Populations on its 11th Session*, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) at 50.

[8] *Delgamuukw v. British Columbia,* [1991] 3 W.W.R. 97 (B.C.S.C.).

[9] Government of Canada, *A Statement of the Government of Canada on Indian Policy, White Paper on Indian Policy* (Ottawa: Department of Indian Affairs, 1969) at 11.

[10] *Calder v. British Columbia (A.G.)* (1973), 34 D.L.R. (3d) 145 (S.C.C.) [*Calder*].

"existing aboriginal and treaty rights" in 1982,[11] and the subsequent positive interpretation of these rights by the Supreme Court in a series of cases,[12] notably *Van der Peet*.[13] However, while courts have grappled with the question of defining native title, the pressing work of organizing governance of indigenous lands has occurred elsewhere. Through Canada's Comprehensive Land Claims Process (CLCP), indigenous nations and the federal government have been negotiating complex settlements for, *inter alia*, co-management of native title areas, wildlife management, and regional development.[14] Because Australia's "*Calder*"—the *Mabo* case[15]—came later than Canada's, Australia has tended to look to the experience of Canada and other countries for governance models for indigenous peoples. This is not to suggest, of course, that the Canadian CLCP has been immune from problems, and as the regional agreements evolve there is no doubt that adjustments will be made, in part, in light of the experience of other countries.

Apart from its analysis of developments in domestic legal systems, another strength of this work is its coverage of evolving international law standards pertaining to indigenous peoples. A clear exposition is given to the corpus of treaties, declarations, and other international legislative and policy instruments concerning indigenous peoples. But while there is a growing international solidarity among indigenous peoples, and increasing emphasis on the need for appropriate international standards for these peoples, international law has yet to be a source of any great influence in shaping domestic legal innovations. The United Nations only formally acknowledged indigenous peoples in 1982, when it established the Working Group on Indigenous Populations[16] and, in an unprecedented decision, allowed participation by representatives of the indigenous organizations themselves (culminating recently in the establishment of the UN's

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[11] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) protects existing Aboriginal and treaty rights from unjustified interference but permits constraints that can be justified: e.g. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1109-10.

[12] See *Guerin v. Canada*, [1984] 2 S.C.R. 335; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.); *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. 250 (F.C.A.).

[13] *R. v. Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.) [*Van der Peet*].

[14] For further analysis, see Benjamin J. Richardson, Donna Craig & Ben Boer, *Regional Agreements for Indigenous Lands and Cultures in Canada* (Darwin: North Australia Research Unit, 1995).

[15] *Mabo v. State of Queensland* (1992), 175 C.L.R. 1 (Aust. H.C.) [*Mabo*].

[16] *Indigenous Peoples and Governance Structures*, *supra* note 1 at 21.

Permanent Forum for Indigenous Peoples).[17] The only substantive treaty devoted specifically to indigenous peoples—the International Labour Organization's 1989 *Indigenous and Tribal Peoples Convention*[18]—has just seventeen ratifications, which do not include the main jurisdictions (for example, Australia and Canada) considered in this book.

Although the emerging principles and standards being developed in international law suggest that there is a common normative basis to guide the renegotiation of the relationships between aboriginal and non-aboriginal peoples for land and resource management, it is also evident from this book that not all indigenous peoples want the same institutional structures and that the institutional structures they do seek are highly contextual. Recent history offers various examples of institutional models, but the possible forms are not all apparent and, indeed, remain to be explored. It would, therefore, betray both the past and the promise of the future to codify a one-size-fits-all institutional model for states and indigenous peoples. What is required instead, stresses Donna Craig in her chapter on "negotiated agreements and regional governance agreements," is negotiation and renegotiation: an ongoing process in which specific institutional arrangements for the management of land and resources are developed in response to specific needs and regional circumstances. Negotiation is the means by which international standards and aspirations for sustainable development and human rights protection can be adapted to fit specific contexts.

Though the authors focus on land and resource management issues, it is vital to recognize that there are many other important social and economic issues relevant to the design and operation of indigenous self-governance and co-management. Appropriate treatment of these issues may sometimes collide with other precepts of Aboriginal self-governance and autonomy. Gender issues are an example. In Canada, the lenient sentencing of sexual assault cases in Aboriginal communities has been highlighted,[19] suggesting the implementation of the principle of aboriginal self-government should not be based on ill-conceived attempts to maintain

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[17] On its establishment, see United Nations High Commissioner for Human Rights, *Permanent Forum Within the United Nations System for Indigenous Peoples*, Sub-Commission Res. 1997/10.

[18] *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 27 June 1989, 28 I.L.M. 1382 (entered into force 5 Sept 1991). The current ratifications are Argentina, Bolivia, Brazil, Columbia, Costa Rica, Denmark, Dominica, Educador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, and Venezuela.

[19] See Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 75.

difference. In some respects, aboriginal societies must evolve and change, especially in meeting standards of justice and decency whose validity transcends particular cultures. A similar tension between universal and culture-specific standards can arise in the environmental sphere, where a conflict may erupt between endangered species conservation and maintenance of traditional hunting rights to those species.[20] Again, negotiated agreements would appear to have a role in mediating such potential conflicts.

The authors' research has revealed an array of exciting and promising initiatives for the governance of indigenous lands. Among the leading models identified by the authors are the comprehensive land claims settlements in the Canadian Arctic;[21] the Sámi parliaments established in Scandinavia;[22] and, in Australia, the joint-management of Uluru and Kakadu national parks.[23] The tone of the book is optimistic, suggesting great advances have been made, such as in New Zealand where it is assessed: "the last twenty years have witnessed a radical and irreversible change in the New Zealand government's acknowledgement of Maori interests."[24] We are reminded, however, that insidious setbacks remain an ongoing threat, such as the Australian government's amendments to the *Native Title Act*[25] in the wake of the High Court's decision in the *Wik Peoples* case.[26] The authors' central conclusion is not that separate land and resources management institutions are needed for Aboriginal peoples, but that structures are needed "for the representation of Indigenous rights and Indigenous interests, and for joint Indigenous-non-Indigenous purposes."[27] Their careful analysis of the historical, political, and legal contexts of each country reminds us, however, that successful models developed in one context may not necessarily be readily transferable to another community

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[20] See Michael L. Chiropolos, "Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species?" (1994) 5 Colo. J. Int'l Envtl. L. & Pol'y 213.

[21] *Indigenous Peoples and Governance Structures*, *supra* note 1 at 435-54.

[22] *Ibid.* at 209-35.

[23] *Ibid.* at 400-02.

[24] *Ibid.* at 145.

[25] *Native Title Amendment Act 1998* (Cth).

[26] In *Wik Peoples v. State of Queensland* (1996), 134 A.L.R. 637 (Aust. H.C.), the High Court ruled that pastoral leases and native title could co-exist. The government sought to neutralize the effect of this ruling by making amendments to the *Native Title Act 1993* (Cth) to deny native title claims to areas subject, *inter alia*, to pastoral leases.

[27] *Indigenous Peoples and Governance Structures*, *supra* note 1 at 484.

or country.

The omission of an index and a comprehensive bibliography is unfortunate, but the material remains relatively easy to navigate through the organization of chapters, each replete with extracts of relevant primary source material and references to relevant literature. Overall, this work is a treasury of insights into the challenge of indigenous land management and governance, and will provide an invaluable reference source for scholars, policy-makers, indigenous negotiators, and other interested parties on the range of adopted models, and the successes and failures of such models.