Review: Aboriginal Title

EDWARD CAVANAGH
University of Ottawa

P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*, Oxford: Oxford University Press, 2011 (356 pp).

Recalling hundreds of cases and placing them into national and transnational political contexts, *Aboriginal Title* presents, as the book's sub-title conveys, an exploration of the modern jurisprudence of tribal land rights. McHugh is frank and reflective about the development of the doctrine, refreshingly partisan and critical in places, apologetic for it in others – and this makes the study more than a reference book for legal scholars with interests in indigenous land rights. The book will be of value to other legal scholars. In fact, it is quite possible to regard *Aboriginal Title* as a historical study of the common law itself – as McHugh uses the doctrine to tease out the complexities and subtleties of the 'common law enterprise' inherited by former colonies the world over. Accompanying this analysis are a number of thoughtful commentaries about public interest litigation and the emergence of international law: topics that are generating interest among legal scholars globally.

With respect, I want to suggest that the title of this book understates the author's finished product, however. There is more to the book than jurisprudence; this is an important contribution to the interdisciplinary field of settler colonial studies as well. In many ways, this is a genealogy of settler reason; as he puts it, an 'intellectual history of a legal doctrine that changed forever the terms of engagement between the tribes and the Anglo-settler state' – something that requires reference to material beyond his collection of case law.[1] It is a study of rights, or more especially, *rights talk*, in popular and political discourses: a phenomenon that starts its life

confined within national domains before spreading its wings into the transnational realm. It is not (with some exceptions) about those colonies that were transformed into self-determining nations with the era of decolonisation, but a story of those settler colonial locales that performed no such transformation – where sovereignty remains held by a settler colonial state which creates the legal and political configuration for indigenous individuals to weave through in pursuit of redress and restitution. For McHugh, 'Common-law aboriginal title was an episode in the legal history of the Anglo-settler state's relations with its indigenous tribal inhabitants'.[2] He develops this argument across each of his detailed chapters.

McHugh's introductory chapter situates the study in a legal context and comes with a concise summation of the history of Anglo settler colonialism. Here he shows off his familiarity with the recent historiography on the topic. Moving on from this firm grounding, he identifies the political conditions specific to each locale that allowed for aboriginal title to emerge. McHugh wants to stress that a number of well-known developments from the 1950s to the 1970s – among them assimilation/'termination' policies, the civil rights movement, non-discrimination legalism, and the rise of indigeneity – had been powerfully influential in the development of the legal doctrine (and he bestows these developments with considerably more causal weight than one might expect from a common law historian).

Then, the narrative continues, mentioning the publication of a few commissioned reports here and there, and the emergence of indigenous activism everywhere; before long a confident and experimental type of legalism was developed (mostly, it must be said, by non-indigenous peoples). This development occurred differently across the board. In Canada, the Indian Act, and the rigid 'status-Indian' reservation system that was foundational to it, was outmanoeuvred in the courts, most famously in the *Calder* case (1973). Following this, the possibility for Aboriginal title was scrupulously studied – mostly by scholars of the Saskatchewan school – and new cases steadily emerged thereafter. Then, in 1982, Canada's new Constitution came with indigenous rights enshrined into it. This led to the replacement of the somewhat erratic pattern of claiming (at provincial level, with inconsistent adjudications) with a more stable and refined (if still controversial) legalism.

Over in Australia, despite the initial impediments set by Justice Blackburn in *Milirrpum v Nabalco* (1971), native title began to appear (if, however, conservatively) in state legislation, spreading from the Northern Territory to Western Australia, and then to New South Wales. Federally launched 'independent inquiries' into Aboriginal demands served more to stunt than foster the growth of native title ('a pattern of policy-dodging' rather than 'policy-making'), before, beginning in the 1980s, a number of lawyers, academics and indigenous people in Queensland began to strategise land claims there. The first *Mabo* case (1982-6) was a failure for the claimants; the second case (in 1992) was a victory, and broke new ground.

In New Zealand, technically there was no aboriginal title doctrine in the early period – or, rather, it did exist but was manifested in very different ways. The establishment of the Waitangi Tribunal in 1975 was a huge milestone, from then onwards (particularly after the mid-1980s), the Treaty of Waitangi obligations were placed under critical independent review. In this context the principles of aboriginal title duly emerged in ways we recognise today; but it would not be until the emergence of the New Zealand foreshore and seabed controversy in 2003 that the doctrine itself came into play before the courts.

Having covered this dense ground, McHugh then becomes more analytical, and turns his focus to Australia and Canada, identifying 'the devil in the detail of a maturing jurisprudence'.[3] As he observes, in response to the *proprietary* nature of the claims – with historical links to *land itself*, tradition, culture and untainted aboriginality at the core of 'the proprietary paradigm', as McHugh describes it – the courts developed a checklist and placed the onus on claimants to tick it off: recognition (of rights consistent with Crown sovereignty), proof (of pre-invasion occupation), nature of land use (within specific territory), and extinguishment/continuity (of title by non-indigenous activity) needed to be shown in court for claimants to be awarded. This was a crucial development. Indigenous rights and the confident legalism associated with it, writes McHugh, 'started out as broad and with the flavour of public interest about them, [but] gradually by a process of refinement and amplification ramified into more concrete forms framed by the proprietary paradigm'.[4]

What follows is the stalling of the doctrine. 'Twenty years of aboriginal rights litigation, and all the eddying and changes that came in that period, had confirmed the institutional limitation of the courts'.[5] In Canada, cases became increasingly aimed towards resource rights and land use, and greater weight was placed on exclusivity of occupation. In Australia, Aboriginal 'custom' and 'tradition' became strict requirements, and a succession of native title legislation further reduced the scope for claimants.

But aboriginal title did not die. McHugh is adamant on this. In the last decade, its principles have been flirted with in places as diverse as Belize, Botswana, Japan, Kenya, Malaysia, Philippines, South Africa, Sweden and Tanzania. In a series of declarations, resolutions and treaties at the level of international law, manifestations of the doctrine have appeared, and continue to appear, as well. Depending on one's disciplinary background, these developments may just as suitably be attributed to the transnational emergence of indigenous rights *discourse* as they can to the jurisprudential essence of common law aboriginal title. However one interprets these developments, it is another matter entirely whether or not they might soon offer real benefits to indigenous communities across the world. This is a matter that McHugh, perhaps out of optimism, chooses not to confront, leaving it lingering in the background instead.

It is the fifth and 87-page page chapter on 'aboriginal title within and across disciplinary boundaries' in which some of the most original contributions of the book appear, as McHugh engages, from a fresh perspective, as a legal scholar, with a number of debates in relation to aboriginality, land, and, more generally, the pursuit for redress, currently raging in the fields of history, anthropology, political science and philosophy. This section is not so much about jurisprudence as it is about interdisciplinarity and the interpretative capacity of non-indigenous professionals. It is, however, certainly the most complex (and, I think, purposeful) part of the book. In it, he critiques the 'claims industry', offers a refreshing take on the 'History Wars', shows sensitivity towards questions of methodology and partiality, and engages with each of the 'many political dispositions' that aboriginal title 'chimed with and against' from the time of its emergence.[6]

Before the conclusion, the reader of this chapter is then lured into a history of the common law status of colonies, mostly amended from his groundbreaking paper written back in 1998 for the *Saskatchewan Law Review*.[7] Reading this section, one wonders whether it belongs in *Aboriginal title*, as it sticks out like the proverbial sore thumb. Thankfully, McHugh offers some justification for its inclusion at the end of the chapter. His argument in this section is worth running through. The history of English common law is one in which indigenous peoples (and their laws) were usually marginalised: settlers and natives, the commonplace imperial fantasy had it, were to live together, all of them subjects of the Crown, but with separate pathways leading them to justice. Needless to say, the fine-tuned and occasionally manipulated common law pathway existed mostly for the settlers; indigenous peoples, from the outset, following *Coke*, had 'infidel' laws (or occasionally, were deemed to have no cognisable legal regime at all; as it panned out, *terra nullius* usually went hand-in-glove with assumptions of *lex nullius*).

One of the main points McHugh wants to make here – there are other, highly nuanced ones impossible to abbreviate – is that, from the late fifteenth century up to the end of the eighteenth, the severely different experiences of settler and indigenous peoples as the common law developed became ever more 'distinct' in the colonial legal orders, and that this affected not only the way that the common law developed in the settler colonies, but also established a platform (albeit a sometimes rickety one) upon which indigenous groups would eventually balance themselves from the 1970s onwards in courtrooms across Canada, Australia and New Zealand. 'However', he goes on,

> the status of property rights inside the colonial legal system was a function of systemic perceptions of justiciability and the nature of [settler] civic government. The constitutional status of a colony was concerned specifically with the relation of the Crown to its own community of subjects. Building an argument for the judicial recognition of aboriginal title from the distinction takes no account of that history. It severs the

> distinction from its own history for the purposes of late-twentieth-century legal argumentation. This is not necessarily to decry that exercise (although it will be plain that I regard it as unnecessarily convoluted and long-winded), so much as to say that a contemporary spin on the distinction should not be regarded as an explanation of how it was conceived historically. This distinction has been used to generate contemporary legal doctrine. It was never seen as having any bearing upon the Crown's management of relations with the tribal inhabitants of territory over which it asserted sovereignty.[8]

There is another 'distinction' embedded into the conceptualisation of aboriginal title about which McHugh writes at length throughout the entire book, and that is the one between *imperium* (sovereignty) and *dominium* (ownership). It is not his intention to deny the historical importance of these terms, or to question their value as analytically distinct categories.[9] Rather, and related to the other 'distinction' identified, McHugh is interested in showing how this separation developed over several centuries with different results for different Crown subjects. Settlers disembarked their boats with both in their baggage; indigenous people tended to be confronted either with 'the suspension of all tribal property, a legal vacuum as it were; or continuity, some form of cognisability in the courts of the *arriviste* legal system'. Centuries later, for all the political specificities of each '*arriviste* legal system' across Australasia and in North America, this very distinction would prove crucial to the ways in which aboriginal title was first conceived (and continues to be today). Common law aboriginal title

> state[d] that the proclamation of Crown sovereignty, sometimes called *imperium* (the self-claimed right to govern), did not simultaneously exclude pre-existing property rights or *dominium*. Sovereignty and ownership were not to be conflated. The feudal model of Anglo settlement synthesizing *imperium* and *dominium* had to be carefully qualified (without being wholly rejected). At

> its most basic formulation, aboriginal title has been founded upon this presumption of legal continuity and the separation of *imperium* from *dominium*. Whilst the Crown becomes technically the paramount owner of all land within its new colony and settler had to derive title from a formal patented grant (the retained feudal element), the tribes' title was to be recognized as a surviving legal 'burden' on that ownership that could only be extinguished (ie legally discontinued) through the Crown.[10]

The distinction bestowed the doctrine with a kind of 'respectability' and purchase in 'legal circles' from the very outset, but with time it probably became too rigid. Land rights and self-determination, after all, belonged to the same indigenous rights program: 'in the political landscape beyond the courtroom door [they] were blended by claimants, politicians, and the commentariat, their inter-connection confirmed by the emergent thrust of international law'.[11]

The development of the modern, 'respectable' legalistic distinction between *dominium* and *imperium*, then – whether or not this distinction in court corresponded accurately at all times with the realities of colonial history – transferred onto the 'proprietary paradigm' at the core of aboriginal title. It slowly froze the doctrine and cordoned it off from self-determination, leading indigenous people into the bind they find themselves today.

Perhaps the most eye-opening observation McHugh makes throughout the entire book relates to aboriginal title as an expression of settlers' sovereignty: 'The reception and jurisprudence of the doctrine in all its national variations signified neither the beginning nor the end but a distinct phase in the legalism of settler-state relations with its indigenous peoples'.[12] And this phase, led by the judiciary, came at a most convenient time.

> The courts were a key means of defanging rising militancy. They legitimized aboriginal claims; accepted on behalf of the Anglo state some measure of institutional responsibility for its

> historical treatment of tribes; and provided a venue in which the national shame could be addressed and even purged.[13]

Its time had come, but it was settlers who made the decision to receive it into their own legal and political systems.

Aboriginal title's allocation by settlers' sovereignty is reflected in the historiography too, argues McHugh:

> Law and history become entwined in moral narratives that simultaneously affirm the agency of [the Anglo] nation-state and avow its redemptive capacity whilst also condemning its present inaction and past conduct. In that sense the contemporary discourse of common law aboriginal rights remains essential inside the firmament of settler-state sovereignty.[14]

The history of common law aboriginal title shows us not only that settlers always held sovereignty over indigenous peoples (if sometimes on behalf of the Crown), but also that they continue to do so. This political reality – a settler colonial one rather than a colonial one, to be sure – greatly impacted on the ways in which the doctrine was imagined (and is still imagined).

McHugh's decision to limit his book to Australia, New Zealand and Canada may not be as startling to common law scholars as it is to historians, but certainly it is significant. The influence of the United States of America's legal tradition post-1776 in the development of aboriginal title is notably (and quite deliberately) understated throughout the book. Interestingly, Chief Justice Marshall receives only a few paragraphs. This stands in stark contrast to the importance other scholars attribute to his decisions: recently, for example, Blake A. Watson has used it to explain *entirely* the emergence of aboriginal title in Australia, New Zealand and Canada.[15] McHugh's approach, while complementary to Watson's and others', is very different. Whether his American readers will be more or less inclined to pick it up because of this remains to be

seen, and its reception north of the 49th parallel will be interesting to observe.

Aboriginal Title is an incredible synthesis of case law, recounting the rise (and, in some respects, fall) of a unique form of public interest-inspired legalism. History and politics are never kept in the background; they accompany the narrative along the way, and occasionally jump out to sprawl over several pages. This is not distracting, on the contrary, McHugh's obsession with helping the reader understand context is entirely appreciated. One suspects this book will become just as important as his earlier tome, *Aboriginal Societies in the Common Law* (2004). Readers should also be excited by his forthcoming project, 'provisionally entitled *The Ideological Origins of Settler Sovereignty*'. It is heralded in a footnote in the introductory section.[16]

BIOGRAPHICAL NOTE

Edward Cavanagh has been a student in many of the old dominions. He has recently published a book on the Griqua people's position in the South African historical tradition, and, with thanks to the Trillium Foundation, is a graduate student at the University of Ottawa, preparing a comparative legal history of companies within the British Empire.

NOTES

[1] P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford and New York: Oxford University Press, 2011): 2.
[2] McHugh, *Aboriginal Title*: 336.
[3] McHugh, *Aboriginal Title*: 106.
[4] McHugh, *Aboriginal Title*: 9.
[5] McHugh, *Aboriginal Title*: 188.
[6] McHugh, *Aboriginal Title*: 327.
[7] P. G. McHugh, 'The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past', *Saskatchewan Law Review*, 61 (1998): 393-430.
[8] McHugh, *Aboriginal Title*: 305-306.
[9] McHugh, *Aboriginal Title*: 18-19.
[10] McHugh, *Aboriginal Title*: 2-3.
[11] McHugh, *Aboriginal Title*: 334-335.
[12] McHugh, *Aboriginal Title*: 101.
[13] McHugh, *Aboriginal Title*: 7.
[14] McHugh, *Aboriginal Title*: 272.
[15] Blake A. Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand', *Seattle University Law Review*, 34 (2011): 507-551.
[16] McHugh, *Aboriginal Title*: 31, n. 8.