

TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP

BY KIRSTY GOVER, OXFORD UNIVERSITY PRESS, OXFORD (2010)
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In this book, Dr Kirsty Gover grapples with the complexity of the indigenous organisational landscape in the Western settler states of New Zealand, Australia, Canada and the United States. The book examines the development of tribal constitutionalism, and explores the consequences of the legal and political distinction between public indigeneity and more organic tribal membership.

The subject matter of the book is important as can be seen by the regularity with which Maori governance or ‘mandate’ disputes make their way to the New Zealand courts in the context of Treaty of Waitangi settlements. The wider context for such disputes, discussed in depth by Dr Gover, is an emerging legal pluralism based on the distinction between indigenous people (defined by settler governments) and tribal members (defined by tribal organisations). The two categories are not perfectly aligned. This book considers the consequences of the distinction between the two, including the frictions and uncertainties it creates, and examines the strategies adopted by tribes and settler governments to manage them.

The book is structured around a core normative problem, namely what principles should structure the relationships between settler and tribal governments in membership governance? And, more particularly, should public indigeneity be confined to those persons enrolled in recognised tribes? Or, to put it another way, should legal indigeneity and tribal membership be made coincident by public law? Dr Gover’s considered answer is that legal indigeneity and tribal membership should not be made coincident. While tribal constitutionalism introduces a new legal pluralism to the constitutions of the Western settler societies, tribal membership governance and its public consequences should be dealt with by agreement and dialogue rather than imposition.

Dr Gover’s analysis of these deeply complex issues is based on a comparative and empirical study of tribal constitutions in the four states. She has, with great persistence, collected and examined 737 current and historic tribal constitutions, most of which are not publicly available. As noted by Professor John Borrows in the Foreword, Dr Gover has performed a huge service in locating and analysing these documents. The extent of the empirical research on which the book is based is breath-taking.

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The book is divided into four chapters. In Chapter One, Dr Gover considers how the concepts of indigeneity and tribalism are to be recognised in public policy in a way that protects tribal self-governance while acknowledging that indigeneity is also created in the public non-tribal arena. She argues that understandings of public indigeneity should reflect the recognition practices of indigenous communities such as community recognition. She recommends the engagement of indigenous communities in the elaboration of public indigeneity. Chapter Two presents the results of the empirical study. It discusses the methodological challenges of the research. It also highlights some significant differences between North American (Canada and the United States) and Australasian (Australia and New Zealand) tribal constitutionalism, particularly in relation to descent, multiple membership and disenrollment practices. Chapter Three considers changes in United States tribal membership governance over time. Interestingly, US tribes are increasingly choosing to use lineal descent and blood quantum rules in membership governance, and are less likely to use residency or parental enrollment rules. The reasons for this are examined and include the strong focus in federal government policy on descent, and the historical settler-driven disruptions in tribal continuity. Chapter Four focuses on Australasia, and looks at membership rules formally recognised through claims processes in Australia (native title claims) and New Zealand (Treaty of Waitangi claims). Again, descent rules are favoured in tribal constitutions because they establish clear and predictable human boundaries, facilitate succession, and demonstrate continuity. There is less flexibility in Australia than New Zealand because the native title claims process is a judicial one whereas the political nature of the Treaty settlement process allows more flexibility.

This book is not one to embark on lightly. It is thought-provoking, indeed at times it is positively brow-wrinkling, and it does require a certain amount of dedication to get through. One of the most notable aspects of the study is the link Dr Gover makes between tribal membership governance and its effect on the political theory of settler states. She argues that the very existence of an inter-indigenous governance order challenges the legitimacy of the state itself. The changes in tribal constitutionalism and in particular the recognition of tribes as public actors therefore necessitates the reconstitution of settler states themselves, with the effect that the constitution of tribes and of settler states can and should proceed in tandem.

Given the breadth of its focus, and its solid basis in empirical research, this book will be of interest to a wide range of people. It will have a particular appeal to those deeply embedded in the indigenous rights area, including indigenous leaders (both tribal and non-tribal), and members of tribal and non-tribal indigenous groups. In the legal and policy field, the book will be of interest to judges, lawyers, academics, policy-makers, those involved in the Treaty claims process and students researching indigenous issues. Those from other disciplines such as political scientists, historians, and anthropologists are also likely to find much of interest.

As noted by Paul McHugh on the dust-jacket, this is the leading scholarly account of key issues of membership and governance facing tribal nations. Dr Gover makes a highly constructive contribution which should contribute to policy development and legal thinking in this area for years to come. She more than succeeds in her aim of contributing to a more nuanced understanding of the evolving relationship between states, tribes and indigenous communities. *Tribal Constitutionalism* is highly recommended.