Book Review

Ulla Secher

Aboriginal Customary Law: A Source of Common Law Title to Land (Hart Publishing, 2014)

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In a recent article in the Saskatchewan Law Review, Professor Paul McHugh argued that "[t]he idea that common law Aboriginal title has *always* been legal truth has become a blind-spot". Instead, he said that "[i]f the predicates of the common law doctrine of Aboriginal title form a "tradition", it is an invented one".[1] But is this legal invention, or what Professor David V Williams has described in the context of the *Ngati Apa* decision as the creation of "new law",[2] appropriate in the development of the common law? In a piece in the same edition of the Saskatchewan Law Review, Professor Kent McNeil argues:[3]

> The common law itself is a rich body of principles and precedents that can be and are adapted and applied in new contexts virtually every time an appeal court makes a decision.

Judges, McNeil says, do not make new law "out of whole cloth",[4] even in cases where they overrule previous decisions. Instead, and here McNeil cites the work of Professor Allan Beever, the positive law is developed in conformity with

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1 PG McHugh "Time Whereof — Memory, History and Law in the Jurisprudence of Aboriginal Rights" (2014) 77 Saskatchewan L Rev 137 at 151 (emphasis in original).

2 David V Williams *A Simple Nullity? The* Wi Parata *case in New Zealand law & history* (Auckland University Press, Auckland, 2011) at 208.

3 Kent McNeil "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014) 77 Saskatchewan L Rev 173 at 196.

4 At 198.

more abstract legal principles, which, it is argued, are more fundamental to the common law than the rules of positive law themselves.[5]

It is appropriate then that McNeil has written the foreword to *Aboriginal Customary Law: A Source of Common Law Title to Land* by Ulla Secher. As McNeil describes, in this work Dr Secher "is not content with reinterpretation and re-evaluation of existing authorities",[6] though this is a real strength of the book. Secher's aim is to advocate an alternative approach to conventional Aboriginal title doctrine, one that tackles many of the legal obstacles Aboriginal peoples face when seeking to vindicate rights to land. Ultimately, as Secher concludes, the purpose of this doctrinal re-examination is to assist "the former colonising powers to become pioneers in a new era of authentic justice".[7]

The book is a challenging read: the author probes deeply into the assumptions underpinning current Aboriginal title doctrine and her scholarship is meticulous and detailed. For those unfamiliar with the Australian case law in particular, parts of the book may appear inaccessible. However, the book's careful structure and clear style will assist attentive readers. Whilst the focus is first on Australia, then on South Africa and Canada, Secher's fundamental reconceptualisation of the Crown's title to land in former British colonies will interest scholars and practitioners in all these jurisdictions. New Zealand readers should not miss the review of New Zealand Aboriginal title jurisprudence in chapter two.

The starting point of Secher's analysis is the decision of the High Court of Australia in *Mabo v Queensland (No. 2)* (*Mabo*)[8] and, in particular, the finding that upon acquisition of sovereignty, the Crown acquired a radical title to land only. The book then addresses the conceptual and practical implications of the abolition of the rule that the Crown acquired beneficial title to Australia upon settlement. In particular, Secher seeks to better understand the origins of the Crown's radical title and its application and consequences for Aboriginal land rights in Australia and other former British colonies. Whilst the focus of the work is on the "inhabited settled colony", a category recognised by the High Court of Australia in *Mabo*, the author argues the work also has implications for conquered and ceded colonies.

Secher argues that radical title is a bare legal title, which creates no beneficial entitlement to the land to which it relates. Radical title has two aspects: it is a postulate of the doctrine of tenure as it applies in Australia; and it is a concomitant of sovereignty, that is, it supports the sovereign's power

5 At 199.

6 Kent McNeil "Foreword" in Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, Oxford, 2014) at viii.

7 Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, Oxford, 2014) at 456.

8 (1992) 175 CLR 1 (HCA).

to convert its radical title to beneficial ownership. This analysis may seem unsurprising to a reader familiar with the New Zealand jurisprudence. Indeed, in chapter two, the author derives support for her view from *Amodu Tijani v Secretary, Southern Nigeria*,[9] *Re Southern Rhodesia*,[10] *R v Symonds*[11] and *Nireaha Tamaki v Baker*,[12] among others.

The analysis of the nature of radical title addresses a significant obiter discussion in *Mabo*. In that case, the Court held that where land is subject to pre-existing native title, the Crown must exercise its sovereign power before its underlying radical title converts to beneficial ownership. However, Secher argues there was no clear majority view as to the meaning of radical title. This becomes evident when considering the status of land subject to no pre-existing native title.[13] In *Mabo*, the majority of the High Court suggested that the Crown automatically acquired beneficial ownership of unalienated land, which was not subject to native title, on the ground that there was "no other proprietor".[14] Secher rejects this theory, which confuses sovereignty and property, describing it (and the "reversion expectant" argument) as "new legal fictions … created to replace the feudal fiction of 'original Crown ownership'".[15]

Having concluded that this unalienated land is not in the Crown's beneficial ownership, Secher examines pre-feudal forms of landholding and traditional exceptions to the feudal doctrine of tenure in order to identify its legal status. Two such examples under which title to land continued independent of any Crown grant are discussed:[16] folkland, an allodial system of customary landholding, which was part of English law prior to the Norman conquest; and tenure in ancient demesne, an exception to the feudal doctrine of tenure.

This analysis provides the basis for Secher's central thesis. She contends that fundamental common law principles and radical title, as described in the *Mabo* decision, provide a basis for Aboriginal people to establish common law

9 [1921] 2 AC 399 (PC).

10 [1919] AC 211 (PC).

11 [1840–1932] (1847) NZPCC 387.

12 [1901] AC 561 (PC).

13 This question is not relevant to New Zealand law as British Government policy was generally based on the assumption that Māori groups claimed property rights in the entirety of the country at the time of the acquisition of sovereignty: see Richard Boast "Maori and the Law, 1840–2000" in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) 123 at 143. For discussion of debates about whether Māori could claim native title only in land that they physically occupied see also Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at ch 4.

14 Secher, above note 7, at 3.

15 At 3.

16 See ch 1. These exceptions are discussed further in the context of the South African example in ch 7.

title to land upon proof that they have a title by virtue of their own custom.[17] As such, Secher offers a qualified version of McNeil's common law Aboriginal title theory. Secher agrees with McNeil that Aboriginal title arises from the legal effect given to occupation of land by the common law but rejects the feudal fiction of original Crown ownership and grant. Instead, argues Secher, after *Mabo* there is no need to invoke the doctrine of tenure to found Aboriginal title; Aboriginal title arises from the common law consequences of occupation which "would give rise to an allodial title where the feudal doctrine of tenure did not apply".[18]

Thus under Secher's reframed doctrine of common law Aboriginal customary title customary law rights acquired *before* sovereignty give rise to a common law title which is accommodated within the post-sovereignty legal regime on the basis either that a traditional exception to the feudal doctrine of tenure applies, or that English land law relating to pre-feudal landholding applied to land subject to pre-existing Aboriginal rights. However, the author goes further to argue that Aboriginal title may arise from occupation before *or after* the acquisition of sovereignty: customary law rights acquired after the acquisition of sovereignty give rise to a common law title on the basis that such rights become the local common law in accordance with doctrine regarding the recognition of custom.

In part IV of the book, Secher goes on to explore the practical implications of the Crown's radical title. This section includes discussion of the implications of Secher's theory of Aboriginal title for South Africa and Canada in chapters seven and eight respectively. It also considers the requirement for proof of Aboriginal title, which Secher argues arises from "the internal dimension" of Aboriginal title that operates among titleholders to determine their rights and obligations.[19] In order to prove Aboriginal title, claimant groups must demonstrate "[t]he pre-sovereignty laws/customs of an identifiable Aboriginal group pursuant to which land was purposively occupied".[20] Additional

17 Secher argues that characterising Aboriginal customary law as a source of *common law* title is particularly significant in Australia because it would extend the protection of the common law to the Aboriginal interest: title would then be extinguished only by legislation. This would remove Australia's anomalous rule, which Secher considers to be policy driven, that Aboriginal title may be extinguished by inconsistent executive grant. At 128–131, Secher notes that this move could have been avoided if the Court in *Mabo* had reconciled the effect of colonisation on pre-existing rights in all inhabited colonies — ie if it had adopted the conquered/ceded rule requiring legislation or agreement to purchase for extinguishment in all inhabited colonies.

18 At 134.

19 For Secher, Aboriginal title's external dimension is the normative structure that accommodates the title within the post-sovereignty legal system determining, for example, the relationship of the title with third parties and the Crown.

20 At 355.

requirements, which Secher regards as "intolerable burdens", would no longer be placed on Aboriginal claimants.[21]

In her discussion of Australian law post *Mabo*, Secher distinguishes between the feudal doctrine of tenure and the doctrine as it applies in Australia following the decision of the High Court of Australia to abandon the fiction of original Crown ownership. The name Secher gives the doctrine as redefined to meet the circumstances of Australia is the doctrine of tenure *ad veritatem*. This nomenclature, says Secher, indicates that the redefined doctrine is "closer 'toward the truth' than its feudal counterpart".[22] Indeed Secher's work may also be seen as part of an iterative process in which the fundamental legal principles underpinning common law doctrine are continually re-examined in order to bring the law closer "toward the truth". In this way, *Aboriginal Customary Law: A Source of Common Law Title to Land* is part of a tradition which seeks to tell the "best story" of the law from the standpoint of justice and political morality. The book stands out in the extensive Aboriginal title literature, however, for its rigour, depth and challenge. It will be fascinating to see how Secher's contribution influences common law thinking about Aboriginal land rights.

21 At 355. This includes the removal of the requirement to prove continuity of laws and customs post-sovereignty: "Since Aboriginal customary title has its origins in customary rights *acquired pre-sovereignty*, it continues post-sovereignty by operation of law" (emphasis in original) at 355.

22 At fn 2, p 82.