**WEEK 9:**

**CHAPTER 4: Indigenous Australians and the System of Law and Justice**

**Native title:**

**Native title:** A right or interest over land or waters that may be owned, according to traditional laws and customs, by Aboriginal peoples and Torres Strait Islanders.

Australia was considered to be a settled rather than a conquered colony meant that the only legally-recognised scheme of land ownership was that recognised by the common law.

**Feudalism:** A strongly hierarchical system of social and economic organisation with the Crown at the head.

The traditional Aboriginal concept of land ownership was totally disregarded by the new settlers.

Common law system of land ownership adopted – Crown holds 'radical' title from which all other titles are derived.

***Mabo and the Native Title Act 1993* (Cth):**

The first strong major affirmative step to recognise and preserve the strong Aboriginal connection with the land was the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which allowed blocks of land in the Northern Territory to be granted to land trusts if traditional Aboriginal land ownership could be proven.

This was a response to the decision in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 that, although thee were traditional customs and laws regulating the relations of Indigenous people with the land, such laws were not recognised by Australian common law.

Major development in the common law's approach to land rights took place in 1992 with the High Court's landmark decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

The Mabo litigation had begun in 1982, when Mr Eddie Mabo, a Torres Strait Islander, and a group of other islanders, began a battle to have their traditional land ownership recognised.

In its decisions, the High Court did not question that Australia was a settled colony, or that English law came with settlers in accordance with Blackstone's formulation.

Nor did it question that the radical title to all land in Australia was vested in the Crown.

Influenced by developing notions about human rights, the court held that it was appropriate to change the common law rule to recognise that the Crown's radical title co-existed with a beneficial native title.

If a group of Aboriginies or Torres Strait Islanders could show that they had exercised traditional rights over land since before British colonisation, the law would recognise those traditional rights.

But if the Crown had exercised its title to the land, either by using itself or by selling or granting it to someone else, the native title may be extinguished.

In *Mabo* the High Court recognised that beneficial native title could co-exist with radical Crown title.
To clarify and simplify the process by which Aboriginal and Torres Strait Islander groups could make land claims, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) (NTA).

1993 NTA was to provide a mechanism for the effective and efficient implementation of the common law as laid down in Mabo.

**Wik and the *Native Title Amendment Act 1998 (Cth):***

The significance of the Mabo decision was underlined by Wik Peoples v Queensland (1996) 187 CLR 1, where a majority of the High Court held, contrary to the expectations of many, that native title could co-exist over land covered by pastoral leases.

Native title was not necessarily extinguished by the lease, as the terms of the lease may allow the two to co-exist.

This decision extended considerably the geographical area over which native title potentially could be recognised.

The 1998 Act modified and restricted common law native title, strengthening the position of pastoralists and mining companies who wished to exploit land over which native title might be held.

*Wik* established that native title may extend to land notwithstanding the existence of pastoral or mining leases over the land.

In *Northern Territory of Australia v Arnhem land Aboriginal Land Trust* (2008) 236 CLR 24, the High Court held that the native title holders in northeast Arnhem Land has rights over the tidal waters in Blue Mud bay, and had the power to exclude non-native title holders that wished to fish in those waters.

**The Complexity of Native Title Claims:**

In *Bennel v Western Australia* (2006) 153 FCR 120, Wilcox J upheld the Noongar community's claim of native title over a large portion of Western Australia including the Perth metropolitan area.

This was the first case in which native title had been upheld in respect of a capital city.

Despite the limits on native title noted by Wilcox J, in April 2008, the Full Fderal Court upheld the appeals of Western Australia and the Commonwealth: *Bodney v Bennell* (2008) 167 FCR 84.

The court held that Wilcox J has not applied a sufficiently stringent test in recognising the native title claim.

It was not enough that the Noongar community had maintained a continuity of society since sovereignty. It was necessary that there be continuous observance of a body of laws and customs in which the native title is founded. Further, it was not sufficient that the community demonstrated a continuous connection with an area including Perth.

A continuous connection with Perth itself must be demonstrated. The Full Court sent the matter back to the trial court so the proper test could be applied.

Native title cases are most complex to courts to face.

The National Native Title Tribunal provides parties with mediation as a mandatory part of the process.

The NTA makes provision for the federal court to make determinations without a full trial by consent of the parties. Most determinations have been made by consent.

The Act also makes provision for the registration of Indigenous Land Use Agreements (ILUA), which do not require a Federal Court determination.

**Improving recognition of native title:**

A number of suggestions have been made to improve the native title system.

- Narrow the scope of the extinguishment doctrine (native title is extinguished where the Crown has dealt with the land inconsistently with the Indigenous party's customary usage).
- Introduce a 'presumption of continuity' in relation to indigenous laws and customs where claimants follow laws and customs they reasonably believe to have been traditionally followed by their ancestors.
- Strengthen the requirement for 'good faith' negotiations.
- Establishing a statutory body to review native title agreements to improve transparency and accountability.
- Making land subject to native title alienable by the native title holders.

A number of reforms have been proposed to improve the native title system's ability to deliver substantive justice to native title parties.

One proposed reform is to narrow the scope of the extinguishment doctrine. Under Mabo and the NTA, native title is extinguished where the Crown has dealt with the land inconsistently with the Indigenous party's customary usage.

A second reform, also proposed by Chief Justice French, addresses both the substantive justice of the law of native title, and the demands it places on the litigant's resources.

The High Court has held that 'this requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.

**Future directions for Native Title:**

A number of suggestions have been made to improve the native title system.

- Narrow the scope of the extinguishment doctrine.
- Introduce a 'presumption of continuity' in relation to indigenous laws and customs where claimants follow laws and customs they reasonably believe to have been traditionally followed by their ancestors.
- Strengthen the requirement for 'good faith' negotiations.
- Establishing a statutory body to review native title agreements to improve transparency and accountability
- Making land subject to native title alienable by the native title holders.
- These issues are being considered by the Australian Law Reform Commission (as of March 2014).

**Indigenous people and the criminal justice system:**

The history of the interaction of Indigenous Australians with the criminal justice system is complex and troubling.

Although native title can coexist with common law land title, the High Court has ruled that the Australian criminal law does not allow for recognition of Indigenous practices.

**Jurisdiction over the 'Aboriginal Native':**

Initially, Australian courts did not expect the Indigenous population to comply with the common law, at least where settlers were unaffected.

Subsequently, in Murrell in 1836, courts were held to have jurisdiction, though Indigenous Australians were regarded as aliens, rather than citizens.

Despite initial doubts, Murrell became accepted as the position. He accepted that Aboriginies are 'subject to and protected by English Law in relation to conflicts between them and the British', but expressed doubt about whether the court had 'jurisdiction over crimes committed by Aboriginies against one another'.

At times, clemency shown to Indigenous Australians due to their relative ignorance of the law.

**Protection Regimes:**

By the 19th century, many Indigenous Australians were subject to protection regimes whereby Protection Boards had extensive control over their lives.

These regimes included the forcible removal of Indigenous children to be raised in institutions or by foster families.

Criminal conduct of Indigenous people was often dealt with by the Chief Protector rather than the criminal justice system – could produce arbitrariness.

Post-WWII there has been a movement away from the paternalistic 'protection approach'. Increasing awareness of civil rights, particularly those of Indigenous peoples of colonies and former colonies.

The 1967 constitutional referendum, which sought to eliminate the discriminatory element from the *Constitutional Constitution,* can be seen as a part of this broader movement.

The rise of protection regimes had seen a drop in the Indigenous prison population. Fall of these regimes has seen an increase in the Indigenous prison population.

**Royal Commission into Aboriginal Deaths in Custody:**

Royal Commission investigated 99 Aboriginal deaths in custody that occurred from 1980-89.

Made a number of recommendations to reduce the rate of Aboriginal incarceration.

Rate has continued to increase, 2000 per 100 000 in 2010 – 14 times the non-Indigenous rate.

High rate may in part reflect discriminatory approach of criminal justice system.

Arrest and detention for relatively minor offences, such as offensive language – often escalates to include resisting arrest, assaulting police and hindering police.

**'Crimes of Poverty, Despair and Defiance':**

High imprisonment not only due to discrimination; also disproportionately high rates of offending.

High rates of imprisonment both a consequence and cause of social disadvantage.

Crucial question is how the criminal justice system should respond to break the cycle – should there be differential treatment – e.g. very controversial when non-custodial sentences granted by trial judge for rape of 10-year-old girl – many overturned on appeal.

The case achieved notoriety because the sentencing judge ordered sentences of probation or suspended imprisonment; none of the defendants were sent to prison. These sentences were based upon the judge's consideration of pre-sentence reports on the circumstances of the offenders, together with the fact that the prosecutor had recommended non-custodial options.

Judgment of Wood J in Fernando (see 4.23) sets out some guiding principles. (Page 78)

Has been argued greater role should be given to traditional forms of dispute resolution.

**Indigenous Sentencing Courts:**

First established in 1999 in Port Adelaide, now operate in most Australian jurisdictions.

Exist in most Australian jurisdictions.

Do not apply customary law in place of ordinary law, but enable Indigenous community representatives to play a role in sentencing.

Sentencing at a round table with offender, magistrate, lawyers, Elders and victim, rather than in a hierarchical court room.

While has not been shown to reduce recidivism, does increase likelihood offender will accept responsibility for offence and acceptance of sentence by offender and community.

This is not available for all offences.

In NSW, under the *Criminal Procedure Regulation 2010*, the offence must be one for which the offender may be sentenced to imprisonment, a community service order or a good behaviour bond.

There is evidence that the courts provide a more culturally appropriate sentencing process that encompassed the wider circumstances of defendants and victims lives, and facilitates the increased participation of the offender and the broader Indigenous community in the sentencing process.

**Customary Punishment:**

Some courts, particularly in the Northern Territory, have reduced sentences on the basis of evidence of traditional custom.

- Acts done in accordance with custom less reprehensible than out of anger or monetary gain.

Some sentences reduced where defendant will also suffer traditional 'payback' punishment, e.g. spearing.

This is an appropriate sentencing factor in two respects. First, if the court fails to take account of the traditional punishment, the defendant may suffer double punishment. Second, by acknowledging traditional law, the court would be contributing to 'the continued unity and coherence of the group'.

Governments generally oppose considering traditional custom in sentencing.

Northern Territory National Emergency Response Act 2007 s 91 prohibits courts from taking into account customary law in lessening the seriousness of criminal behaviour.

The Council of Australian Governments (COAG) issued a communique on 14 July 2006, stating, 'no customary law or cultural practice excuses, justifies, authorises, requires, or lessen the seriousness of violence'.

The Commonwealth Parliament subsequently passed the *Northern Territory National Emergency Response Act* 2007 (NTNERA), s 91.

**Northern Territory Intervention**

The Howard Federal Government, had highlighted concerns about constantly high levels of violence in Aboriginal communities, and had been one of the major supporters of the COAG resolution.

In 2007 the Commonwealth initiated the Northern Territory Intervention in response to Little Children are Sacred report on child sexual assault.

A raft of legislation that imposed restrictions and controls on several Indigenous communities: Section 91(a) of NTNERA

- suspended native title and compulsorily acquired land for five-year leases to enable housing and infrastructure to be improved
- welfare payments quarantined
- availability of alcohol restricted
- restrictions on access to pornography
- Indigenous violence or child abuse declared a 'Federally relevant crime' to enable the use of the Australian Crime Commission's extensive investigative powers.

Similar to past protection regimes.

**Racial Discrimination or Special Measure?**

The Constitutional amendment of 1967 and the abandonment of the protection regimes represented an effort to reduce the discrimination suffered by the Indigenous populations.

Racial Discrimination Act 1975 attempted to make racial discrimination unlawful (s 9) and make ineffective laws limiting the rights of particular groups (s 10) to eliminate obligations under Convention on the Elimination of All Forms of Racial Discrimination. Section 8 created an exception for 'special measures'.

Northern Territory Intervention legislation proclaims itself a 'special measure'.

Also suspended application of Racial Discrimination Act.

In 2010, welfare control provisions extended to all vulnerable recipients.

Other measures remained for Indigenous peoples alone on basis of 'special measures'.

Questioned whether actually 'special measures'.

**Other Constitutional and Legal Challenges to the Intervention:**

In *Wurridjal v Commonwealth* (2009) 237 CLR 309 the High Court considered whether NTNERA provisions impacting on possession and control of Aboriginal land were unconstitutional.

In 1967, the Constitution was altered to allow the Commonwealth to legislate for Aboriginals as a race for whom it was necessary to make special laws (s 51(xxvi)).

It is unclear whether s 51(xxvi) is limited to laws benefiting a specific race, although four High Court justices have expressed views along these lines in *Kartinyeri v Commonwealth* in 1998.

In 1967, s 127 of the Constitution was removed, which excluded Aboriginals from the census.

It is a current government policy to hold a referendum by 2013 on including positive recognition of 'the unique and special place of our first peoples' in the Constitution.

**Express and implied Constitutional rights:**

In *Kartinyeri* and *Wurridjal* the Indigenous parties sought to mount more powerful arguments, invoking a document that does limit Parliament's sovereignty. They argued that the legislation was unconstitutional.

The Constitution provides the basis for the Commonwealth Parliament's law-making power, and legislation that does not comply with the *Constitution* is valid.

The Constitution limits the Commonwealth's law-making power – legislation not in compliance with it is invalid.

Affects validity of legislation, not actions done under legislation.

Unlike the US Constitution, few express rights in the Australian Constitution, e.g.:

- acquisition of property must be on just terms (s 51(xxxi))
- Commonwealth cannot prohibit exercise of religion (s 116).

Some limited implied rights of limited scope:

- from the system of representative and responsible government:
- political communication
- Freedom of movement and association (only half the High Court in Kruger).

**Indigenous Australians and the Australian Constitution Constitutional recognition of the first peoples**

Continuing demands for the Constitution to recognise Australia's Indigenous people.

Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) passed after government failed in its 2010 pledge to hold a referendum on constitutional recognition.

Some qualified recognition in state constitutions in Qld, NSW and Vic**.**

1967 amendment removed a perceived discriminatory aspect of the Constitution.

Continuing demands for the Constitution to give Australia's Indigenous people positive recognition.

1999 constitutional referendum rejected a proposed addition to the Constitution's preamble 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'.

Political support for constitutional recognition continued.

Government failed in its 2010 pledge to hold a referendum on a suitable amendment no later than the 2013 federal election.

Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) passed as an interim measure.

Qualified recognition in state constitutions in Qld, NSW and Victoria.