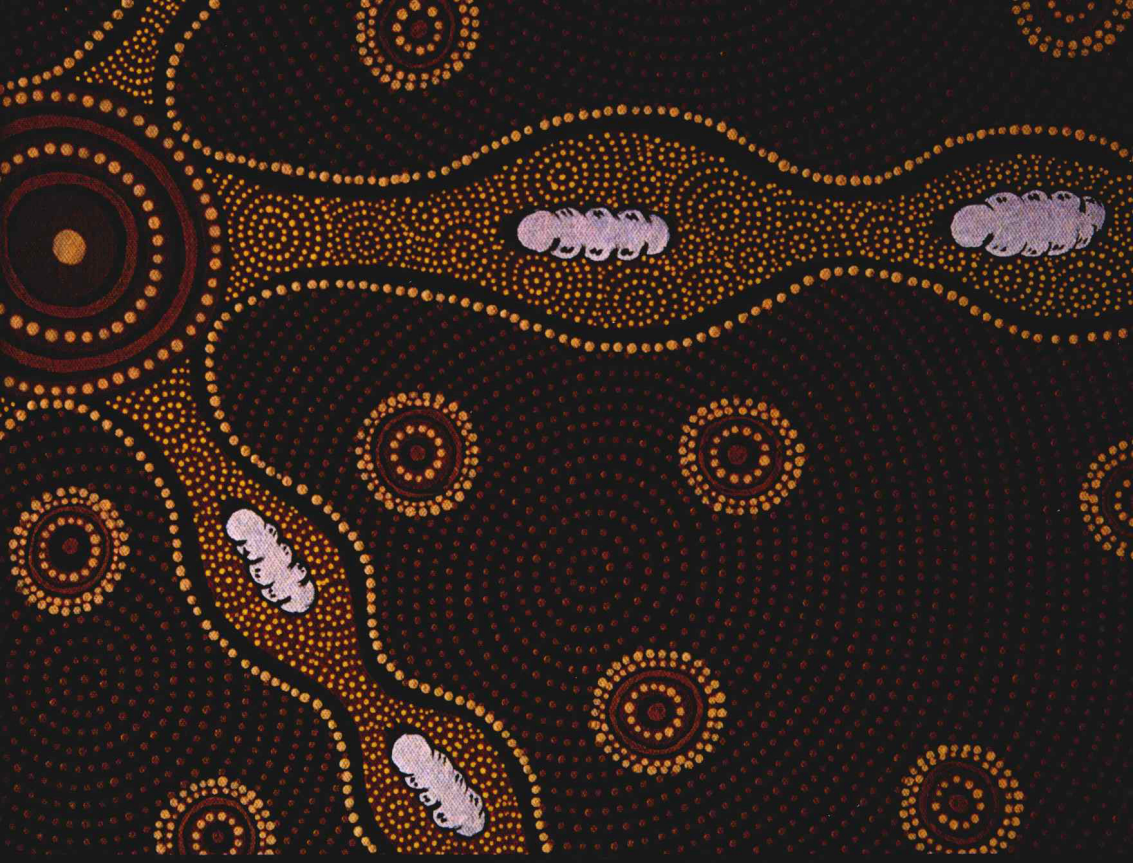

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COMPARATIVE PERSPECTIVES ON COMMUNAL LANDS AND INDIVIDUAL OWNERSHIP

SUSTAINABLE FUTURES

EDITED BY
LEE GODDEN AND
MAUREEN TEHAN

ROUTLEDGE

Comparative Perspectives on Communal Lands and Individual Ownership

Sustainable futures

Edited by Lee Godden
and Maureen Tehan

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Preface

His Honour, Justice A. Sachs, Constitutional Court, The Republic of South Africa

There is much that the law can do, but there is only so much that the law can do. Let me start first with the much that the law can do. I think of three landmark cases in my lifetime that have had the effect of completely transforming the possibilities of the law. The first is *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954). By declaring racial segregation in public education to be unconstitutional, it not only dealt a death blow to the doctrine of separate but equal, but transformed the way Americans (and much of the world) looked at the question of race. It also revolutionized the manner in which the US judiciary saw its role. The Supreme Court felt it necessary to go beyond merely declaring racial segregation in the school system to be inherently violatory of the Constitution, and then leave it to the educational authorities themselves to make the necessary corrections. Instead, it invented a wholly new form of judicial remedy, the structural interdict. (And the droll thought passes through my mind that the Court was sharing something with Marx when he declared early in his life that the problem was not to interpret the world, but to change it.) From now on the courts were to have an ongoing supervisory role in relation to governmental conduct concerning major social issues. And as time went by, controversies that had once raged around *Brown* itself now attached themselves to the manner in which desegregation was to be brought about.

And this is where it became clear that there is only so much that the law could do. At the time of the commemoration of the fiftieth anniversary of *Brown*, a vast amount of literature appeared commenting on the success and failures of the decision. Many of the writers pointed out the extent to which the same pernicious racism that had denied people the full enjoyment of their rights in 1954 continued to this day, to plague the school system and wider society. This resulted not simply from intransigence and rearguard action by white supremacist state and local authorities; it was the consequence of patterns of racialized thinking and practices endemic to the USA. Many commentators observed that much of the brave legal imagination of *Brown* had dissipated. I belong to the generation that was inspired by *Brown*. I was a student at the time and recall how it completely recast

the debate on the connection between law and race. To my mind it stands as one of the great legal decisions of the twentieth century. But events that followed show how devilish the detail could be. Law could influence context but also be overwhelmed by context. Indeed, a forceful minority in the Supreme Court have recently accused the majority of that Court itself of spuriously utilizing the formal language of *Brown* to negate the essential spirit of *Brown*.

Similarly, there is much that *Mabo v Queensland* (1992) 175 CLR 1 did. The terms of the debate on aboriginal land rights were totally transformed. Ways of looking at the relationship of land to people, and of people to land, would no longer be the same. What had been projected as a civilizing mission was now recast as a colonizing project. The indigenous people could no longer be looked at as though they were a form of roaming human fauna, who happened to be on the land when the settlers came and established legal control. Now they emerged as having had active legal personality all along. This gave them presumptive forms of title to the land on which they lived.

The influence of *Mabo* spread far beyond Australia's shores. When we in South Africa had to consider land claims based on concepts of indigenous law, *Mabo* had already invaded our imaginations. And although we looked carefully at the legal technology involved, its main thrust came from the transformed overview it presented of Australian social and legal history. In the end, the Constitutional Court in the *Richtersveld* case did not draw heavily on any precise aspects of legal doctrine enunciated in *Mabo*. Yet the possibilities opened up for new legal thinking were resonant in our country too. We understood that questions of restoration of land and restoration of dignity could not be separated.

And yet, and yet ... there is only so much that the law can do. This book sets out to map advances and retreats in the decade and a half since *Mabo*. Yet it does not use *Mabo* as a starting-off point, but rather takes its existence for granted. Indeed, one of the main preoccupations of the authors is precisely to decide what is an advance and what is a retreat. It is in this respect that the concept of sustainability becomes all-important. Sustainability is the connecting theme of the book. It is a powerful concept that has already transformed legal thinking in the sphere of environmental protection, and is particularly apt in relation to the issues traversed here. Sustainability is concerned with the conservation of land and natural resources. Sustainability also refers to the organic vitality of communities and cultures, including their knowledge systems and sense of identity. And sustainability is required for the dependability of ameliorative government and civil society programmes. And how do you conserve, transform, progress and sustain at the same time? The very notion of sustainability has to be sustained!

What *Mabo* did was to establish a totally new starting-off point for discussion on the relationship of land and people. In re-marking the land of

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Australia, it re-marked the land Australia. I make this point not just to enjoy the play of words between land as the active surface area of a country, and the word 'land' to denote the country itself. I do so to emphasize the multilayered and at times elusive issues involved. In this respect, the contributors have achieved something that many scholars fail to do, namely, to connect close-up views based on reliable information drawn directly from research on the ground to enlarged analyses that locate the problematic in a wider frame.

One of the sayings in the English language that turns me cold is 'the road to hell is paved with good intentions'. It is a terrible statement designed to undermine all idealism and hope. But as this book illustrates, good intentions alone are not enough. Good information, constant feedback and the capacity never to lose sight of the larger picture is always essential. This is especially so in an area where the sands are shifting all the time.

What comes through strongly to me from this book is the importance that the principle of variability has for the sustainability of sustainability. This is the last area where silver bullet solutions have a role to play. The law as we know it tends to dislike hybridity. It seeks to establish formal and predictable legal regimes that can only be altered through precisely predetermined procedures. Yet there are circumstances where relationships and processes need to be more open-ended. Thus, the metaphysical needs of communities and the bottom-line considerations of mining companies may not easily be reconciled. But that is exactly what the law must set out to do. It must create processes and concepts that allow apparently incompatible notions to coexist, hopefully for mutual advantage.

In this respect, I offer an observation based on our own experience in South Africa. It concerns the importance of process. There are some questions for which there is no single, correct legal answer. The law must be invoked in such a way as best to acknowledge the essence of the competing interests at stake. Questions of process at times must take over from the standard forms of administrative and judicial decision making. In the field of legislation the Constitutional Court has given considerable weight to the importance of participatory democracy. This concept has special value for groups that have a great deal at stake in relation to proposed measures but are relatively weakly represented in government and the legislature. Another concept that the Court has developed in relation to exercises of public power that affect marginalized communities, is that of engagement. It requires that the parties meet and seek to find fair and practicable solutions within the matrix of constitutional requirements, before the Court will adjudicate. The limited experience we have had has been positive. Engagement does more than facilitate good outcomes. It provides voice and dignity to people who otherwise might be regarded as 'the homeless' or 'the landless'.

What goes for Australia applies to many other countries undergoing similar forms of reconfiguring land rights. The essays show how remarkably

similar the issues are that pop up in different continents, a strong example being the controversies around the utilization of the individual title. The editors and the individual authors wisely do not pretend to offer definitive solutions. The material in this book is immeasurably richer because of this. It provides policymakers and activists with dependable information and thoughtful analyses. And it must be a first port of call for anyone seeking foundational material for developing the law in this area, whether through law making, administrative practice or litigation.

After *Mabo*, it should have been easy. Aboriginal society had two characteristics that people throughout the world were hungering for. The first was an organic connection with the land. The second was a sense of human solidarity and interdependence. Yet experience has shown that the drive for material acquisition has intensified rather than diminished in the past fifteen years. And people of aboriginal descent have not been exempted from it. It is an area where I have great difficulty in locating my own thinking. Not long ago, I sat next to a native American at a function at the University of Connecticut. His remit was to manage the income from casinos of a small tribe to which he belonged. The casinos were so lucrative that the State of Connecticut depended on them for 11 per cent of its annual revenue. He was manifestly a progressive and forward-looking person who was ensuring that the profits from the gambling were used to sustain the tribal community in the best way possible. Yet I felt totally confused. Reading this book and thinking back on that encounter highlight for me the importance of context and variability. I congratulate the editors and contributors for the work they have done. The book is radiant with intelligent and engaged scholarship.

Oh, and by the way, the reader might be wondering what the third landmark case is that completely transformed the possibilities of the law. It is, of course, *Pinochet (R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147). But my thoughts on *Pinochet* belong to a preface of a book not yet written, not to this one.

So I end this preface with the observation that the issues in this book go well beyond responding to grave historical injustice to a particular section of Australian society. Indeed, they go beyond the question of how Australia sees itself and how the world sees Australia. They concern how all people everywhere see themselves in relation to the land on which they live, and the communities in which they function.

Albie Sachs,
Johannesburg,
30 November 2008.

Acknowledgements

The chapters in this collection record and analyse diverse aspects of the movement towards privatization and individual title over indigenous and local peoples' communal lands and resources. Drawing on experiences and insights across time and jurisdictions, the collection is an important contribution to the critical Australian and international debates about privatization, globalization, property rights and the long-term viability and sustainability of communal land and resources and the communities that have integral connections with these lands and resources.

In June 2006, the Melbourne Law School hosted a workshop, 'Trends toward Individual Title over Communal Lands: Implications for Resource Management and Sustainability', which was financially supported by the Australian Research Council. The majority of chapters in this collection were first presented as papers at the workshop. One of the specific aims of the collection was to provide a broad range of contributing authors, including multidisciplinary perspectives. We are particularly pleased that we are able to include chapters by postgraduate students and by researchers in the early years of their academic careers, as well as notable scholars in the field. We thank the authors for their insights and their perseverance; bringing such a diverse group of scholars together has greatly enriched the project, if at times also 'expanding' the timelines.

Many people contributed to the production of this edited collection. The editors acknowledge and thank them all for their myriad contributions.

We thank the Centre for Resources, Energy and Environmental Law and the Melbourne Law School for ongoing support. In addition to those who have contributed chapters to this collection, we thank Odette Mazel, Jo Bird, Fabienne Balasamo, Darren Dick, Jennifer Beard, Tina Takagaki, Chris Loorham and Bill Genat for their participation and contribution to the debates in the workshop.

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and examine the many dimensions of property rights and sustainability. The publication of this work was also assisted by a publication grant from the University of Melbourne, as well as financial contributions from the Melbourne Law School.

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Lee Godden and Maureen Tehan,
2009.

List of contributors

Adjunct Professor Lila Barrera-Hernández has a law degree from the Universidad de Buenos Aires, an LLM from University of Calgary, and an SJD from Golden Gate University. She is a teaching member of the Natural Resources Research Group, Faculty of Law, University of Calgary, Canada, and an Academic Advisor to the International Bar Association on Energy, Environment, Natural Resources and Infrastructure Law.

Dr Simon Batterbury teaches environmental studies at the University of Melbourne. A geographer, he specializes in the interdisciplinary analysis (and relevance to policy and activism) of environment and development issues in dryland Africa, and more recently, in East Timor and New Caledonia.

Associate Professor Richard Boast holds an appointment in the Faculty of Law at Victoria University, Wellington, New Zealand. He specializes in natural resources law, property law and legal history and has published widely in these areas. He has appeared before the Waitangi Tribunal on numerous occasions, both as counsel and as an expert witness.

Mr Peter Bowen is Principal Geospatial Scientist at the National Native Title Tribunal in Perth, WA. As national custodian of spatial aspects of native title matters, Peter is recognized for his expertise in the development and application of spatial information and is a passionate advocate of the value of spatial information in society.

Commissioner Tom Calma has been the Australian Aboriginal and Torres Strait Islander Social Justice and National Race Discrimination Commissioner since July 2004. The Commissioner has wide responsibilities for ensuring social justice in this area. He has been involved in indigenous affairs at various levels and has worked in the public sector for over 30 years.

Dr Shaunnagh Dorsett is Reader at the Faculty of Law, Victoria University of Wellington. Her research interests lie at the intersection of legal

history, property and indigenous rights. Her recent publications consider the foreshore and seabed regimes and the legal interactions between colonizer and colonized in colonial New South Wales.

Joseph D. Foukona has an LLB, an LLM and PDLP from University of the South Pacific (USP) and an LLM from Victoria University, Wellington. He is a staff member in the Law School at USP. He teaches property law, equity and trust law, and pacific land tenure.

Professor Lee Godden is a Professor at the Melbourne Law School, Australia. Her research covers the intersections of indigenous land rights, property law, and environmental and natural resources law, all with a focus on sustainable development. Ongoing research projects explore legal regimes governing communally held land and property rights in resources in diverse areas.

Ms Clancy Kelly is a PhD candidate at the Melbourne Law School, University of Melbourne, Australia. She has worked in the field of international health and human rights and has a particular interest in indigenous health questions.

Professor Marcia Langton, AM, is Chair of Australian Indigenous Studies at the University of Melbourne. Her doctoral research explored the statutory land claim and native title system in eastern Cape York Peninsula. Marcia has published extensively on Aboriginal affairs issues including land rights, resource management, social impacts of development, indigenous disputes, policing and substance abuse, and gender and identity.

Professor Hanri Mostert is Professor of Law in the Faculty of Law at the University of Cape Town in South Africa. Her research interests are in property law and comparative constitutional law. She has published widely on the transformation of South African rights and land registration systems amid the application of different developmental theories.

Professor Juanita M. Pienaar was in 1997 the first female professor to be appointed to the Faculty of Law at the University of Stellenbosch. She has published extensively on land reform and indigenous law and has just completed a year as an acting judge in the Land Claims Court.

Dr Margaret Stephenson teaches at the TC Beirne School of Law, University of Queensland, Australia. Her research interests include real property law, native title, cultural heritage and indigenous issues in Australian and Canada. Margaret has edited three books: *Mabo: A Judicial Revolution*; *Mabo: The Native Title Legislation*; and *Australia: Republic or Monarchy?*

Associate Professor Maureen Tehan holds an appointment at the Melbourne Law School, Australia. She researches and teaches in the fields of

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property and indigenous legal issues, especially land tenure and cultural heritage, and has been involved in research projects on aspects of negotiation and implementation of agreements with indigenous peoples. She has extensive experience as a legal advisor and consultant to indigenous organizations.

Dr Jude Wallace is a lawyer who specializes in land policy and land administration systems for good governance. She focuses on tenure and titling, transaction management and building infrastructures to deliver sustainable development in countries at all stages of development.

Contents

Chapter 1

Introduction

A sustainable future for communal lands, resources and communities

Lee Godden and Maureen Tehan[1]

Sustainability has become a catchword for 'visions' of the future that seek to build resilient cultural and natural communities and institutions. Sustainability, particularly given its association with development, is not an unproblematic objective. In particular, for many indigenous peoples and local communities,[2] whose access to land and resources has traditionally been associated with race and cultural identity, the capacity to build viable futures is premised upon retaining and enhancing communally held land and resources (Borrini-Feyerabend 2004). On the other hand, there are strong pressures operating through globalization, and in locally oriented land policies, to renounce communal holding in favour of an individualized form of ownership. Individuated ownership is seen as the key to providing property related protections to individuals, thereby allowing freedom of choice and a basis for entrepreneurial success (Hughes and Warin 2005). These positions represent two ends of a spectrum. Indeed, current debates over the respective merits of individual title or communal lands retrace similar oscillations across many cultures and historical periods, and reinforce the central significance of the 'land and resource question'. In this regard, this volume comprises a collection of case studies, analyses and evaluations of changing models of communal property, law and titling systems that are emerging as the vehicles governing access to land and resources globally, regionally and locally.

The collection comprises international analyses in conjunction with case studies concerning communal land and resource holding drawn from Australia, the Americas, Africa, New Zealand and the Pacific region. Each chapter explores an aspect of the broader themes of the tensions between communal and individual property rights in land and resources, trends to privatization and individuation, and the prospects for resilient, sustainable communities.

Case studies are drawn from a matrix of locations to demonstrate these themes, although any selection of places is at once representative and yet idiosyncratic. In part, such particularity derives from the original inspiration

for the collection which was spurred by suggested changes to native title law and statutory indigenous land rights regimes within Australia. In Australia, broader issues about political reconciliation between indigenous and non-indigenous Australians, and the relative disadvantage of Aboriginal and Torres Strait Islander peoples, have crystallized in selected policy settings around the advocacy of various forms of individualized dealing with land as a means to overcome severe problems of poverty, welfare dependency and community breakdown in indigenous communities, especially in remote and rural regions. Many chapters had their genesis at a workshop, 'Trends toward individual title over communal lands: Implications for resource management and sustainability', held at the University of Melbourne in 2006. Yet these Australian developments mirror similar policy, legal models and implementation strategies being advanced at the international level and in many countries around the world.

While this collection is timely for informing policy within Australia, it is pertinent to broaden the debate, drawing on the experience of other jurisdictions and international developments to provide a more comprehensive analysis of the legal, institutional, policy and environmental frameworks surrounding questions of individual 'title', in communal land and resources. Accordingly, the comparative analysis in *Sustainable Futures* is critical, both in terms of identifying trends at the international level, and in representing the historical experience and current reform processes in other countries. Clearly, countries such as Australia, Canada, the USA and New Zealand, with their shared common law heritage, have much to offer by way of comparative jurisprudence and policy initiatives.

However, other regions, such as South and West Africa, the indigenous populations of South America and the Pacific Island nations face similar issues, in part as a legacy of the imposition of colonial legal systems in those countries. Moreover, the experience of emergent nation building in the African and the Pacific Islands contexts is a further source of valuable comparative insight. The selection of case studies largely focuses on countries where common law property and land law systems were instituted under colonial regimes, together with a consideration of post-colonial programmes that, again, reflect a particularly westernized model of land law and land title. While the skew towards common law systems is acknowledged, the experiences that are documented here offer a more expansive contribution to understanding the processes at play across many regions where communal indigenous and local systems of land and resource holdings are under pressure.

Case studies

Property law and land tenure have long been integral components of the governance processes that sit at the interface of human communities and

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