

A New Perspective Concerning Place, Reconciliation and Judgment via a Consideration of the Nexus between Christianity and Indigenous Spirituality

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The paper first offers a brief overview of some key concepts of Native Title, inclusive of key dates and events significant to the current native title issues in Australia. It then proffers a new perspective concerning three key issues relevant to the nexus between Christianity and Indigenous spiritualities, namely (a) the importance of place, (b) reconciliation, and (c) the judgment.

Introduction

A famous cartoon character, Agro the puppet, once said that opinions were like bottoms, everyone has one. Native title is one of those topics about which everyone, or almost everyone, seems to have an opinion. I am engaged in the mediation of native title issues, assisting parties involved in the process to resolve their issues by agreement. As a result of my personal experiences, I would like to proffer a new perspective concerning three key issues relevant to the nexus between Christianity and Indigenous spirituality: (a) the importance of place, (b) reconciliation, and (c) the judgment.

Brief Overview of Some Concepts of Native Title

It is necessary to understand some basic principles about native title in order to make sense of these three key issues, since it is possible to have firm beliefs with little supporting knowledge. Similarly, the strong opinions that are commonly expressed about native title matters are often based on a very limited understanding of the topic. There must be some common understanding of the underlying principles in order to make sense of the following illustration of native title, so, first, I will outline some key concepts.

Some of the more significant dates and events that help us to make sense of the development of the native title system that we have today are:

- 1770 – Captain Cook sailed along the east coast of Australia carrying instructions from the King of Great Britain. Amongst the instructions were the following points (Jones, n.d.):

You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprized by them, but to be always upon your guard against any Accidents. You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain.

The evidence suggests that, while Captain Cook observed that there were natives,

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he did not endeavour to cultivate a friendship or seek consent to the taking of possession of “convenient situations.” Successive government policy positions were then built on this lack.

- January 26, 1788 – English sovereignty is first established in Australia. This is not the complete picture as sovereignty was extended over an ever-increasing area in stages until 1879 and, even as late as November 13, 1990, the territorial sea was extended from 3 to 12 nautical miles. For the purpose of this discussion the important date is January 26, 1788, as the date on which a new sovereign power established a new legal system in Australia.
- October 31, 1975 – The Racial Discrimination Act (RDA) was proclaimed, establishing that the rights of our citizens are protected, without reference to racial origins. The important point for our consideration is that the rights of native title-holders, comprising our Aboriginal People and Torres Strait Islanders, are protected by our Australian legal system in the same way as the rights of non-indigenous Australian citizens. Importantly for native title, it meant that the State and Commonwealth Governments could no longer legally ignore the rights that Indigenous people held in land, and that such rights are protected by the Australian legal system. The fact that the various and successive governments did not recognise the existence of such rights did not remove their obligation to do so, and this was ultimately to be found in the High Court’s decision in *Mabo No 2 (Mabo and Others v. Queensland [No2], 1992)*.
- June 3, 1992 - The High Court of Australia handed down its decision in the case of *Mabo No. 2*. For the first time, the Australian legal system found that rights in land that arose from the traditional law and custom of our Torres Strait Islanders and Aboriginal Peoples’ existed, and that the rights were legally protected where they continued to exist. The case also found that native title could be extinguished by the valid acts of government such as grants of interests in land. The Meriam People, on their island of Mer (the traditional name for Murray Island in the eastern Torres Strait), still held the traditional rights and interests in their land under their law and custom that became recognised in Australian law as native title. The rights were recognised as having continued to exist in accordance with the Meriam People’s law and custom. Importantly, also, the Court found that native title had been extinguished on part of Mer by certain valid acts and grants of government. Those acts were valid because of the sovereign power deriving from the Australian Government. Later, it would be found (*Wik Peoples v. Queensland and Others; Thayorre People v. Queensland and Others*, 1996) that proclamation of the RDA was crucial in determining the procedural rights afforded the traditional owners when the government acted to effect valid extinguishment. In effect, discriminatory practice was legal, valid, before the RDA, but not after. Put simply, procedural rights including compensation apply to acts affecting rights of Aboriginal people and Torres Strait Islanders after the RDA came into force, but not before.
- January 1, 1994 – The Native Title Act of 1993 (NTA) was proclaimed as the Keating Government’s policy response to the decision of the High Court in *Mabo No. 2*. Importantly for this discussion, the first of the four main objects of the NTA (1993, Section 3[a]) is to “provide recognition and protection of native title.” It is fifteen years this month, January 2009, since the NTA was proclaimed.
- December 23, 1996 – The High Court handed down its decision in the *Wik* native title case. Two key findings (Toohey, 1996, pp. 82, 83) were that: (1) “... there was no necessary extinguishment of those [native title] rights by reason of the grant of pastoral leases under the Acts in question,” and compensation for the grant of a mining lease, which took away or extinguished native title rights and interests, before the RDA was proclaimed on October 1, 1975, was valid, and that therefore

no compensation was payable. It should be noted here, that validity is a legal rather than a moral issue.

- September 30, 1998 – The Australian Government gave effect to a major revision of the NTA, commonly known as the “Ten Point Plan” amendments in the Native Title Amendment Act (NTAA, Cth). This was the government’s policy response to the Wik Decision and other developments in the native title law. There were three key legal developments. First, the Full High Court in *Brandy v. Human Rights and Equal Opportunity Commission* (1995), found that the Human Rights Commission’s powers were not the same as a Court. This also affected the National Native Title Tribunal’s perceived powers as it had been established on a similar misunderstanding. Second, the High Court in *Waanyi (North Ganalanja Aboriginal Corporation and Another for and on behalf of the Waanyi People v. Queensland and Others*, 1996), found that claims to native title could be made over grants other than private freehold, thus causing a debate about the extinguishing effect of a wide range of leasehold interests, other than pastoral leases which had been the subject of the Wik case. The amended NTAA contained schedules of leases that extinguish native title. Pastoral Leases were not scheduled leases. Third, the Full High Court’s decision concerning the Wik and Thayorre Peoples (*Wik Peoples v. Queensland and Others; Thayorre People v. Queensland and Others*, 1996) clarified that native title could co-exist with pastoral leases.

An important point of distinction in regard to native title is that either the existence, or extinguishment, of native title is a legal fact based on existing rights and not a policy choice of government. How governments respond to the legal fact of native title is a policy choice. For example, since Captain Cook took possession of the eastern part of Australia in 1770 for the King of Great Britain, some key policy responses of governments aimed at addressing the needs of Indigenous Australians include:

- Captain Cook was instructed to cultivate a friendship and seek consent of the natives – though it appears that Cook ignored this government policy.
- Aboriginal reservations were established in the 1800s to provide a place for the Indigenous inhabitants.
- Church-run missions were established in early to mid 1900s.
- Land Rights grants, government grants of titles to land, to the Indigenous people, commenced in 1975. Two significant examples of high profile Land Rights grants are the freehold titles held by the Traditional Owners over Uluru and Kakadoo. These are freehold titles granted to them by the government. Native title may co-exist with a grant of title under Land Rights legislation but they are conceptually quite different in their origin.
- Prime Minister Rudd’s apology to the stolen generation on February 13, 2008.
- The Victorian Government’s announcement (Topsfield, 2009) that it will consider an alternative native title settlement scheme for Victoria. This consideration was the result of a joint Government and Aboriginal proposal after negotiations facilitated by Aboriginal leader Professor Mick Dodson AM. Professor Dodson became the Australian of the year on Australia Day January 26, 2009, in recognition of a lifetime of work for his people and reconciliation.
- The Queensland Premier, Anna Bligh’s announcement on January 16, 2009, to establish a committee to provide recommendations for wording to be included in Queensland’s constitution to recognise the Aboriginal and Torres Strait Islanders as the original inhabitants of Queensland.

The crucial distinction between native title and policy decisions of government is illustrated by the fact that governments opposed the claim to recognition of native

title by the Meriam People (Mabo No. 2, 1992) and the Wik People's claim (1996) for recognition of native title over pastoral leases. In both cases, the Court found the traditional owners had, or could have, rights and interests that derived from their traditional law and custom. In the case of Wik, the Court found that native title could co-exist with pastoral leases, but left the final determination of whether it does so in the specific cases for the Federal Court to decide in the first instance. Since then, native title has been found to exist by consent over some of the pastoral leases, but some other pastoral leases covered by this claim are yet to be determined. The recognition in each case was confirmation of a legal right that already existed, and not a policy choice made by government.

It is necessary to demonstrate that the claimant group has maintained their law and custom including, for example, cultural heritage, spiritual attachment, and other of their traditional society's norms, to secure the recognition that native title exists. However, the rights recognised as native title relate only to the physical activities and use of the land. These rights could include the right to hunt, gather food, conduct ceremony, camp and live on the land. At its highest form, native title can provide exclusive possession of the land, providing the right to exclude others.

As native title is a pre-existing right arising from a pre-existing society's laws and customs that are recognised in the modern legal system, we need to briefly consider what are the elements of a determination of native title. The Native Title Act (1993, Section 225) sets out the questions that the Court must answer when it makes a determination of native title. Those questions are briefly summarized as follows:

First, does native title exist (Yes or No)? If the answer is "Yes," then answers are required to the five questions paraphrased as follows:

- 1 Who are the people who hold native title? How are the members of the native title holder's community identified?
- 2 What rights and interests do they hold, that are recognised as native title?
- 3 What other rights and interests are held in the land? (Leases, licences, permits and reservations are some examples of other interests that may coexist.)
- 4 How do the two sets of rights, (2) and (3), relate to each other?
- 5 Is the native title exclusive or not? (This is essentially answered by the time the previous questions have been answered.)

By observing when and where determinations of native title have occurred, whether native title has been found to exist or not, and whether determinations have resulted from a contested trial or are made by consent of the parties, questions and conclusions can be drawn regarding both the legal circumstances and also the policy positions taken by the applicant and respondent parties from time to time. The law exists in a political context that provides differing policy responses.

The different policy positions of key parties are observable in patterns that have emerged from agreements reached about native title. For example, there is a particular form of agreement that is available to parties to deal with practical issues that are not resolved within the terms of a determination of native title. The particular form of agreement provided by the NTA is termed an Indigenous Land Use Agreement (ILUA). Indigenous Land Use Agreements are agreements registered by the National Native Title Tribunal. They can deal with a wide range of subject matter related to native title and other interests. Indigenous Land Use Agreements can be made between the parties to the agreement, whether or not there is a determination by the Court that native title exists. The fact that these agreements are used more widely in some states than other states, is due to the differing policy responses. The fact that there is not a steady flow of determinations recognising native title by consent, is also partly due to various policy positions and pressures that arise over time.

In summary this far, the key points as they relate to the subject of this paper are that:

- recognition of native title is the recognition of a pre-existing right, not a grant received from government;
- native title is the recognition of that part of the traditional law and custom that relates to traditional physical activities on their land; and
- traditional law and custom that gave rise to the rights must be maintained, observed and practised through time.

The Importance of Place

Continuing with the illustration of native title, I now address the first key issue of the importance of place. Let me ask you about “your place” (where you live, where you were born, the place you call home) to establish identity. When first meeting people, we often ask, or are asked, about “our place.” Where is your place? This should conjure up pleasant, happy thoughts, and it is a tragedy indeed if this is not so, for whatever reason. Our thoughts of our place have a powerful affect on our wellbeing, our feeling of self worth and assurance. It is part of our physical wellbeing. Tacey (2009) noted: “It is a pity that spirituality is contrasted with the physical when it is a part of the whole being.”

The close link between our perception of our place, our sense of belonging, and our physical wellbeing, has been recognised from ancient times. Some biblical and more recent indigenous examples of this link are:

- The psalmist wrote about the depression of God’s people, Israel, as they were forced to sit by the waters of Babylon, where their captors demanded of them that they sing their traditional songs: “How can we sing the songs of the Lord, while in a foreign land?” (Psalm 137:4 New International Version). It is perhaps because we can all relate to the feeling of depression at the situation they found themselves in, even if we are not in the same circumstance, that this psalm became a popular song some years ago.
- Daniel (Daniel 9:2,3) pleaded strongly for his place when he thought that it would remain in ruins for some considerable time to come. It is also interesting that God’s final promise to Daniel (Daniel 12:13) was not that he would understand all things, but that his place in eternity was sure. Daniel’s strong feeling for his place had not diminished during 70 years of separation.
- Nehemiah was severely depressed at the state of his place, even though it is most unlikely he had ever seen Jerusalem (Nehemiah 1:4-2:9).
- Jesus knew the importance of place to Zacchaeus when he told him to hurry down from the tree, because he wanted to go home for lunch with him (Luke 19:5). Jesus was interested in Zacchaeus’ salvation rather than the meal, as he was on his way to Jerusalem for the final time.
- Job, the man from Uz, looked for the day when his redeemer would stand with him on his land (Job 1:1, 19:25).
- Jesus promised that he was going to prepare a place for each of us. It is his place too (John 14:1-3).
- Abraham left his place while considering his inheritance, and looking by faith for a place for his descendants on this earth and the city whose builder is God (Hebrews 11:8-10).
- God’s people in trouble have a place prepared for them by God (Rev. 12:6).
- Lucifer lost his place in Heaven. He was evicted, and the locks were changed (Rev. 12:7-9).
- Not surprisingly, Aboriginal People and Torres Strait Islanders also have a strong connection to their place. For example, Tania Major (young Australian of the Year for 2007) stated in an interview with Andrew Denton (Denton, 2007) that she was

“a Kokoberra woman [which] means I’m from Kowanyama in a right Aboriginal community, in Cape York,” when explaining the importance she attached to her place.

- Recently, the traditional residents of the former Mona Mona Mission near Kuranda were offered new housing in Mareeba or Cairns in exchange for leaving their place, because it was considered too expensive to provide services to the remote community (e.g., see Strauss, 2009, January). They strongly rejected the proposal that would require them to leave their place, particularly in order to help government meet its short-term housing and budgetary requirements. Where is your place? Would you answer the question the same way now?

The first object (Section 3[a] of the four main objects of the Native Title Act, 1993) is: “to provide recognition and protection of Native Title.” It is important that we, as Australian citizens, recognise the importance of place and belonging to our original owners of the land.

As a personal observation, I have witnessed a change of attitude in the Traditional Owners across the Torres Strait and Cape York, as they have seen their traditional connection to the land recognised as Native Title in the Australian legal system. Rather than closing off areas to the wider community, there has been a more relaxed and welcoming attitude flowing from the determinations generally, with appropriate protocols for respect.

Native Title is, as stated above, *recognition of rights that exist*. What is your attitude toward the recognition of the rights of others, and in particular, Native Title rights?

Reconciliation

The second key issue, reconciliation, has many facets. Issues of employment, health, education, and housing, are important elements of reconciliation, but recognition of traditional place is a vital element in the total perspective. This is not surprising, as we observe that the wellbeing of biblical people, the Jews, was also linked to the recognition and importance of their place.

While appropriately seeking recognition of their Native Title rights, at each crucial step, traditional owners have extended the hand of friendship and reconciliation as they have proposed practical solutions to complex legal questions. For example, after the High Court’s decision to recognise Native Title (*Mabo and Others v. Queensland* [No2], 1992), it was Aboriginal People who proposed and accepted the process to validate an unknown number of invalid grants that had been made post the Racial Discrimination Act of 1975. Similarly, after the Wik Decision (*Wik Peoples v. Queensland and Others; Thayorre People v. Queensland and Others*, 1996), there was an issue with an unknown number of invalid grants since the Native Act was proclaimed in 1994, and, again, the solution to validating these grants was proposed and accepted.

Whilst the recognition of native title rights and interests is a question of law, not a policy option of Government and others, it nevertheless requires a policy response to the fact from governments, corporations, and individuals. It is a reasonable expectation that Christians should support, and be amongst the leaders of, reconciliation in our nation. For example, as Christians, we believe that all things are reconciled to God by Christ making peace through his blood (Col. 1:20). Importantly, we also believe that we are given the ministry of reconciliation (2 Corinthians 5:17-20). This ministry is a requirement of all who claim to follow Christ, not an option. The heart of the ministry of reconciliation is that we are all one in Christ Jesus (Gal. 3:28). This means that Christ bought back the right of existence for us. Accordingly, whether we recognise it or not, we all belong to God.

Jesus showed, by practical example, what true acceptance and reconciliation meant. He openly associated with people whom his society considered to be sinners

and social outcasts (Mark 2:15-17). He sought the friendship of the Samaritan woman at Jacob's well, against the social norms of the day, in order to reach her as well as her family and friends (John 4:39-42). He healed ten lepers, with no strings attached; only one, a Samaritan, would return to thank him (Luke 17:12-17). He took an international detour to heal the daughter of the Syrian Phoenician woman (Mark 7:25-30). The actions of reconciliation, as Jesus' ministry showed, are to be carried forward without reference to whether or not there will be recognition, thanks, or reward. The ministry of reconciliation often is misunderstood by those closest to us, and of whom we anticipate the greatest support; but the ministry does not depend on appreciation or approval of others.

We are given the ministry of reconciliation because "...to all who received him, to those who believed in his name, he gave *the right* [italics added] to become the children of God – children ...born of God" (John 1:12,13). He also encourages that: "[a]s I have loved you, so you must love one another" (John 13:34). We are all one family, and responsible for the wellbeing of one other.

On July 1, 1871, the Rev. Samuel MacFarlane from the London Missionary Society arrived at Darnley Island in the Torres Strait (Burton, 2007). The Torres Strait Islanders were ready to accept the "new light," and readily converted to Christianity. July 1 each year is a public holiday in the Torres Strait, celebrating the "Coming of the Light." Generally speaking, they were, and remain, a deeply spiritual people.

Other principles common to our Indigenous peoples and Christianity include the principles of acceptance, forgiveness, and appreciation. These principles often are seen in the dealings that we have with Aboriginal People and Torres Strait Islanders. It is not surprising, therefore, to also find that they have a strong identity with their place. It is common to find that Aboriginal People and Torres Strait Islanders are leaders in the process of reconciliation with the wider society. This makes my work more rewarding, as there is a common understanding and acceptance of the benefits of reconciliation through agreement-making processes wherever possible. Prayer is not unusual when opening and closing secular meetings to resolve native title issues.

Judgment

We have covered briefly the first two key issues of place and reconciliation. Now I turn our attention to the third key issue, the Judgment. This issue is significant for the biblical writers, since the term is used more than a thousand times in the Christian Scriptures, normally in a juridical sense. Native Title cases are, at their core, legal cases that are usually decided by the Federal Court of Australia.

The Bible speaks of judgment in two distinct contexts. The first and most commonly understood and quoted context is judgment in the sense of a criminal trial. The Bible speaks of the examination of the record to determine the outcome (e.g., Daniel 7:10). Our secret thoughts and motives are on trial (e.g., Eccles. 12:14; Luke 8:17, 1 Cor. 4:5). Our idle words and works are also taken into account (Matt. 12:36; Rev. 20:13). It is not surprising that, in Hebrews 10:27, we find reference to a fearful looking for of judgment, since, if we are honest, we recognise that we are in a hopeless position.

On the other hand, the Bible presents an entirely different perspective of the judgment. First, we gain the picture that we can determine the outcome of our own case, as it is our right that is being judged. "If I judge myself then I am not judged" (1 Cor. 11:31). Our right is secure. We have been bought at a price (1 Cor. 6:20). We were purchased with "the precious blood of Christ" (1 Peter 1:18,19). John the Revelator states that, "Blessed are those who wash their robes, that they may *have right* [italics added] to the tree of life and may go through the gates into the city" (Rev. 22:14). It is legitimate to claim my right, but rather futile to claim my innocence in God's Court. We read in the book of Daniel (7:22) that the "Ancient of Days came and pronounced judgment in favour of the saints of the Most High and the time came

when they possessed the kingdom.” This perspective of the judgment gives us hope, not condemnation. The kingdom is ours, not because of our works, but because it is our right to possess. Our place has been prepared and our right has been secured.

The points of principle that I have often seen illustrated, as I observe Native Title claims go through mediation, reach agreement, and are confirmed by the Court, can be briefly summarized as follows:

- Place and belonging are necessary for all cultures, all peoples, in all times. One of the great promises that God has given us is the assurance of a place as a right in his family and his place. Our very health and wellbeing, our sense of self worth, is affected by reference to our sense of belonging and place, both now and in eternity.
- Reconciliation is offered by God, and given to us as a ministry. It is not an option for Christians, or a particular talent given to some Christians.
- To be assured of a positive outcome in the judgment, we need to plead our legal right to the inheritance or possession of a place in God’s kingdom, which was achieved for us by Christ. We are in trouble if we plead our right based on our innocence or our own merits.
- The only entitlement that is given is recognition of the right that already exists in law.
- The parties commonly settle Native Title claims once they have seen the evidence that can be presented to the court. They then collectively go to the court with an agreement to recognise that Native Title exists. The important point to note here is that the deal is done before the court begins. It is called a determination of Native Title by consent of the parties. The claimants are not examined or cross-examined in the witness box, because the right has been agreed to beforehand. Similarly, the outcome of the heavenly trial of my legal right to a place in the kingdom is settled before I appear in court.
- The deal is completed before the case is brought to court, where it is publically confirmed. If we have instructed our advocate, Jesus Christ, to plead our right to the kingdom, and this right is demonstrated by the evidence of our citizenship, then the outcome is assured, and confirmed by the court.

Conclusion

In conclusion, there are two questions I leave for us (individually and collectively) to ponder:

- 1 How do we view the importance of our place, and the importance of demonstrating genuine respect for the rights of others as they exercise their right to have past wrongs addressed?
- 2 Do we respect the right of others to have their rights confirmed in regard to their land, their place, and their home?

The recognition that we each have a place in God’s Kingdom, by right, and that we can obtain it by no other means than by that right, may well be revealed by your answer to these questions.

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