Modes for Reckoning with the Past: Lessons from the recognition of Modern Indigenous Peoples' Rights

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The question of legal accountability in the present for acts of violence, dispossession, enslavement and financial irresponsibility carried out in the 'past' is currently at the heart of several legal and policy debates and the global public discourse around broader issues of persistent and rising inequality, restructuring of welfare and austerity regimes, racial justice, debt relief and reparative justice. From reparation claims for colonial era slavery and violence being brought against the U.K. by succeeding generations of family members of those tortured and killed in the counter-insurgency operations against the Mau-Mau war of independence in British colonial Kenya and by the Caribbean states for harms suffered during large-scale colonial era slavery, to the linking of the current state of extreme inequality and institutionalised racial violence directed against African American communities in the U.S.A., the demands actions and events past continue to make on the present are at the centre of key debates regarding the possibility of generating a more just future.[1] In our present, to paraphrase the anthropologist David Scott, the past no longer seems to be easily letting go and as demanding a lot more effort and work from succeeding generations.[2]

It is with cognizance of this broader context and its central problematic that in my research I have been attempting frame and address the more specific questions of temporality, coloniality, indigeniety and law. In particular, my research examines how the question of past violence and dispossession and its continuing constitutive effects into the present in the particular case of indigenous peoples has been sought to be addressed in the case of modern indigenous peoples' rights, both internationally and in the case of specific settler-colonies. More specifically, how has the 'past' sought to be constructed in these processes along with its particular relationship to the present? What lessons, if any, can we draw upon from this particular mode of reckoning with the sordid past?

The development of modern indigenous peoples' rights have been celebrated in many quarters for their interruption of the modernizing and developmentalist teleologies of modern nation states that had sought to deny the existence of indigenous peoples and to progressively assimilate them into the population of the nation-state.[3] Importantly, this has also included the recognition and protection of certain basic rights accruing to individuals and groups on account of their status as indigenous peoples.

A key feature of this modern indigenous peoples' rights that I identify in my research is that how the rights recognition and protection here gets premised upon the prior construction of the identity deemed worthy of indigenous peoples' rights protection as one being marked by a vulnerability (signifying a heightened potential for disappearance and erasure and thus a

[1] *See* Ta-Nehisi Coates, 'The Case for Reparations', *The Atlantic,* June 2014; Priyamyada Gopal, 'Much of Britain's wealth is built on slavery. So why shouldn't it pay reparations', *New Statesman,* 23 April 2014.
[2] *See* David Scott, *Omens of Adversity: Tragedy, Time, Memory, Justice,* Durham University Press, 2014.
[3] In the international legal architecture this shift is most significantly captured in the change in the two ILO Conventions, i.e. from the expressly assimilationist ILO Convention 107 of 1957 to the only legally binding international convention recognizing and protecting indigenous identity and rights in the form of the ILO Convention 169 of 1989. *See* Karen Engle, *The Elusive Problem of Indigenous Development,* Duke University Press, 2011.

failure of temporal transmission), and a authenticity, signifying a ahistorical temporal continuity.[4] Thus, in temporal terms, this is a protected and recognized identity signifying two contradictory temporal demands – in order to be indigenous and worthy of special rights protection one must exhibit *both* temporal discontinuity in the form of erasure and loss and also a temporal continuity in terms of evidencing a continuous and uninterrupted practice of an authentic and 'traditional' set of cultural practices.[5]

As the legal scholar Chris Tennant showed in his early work on the ILO and the other United Nations institutional engagements with modern indigenous peoples' rights, this present vulnerability and this age-old authenticity are firmly hinged together in that indigenous peoples are constructed as the (precarious) remnants of an age prior to the 'contemporary' modern era who are now threatened with large-scale extinction and cultural genocide on account of the unchecked, dynamic and untrammelled development and expansion of 'modernity' into 'remote regions' of the world.[6] Indigenous rights here become a shield to protect and preserve these peoples and valuable 'culture' from the operations of historic processes and structures that are themselves constructed as natural, inevitable, albeit unfortunate.[7] In this way, the numerous choices and particular decisions taken at different levels, including that of the state and international apparatus, that constitute the systems of (continued) dispossession of these peoples gets erased in the very move which offers them certain rights protection.[8]

Specifically, in the case of Australia, a former British settler colony that had infamously adopted a overtly assimilationist and in many ways, genocidal policy towards the indigenous peoples — including a series of violent dispossessions largely enabled by the Australian settler law at the time. Apart from forced seizure of land, this policy infamously included the separation of younger generations of indigenous peoples from their indigenous families in order to achieve the aim of 'civilizing' them and to bring about their proper assimilation into the 'nation'.[9]This policy of dispossession and denial – symbolically captured by the reliance on the doctrine of *terra nullius*, as per which Australia was uninhabited land at the time of its 'settlement' - began to be unravelled with the Australian High Court Judgment in the *Mabo* case in the year 1992.[10]

This renunciation of this doctrine by the Court can be seen as an attempt to exactly reckon with the violent and dispossessive past by attempting undo its legacy in the present by way of

[4] *See* Anna Lowenhaupt Tsing, '*Adat*/Indigenous: Indigeneity in Motion', in Tsin (ed,), *Words in Motion,* Duke University Press, 2009.

[5] As Elizabeth Povinelli notes, the successful performance of this identity requires an intricate balancing on the part of the claimant, who can neither be too little or too much of either – vulnerable or authentic. Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism,* Duke University Press, 2002.

[6] Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993', *Human Rights Quarterly* 16, 1 (1994) 1.

[7] *See* S. James Anaya, *Indigenous Peoples in International Law,* Oxford University Press, 2004.

[8] *See* Sundhya Pahuja, 'Laws of encounter: a jurisdictional account of international law', *LRIL* 1, 1, (2013) 63.

[9] The survivors of this policy are now collectively referred to as the 'stolen generation'. Robert Maine, 'In Denial: The Stolen Generations and the Right', *Quarterly Essay* 1 (2001) 1.

[10] *Mabo and Others* v. *The State of Queensland,* (1992) 175 CLR 1. For scholarship which has hailed the transformational effect of this decision and the changes it brought about *see* Richard Bartlett, '*Mabo*: Another Triumph for Common Law', *Sydney Law Review* 15 (1993) 178; Henry Reynolds, *The Law of the Land,* 3rd ed., Penguin, 2003.

expressly recognizing and protecting 'native title' to the land whereas the previous doctrine on *terra nullius* had been premised upon the denial of 'native' presence on the land.[11]

Much like in the case of the modern international regime of indigenous peoples' rights, the pivotal shift seems to occur vis-à-vis the treatment of what get referred to as indigenous 'culture' or 'traditions'. This model of reckoning with the past seems to move from an outright dismissal of all indigenous 'culture' and 'tradition' as being inferior, backward and primitive compared to the dominant/colonial culture to one where rights protection and recognition is afforded to this very indigenous 'culture' and 'tradition'.[12]

What is pertinent are the grounds on which this indigenous 'culture' or 'traditions' do get recognized by the Court (and subsequently by the legislature) and, since it is this culture that is deemed to be the object of rights recognition and protection, also the grounds of these 'special' indigenous rights under Australian law – namely, continuous observation of the original (and thus authentic) cultural practices by the claimants as well as the vulnerability of those practices in the face of the colonial history of dispossession.

In the case of the first criterion, it is significant that cultural authenticity carries strong connotations of non-relationality, with the features of cultural production and practice which we associate with relational existence with others, namely, transformations, hybridization and exchange, being treated as grounds for non-recognition of indigenous cultural practices for the purposes of native title claims.[13]The emphasis on non-relationality is further evidenced by the fact that the practices in question need to be in existence pre-settlement (or invasion) of Australia, when presumably the indigenous inhabitants of the land were existing all on their own. This object of recognition and protection – indigenous culture – would thus seem to exist outside of time itself, which interestingly also makes for it exhibiting all the signs of what signifies the 'past' in modern temporal regimes – i.e. endless repetition *sans* difference, creation or change – which is what the progressive temporal stage that modernity (and those deemed to be fully modern, i.e. Euro-American) was said to inhabit (i.e. the present) was said to have overcome.[14] I would argue that with this shift what changes is the overt hierarchy between indigenous culture and 'modern' culture but not the sense of the implicit natural superiority as force of the modern present over the indigenous past. It is, after all, but natural,

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[11] The Court in its own words described the task before it as being one of confronting "the darkest aspect of the history of the nation". It is also instructive to read an editorial in one of the leading Australian newspapers in the wake of the judgment that opined: "*With Justices William Deane and Mary Gaudron, the matter was put as clearly and as truly as it could be. The dispossession of the Aborigines was 'the darkest aspect' in the history of Australia. It had bequeathed us a legacy of 'unutterable shame'. While this legacy remained unacknowledged and unrepaired in law, the spirit of our nation was diminished."* Robert Manne, 'Forget the Guilt, Remember the Shame', *The Australian,* 8 July 1996, p. 11.

[12] Silverstein provides us with an illuminating account of the exact contours of this shift when he writes: "*Queensland, as defendant, had based its argument on the decision in* ***In re Rhodesia****, claiming that the Indigenous inhabitants of Australia were 'so low in the scale of social organization' as to be bereft of recognizable property rights. The court, however, rejected this approach as contrary to modern standards of human rights and anti-discrimination. Rather, the approach relied upon (…was) to use native law and custom to animate a native title which persisted through colonisation."* Ben Silverstein, 'The Rule of Native Title: A View of *Mabo* in the British Empire', *Griffith Law Review* 16 (2007) 55, pp. 74-76.

[13] This was made clear in the Court's decision in the *Yorda Yorda* case a few years later, wherein the Court wherein the court ruled that where the practices in question displayed some sort of transformations and the effects of the interactions between indigenous groups and settlers that would prove to be fatal for any successful rights claim in the present as they would be said to be extinguished. *Yorta Yorta Aboriginal Community* v. *The State of Victoria and Ors,* 1606 FCA (18 December 1998). *See* Valerie Kerruish and Colin Perrin, 'Awash in Colonialism', *Alternative Law Journal* 3 (1999) 3.

[14] *See* Peter Fitpatrick, *The Mythology of Modern Law*, Routledge, 1992.

much like the flow of time from the past to the present to the future in the modern temporal regime, that the past should give way to the present.[15]

Critically such a denial of relationality acts as a denial of any *constitutive* relationship between the settlers and the indigenous peoples in the present – including one materially constitutive of settler privelege and indigenous vulnerability - a relationship that would have entailed a measure of accountability and responsibility on their parts in the present.[16] For after all, with the assumed "denial of coevality"[17] that the performance of authenticity demands, how can we begin to think in terms of relations of responsibility between groups of peoples who inhabit entirely different temporal locations? It makes for a reckoning with the past that is premised upon the denial of any actual responsibility in the present on the part of the dominant settler groups towards it. As a consequence a native title claim as Judge Olney in the later case of the *Yorta Yorta* observed:

> *"…is not about righting the wrongs of the past, rather it has a very narrow focus directed to determining whether native title rights and interests in relation to land enjoyed by the original inhabitants of the area in question have survived to be recognised and enforced under the contemporary laws of Australia."*[18]

I would argue, it is the above mentioned vulnerability of the past to the force of present and the 'natural' flow of time itself that brings us to our second requirement of this indigenous culture – its vulnerability. Without exhibiting this 'fragility' in the face of so-called forces of nature that make up the 'dark history' of the Australian nation how can these practices claim the protection of 'special rights' which are aimed at their 'preservation' and 'conservation' and how can this shift be seen as one which moves from a 'dark history' of trauma to a celebrated present of the triumph of tolerance if the object of protection does not display signs of trauma and a propensity to simply disappear?[19]

As was suggested earlier, not only are these two requirements contradictory, they also have a rather troubling effect on the construal of the 'dark' and 'shameful' past that is sought to be reckoned with, particularly when it comes to identifying its underlying causes – undoubtedly a key question when it comes to determining accountability. So when vulnerability is to be exhibited in conjunction with a non-relational authenticity we end up with a schema wherein the causes of it can only be innate and internal to the 'culture' concerned. A culture

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[15] *See* Rolando Vàsquez, 'Modernity Coloniality and Visibility: The Politics of Time', *Sociological Research Online* 14 (4) 7 (2009)

[16] As Povinelli observes, this authentic and essentialist identity demanded by the law makes an impossible demand upon the indigenous subject to elide exactly those markers of dispossession (and relatedly, settler privilege) that give this subaltern identity its lived meaning in a context of colonial domination. I.E. where this model of recognition would have indigeniety as being an essentialist and inherent identity, forged in pristine solitude, Povinelli insists that it has no meaning outside the context of a violent and dispossessive relationality of a settler-colonial state and the struggles waged against its operations by these groups over the last two hundred years. Povinelli, *The Cunning of Recognition*, p. 40.

[17] *See* Johannes Fabian, *Time and the Other: How Anthropology Makes its Object*, Columbia University Press, 1983.

[18] Silverstein describes this model of recognition of indigeniety as a: *"…system which located land rights in an expression of continuity rather than justice: land rights, however minimal, were to be recognised for those who could show the least colonial intervention in their lives, not on the basis of restoring justice and making amends for theft.*" Ben Silverstein, 'The Rule of Native Title: A View of *Mabo* in the British Empire', *Griffith Law Review* 16 (2007) 55, pp. 56-57.

[19] *See* Povinelli, *The Cunning of Recognition.*

disappears because it could not, on its own, withstand the forces of time. Furthermore, given the staged temporal naturalness underlying the effects of the 'encounter' of the settlers on this indigenous 'culture' as past, the processes and histories of violent colonization and settlement end up getting presented as 'forces of nature' – or to use the (in)famous phrase from the judgement of the Court 'the tide of history – which suggests a process, very much along the lines of the 'modernity' that Tennant identifies in the case of the international regime, which was deterministic and *sans* any particular choices and decisions for which any accountability can be construed in the future. At the end of this reckoning we are left with a sense that violent colonization just happened, inevitably, irrevocably, "having a momentum of its own"[20], albeit unfortunately and while it might be a source of nostalgic lament it can't be a source of any accountability on the part of the current generation of settlers or even of this generation of lawmakers. As the Australian legal historian Ann Genovese observes:

> "*Through the tide of history, the extinguishment of native title is effected without the overt violence associated with burying, trampling and overlaying…The metaphor reveals a particular understanding of history as a means for erasing and forgetting the past that serves to exculpate the law of any responsibility for the extinguishment of native title. The tide of history is not just a means of revealing events though texts but a force that alters those events. It has inevitable and unstoppable consequences. The law can only observe on what history inevitably does and comment on the impact of the consequent erasure. The past is not only capable of washing away the facts but this erasure is inevitable and irrevocable. Tides, like colonisation, arrive from the ocean and make irreversible progress that is out of the law's control. The tide of history, then, implies the impossibility of a jurisprudence of historical injustice."*[21]

Even more troublingly, when these two aspects get combined, we have schema in which increasingly the responsibility for suffering the violence and dispossession of colonization gets ultimately placed upon indigenous culture or to be more exact upon those claimant subjects who fail to adequately maintain its continuity and authenticity. For as the Anthropologist Elizabeth Povinelli argues in her influential account of the Australian indigenous peoples policy of this period, its 'cunning' lies in its displacing the guilt for the effects of dispossession in terms of 'loss' indigenous culture and traditions on these groups themselves who are seen as having failed to adequately preserve them against the 'tide of history'.[22]

In a model where the only decisions and choices ultimately being made are by these indigenous peoples themselves – namely, the choice to either continue with the customs and traditions of the ancestors or to forever lose them in the face of the forces of dispossession – we see how it is the so-called beneficiaries of these rights who end up being responsibilised for their failure to successfully perform the benchmark for their achievement. Thus a failed native title claim on account of a loss of 'culture' and 'traditions' in the face of the dispossessive 'tide of history' evidences a failure to presevere and continue with traditions on

[20] Silverstein, 'The Rule of Native Title', p. 75.
[21] Ann Genovese, 'Turning the Tide of History', available at: https://griffithreview.com/articles/turning-the-tide-of-history/ (last accessed 21/07/2015).
[22] Povinelli, *The Cunning of Recognition,* p. 54.

the part of the claimants.[23] It is they who need to inculcate virtues of consistency and preserverance in order to become responsible subjects.[24]

What does this mean in terms of our initial question of reckoning with the past in the present in order to generate a more just future? It is my contention that the model offered by modern indigenous peoples' rights is one in which the past is sought to be reckoned with in order to authorise the present order of things or, to use the popular terminology, reconcile with the present dispensation and *not* as a reckoning which opens up the present to a transformational opening, i.e. the future. In this regard, it is the construction of an essentialist, exclusive and ahistorical indigenous identity as itself a remnant of the past in the present that plays a pivotal role by both constructing the violent and dispossessive past as *passed* and as having no direct and material bearing upon the present (one which gets hailed as having overcome it) and also as non-relationally construing settler-indigenous relations in the present and thus suggesting that indigenous vulnerability in the present is not an effect of continued settler conduct and actions but exists independently of it (as in the vulnerability of tradition in the face of modernity). The 'invisible asterisk' that Engle's and Povenelli identity when it comes to the recognition of indigenous cultural practices worthy of protection is basically this – one which prevents recognition of rights and protection of practices which actually disrupt and challenge this *status quo.*[25]In cases where the rights under native title happened to be inconsistent with the existing settler property rights regime, the position was clear – they would be struck down.[26]

In conclusion, I would connect the critique provided here of the recognition paradigm of modern indigenous peoples rights and its particular mode of temporalizing and relating to the past actions in the present to the broader current debates regarding attending to the past. In terms of lessons learnt, one significant aspect concerns the difference between constructing, recognizing and invoking the past to ground authority in the present and elide responsibility to one in which the past is constructed in a manner which allows for the taking up of responsibility in the present in a manner that is responsive to the continued suffering generated in it from these actions past. Crucially, in the later case, the construction and engagement with the past is an active one in that contrary to it generating the grounds to stabilize the present effects a transformative change in the present order. Here the responsiveness of justice, which might exactly be disruptive and destabilizing for the current dispensation of things, takes precedence over the ordering stability of reconciliation. It is an approach that is open to conceiving the constitutive historical relationship between the contemporary prevalence of suffering and disadvantages with the contemporary dispensation of privilege and how they have been inherited from an often traumatic and unjust past.

[23] Povinelli, *The Cunning of Recognition.*

[24] For a development of the argument that under the current neoliberal condition such responsibilization of subjects has emerged as a dominant mode of governance *see* Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution,* The MIT Press, 2015.

[25] Thus 'native title' itself as it got spelt out on this case law as well as in the relevant legislation, i.e. the Native Title Act of 1993, the rights to land being recognized were primarily rights to access and not to exclusive possession. It is also pertinent to note that with the Native Title Amendment Act 1998 the scope of these rights was further watered down by restricting possible Native Title over pastoral land and seas.

[26] *Western Australia* v. *Ward* (2002) 213 CLR 1, p. 89. *See* Silverstein, 'The Rule of Native Title', p. 74.