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Displacement, Replacement and Relocation: The Noongar Aborigines' Land Claim in Western Australia

Displaced from their own “country” by colonisation, the Noongar Aborigines of the south-west of Western Australia have lodged the *Single Noongar Claim*, an application for determination of native title, to seek the recognition of their customary land rights. Through that process, they were confronted with a second displacement by the respondents to their claim who tried to deny them this recognition. But the Noongars found ways to relocate themselves territorially, historically, socially, economically and politically in their “country.”

After the British Crown acquired sovereignty over the western part of Australia in 1829, British settlers progressively deprived the Noongars – the Aboriginal Australians of that area – of their lands. The Noongars increasingly came under control of the government of Western Australia which restricted their liberties and segregated them in town camps, missions and reserves. They have survived that history of oppression and, since 1995, they have sought the recognition of their native title. In Australia, the *Native Title Act 1993* recognises that the Australian Aborigines' connection with the land survived the acquisition of radical title by the British Crown at the time of sovereignty. It enables Aboriginal people to make legal claims over a territory they owned in accordance with their “traditional” laws and customs, provided that it is on Crown land.

In 2003, eighty Noongars, represented by the South West Aboriginal Land and Sea Council (SWALSC),¹ lodged an application for determination of native title over the south-west of Western Australia, including the Perth metropolitan area. This application referred to as the *Single Noongar Claim (SNC)* was made on behalf of all the Noongars, a population estimated at 27,000 people. At the request of the State of Western Australia (the State) and the Government of the Commonwealth of Australia (the Commonwealth),² the *Metro Claim (Bennell v Western Australia)* covering the Perth metropolitan area was treated as a separate proceeding of the *SNC* before Justice Wilcox. In his judgement delivered in 2006, Wilcox recognised the existence of a single Noongar society governed by a normative system of laws and customs at the date of settlement in Western Australia in 1829. He also confirmed the continuity of that society and its normative system to the present day. He identified native title rights which had survived the acquisition of sovereignty by the British Crown and should be recognised, subject to extinguishment.

The State and the Commonwealth appealed this decision. In 2008, the appeals division of the Federal Court of Australia (the Full Court) handed down a judgement which confirmed the existence of a single Noongar society to sovereignty (*Bodney v Bennell*). However, the Full Court concluded that Wilcox had failed to consider the continuity of this society and its connection with the area in the separate proceeding, and sent the

1. SWALSC is the Noongars' Native Title Representative Body. NTRBs are organisations appointed under the *Native Title Act 1993* and recognized by the Federal government to represent the Aborigines in native title matters.

2. As the principal respondents in the case, the State and the Commonwealth will mainly be considered in this article. Among other respondents were the Western Australian Fishing Industry Council (WAFIC), various local government authorities and Christopher Bodney, a Noongar man who had registered five separate applications.

case back to the earlier Court for reconsideration. In consultation with the Noongars, SWALSC decided to pursue the *SNC* out of court and through negotiations with the State.

During the colonial period, the Noongars were displaced from their own “country”³ but, with native title, they found themselves confronted with a second displacement. To deny the recognition of their land rights, the respondents to their claim tried to impose on them a legal definition of “society,” and how they should be socially and territorially organised. The respondents also strove to deprive the Noongars of their Aboriginality and their history. Without going too deeply into legal technicalities, this article considers the different aspects of this re-displacement and its implications through some of the arguments and concepts mobilised by the State, the Commonwealth and the Full Court. It also highlights how the Noongars resisted and managed to replace the definition of an “authentic” Aboriginality they were confronted with by a more inclusive approach. Finally, it examines how the Noongars succeeded in relocating themselves back on their territory.

Displacement

To have their native title claim recognised, the Aboriginal applicants must prove their existence as a “society” which originates in the society in existence at the time of sovereignty. They also have to demonstrate their cultural continuity with the precolonial society, endorsed as the model to which the postulants must correspond to be recognised as “traditional,” and thus “authentic” Aborigines. The native title legislation is modelled on anthropological concepts which have been crystallised into legal concepts, despite the fact that they have been questioned since. The judges and lawyers use anthropological writings as proof during the trials where anthropologists are also called as experts (Dousset & Glaskin). Anthropology is the basis on which each party will defend its picture of a “traditional society,” and attempt to persuade the judge to recognise it in preference to rival versions presented.

The anthropological concept of “tradition” which shapes the native title legislation evacuates history and context and freezes the peoples it is applied to, displacing them into another time. The moment when “traditional” societies were recorded by some anthropologists has been termed the “ethnographic present” (Burton; Dousset; Fabian). During this short lapse of time, the “primitive” societies under scrutiny were thought to have ceased to exist, due to their encounter with Western society, but they were not yet considered too acculturated for a reconstruction of their precolonial “traditional” state to be undertaken. Anthropological writings in this vein were dedicated to recreating a picture of these societies as they “really” were before being contaminated by the West. “Traditional” societies were thought of in terms of “tribes”: social entities defined as territorial, linguistic, kinship-based, political and religious units. For the whole Australian continent, Alfred Radcliffe-Brown elaborated a theoretical model of the tribe as a social unit composed of hordes, patrilineal and exogamic groups who exploit the

3. For the Aborigines, *country* represents both the physical and the metaphysical worlds. During the Dreamtime, mythical ancestors produced a cultural framework and shaped the physical world. Topographic features are their physical traces and embody their power. Through their rituals, human beings reactivate that power to ensure the renewal or maintenance of natural species. Human beings, the natural elements and the spiritual world are thus interrelated and form a single whole.

resources of a territory they own. The concept of "tribe" has been criticised since the mid-twentieth century for its early implications with evolutionist theories and its lack of relevance, as it does not reflect the cultural reality and the flexibility of the social and territorial systems observed in the field (Godelier; Hiatt). "Traditional" societies were the reflexions of the Western preconceptions projected on them by the anthropologists: they were imagined (Burton). The concept of "tradition" has also been questioned to reveal that traditions are not fixed and unchanging and can be, for instance, invented (Hobsbawm & Ranger), reinvented, and employed as a strategic resource (Keesing & Tonkinson) or can reflect both continuity and discontinuity (Handler & Linnekin).

The native title legislation has remained impervious to these questionings and requires the Aboriginal applicants to demonstrate that their social and territorial organisation corresponds to Radcliffe-Brown's classical model. In 2002 in the *Yorta Yorta* case,⁴ the High Court placed greater emphasis on the term "traditional" (*Yorta Yorta* 46-47; Strelein 77-80). It considered that the members of a society are bounded by the observance of a common normative system of laws and customs. To prove that their society is "traditional" and obtain the recognition of their native title, the postulants have to establish that their normative system of laws and customs derives from the pre-sovereign normative system of their ancestors and has been substantially maintained. To the common understanding of "traditional" as meaning "transferred from generation to generation," the High Court added a notion of age and continuity.

The *SNC* is a perfect example of the way the Australian State implements its "repressive authenticity," a strategic tool designed to eliminate the Aborigines (Wolfe 163 *sq.*). Patrick Wolfe argues that the Australian State is still to be regarded as a colonial state which pursues the logic of elimination of the Aboriginal population it has been deploying since the early days of colonisation. The land rights legislation, Wolfe explains, is the continuity of that logic of elimination as it imposes an ideal "authenticity" against which the Aborigines cannot measure themselves, and thus are excluded from native title. Wolfe writes that "[colonialism] does not appropriate a historical indigeneity; it replaces it with a conveniently mythical one of its own construction. The condition of its replacement is precisely the elimination, or *displacement*, of the empirical indigene within civilisation" (208, author's emphasis). The Aborigines, such as the Noongars, who have fully endured the impact of colonisation are displaced from the category of the "authentic" Aborigines. Because they are historicised, they are not found to meet the standards of the fabricated "traditional" Aborigines living in a mythical time, and are elided.

In the *SNC*, the State, the Commonwealth and the Full Court acted to reinforce this "repressive authenticity." The Noongar applicants' referential for "traditional" society was the same that existed in 1829. To defeat the *Metro Claim*, the State and the Commonwealth based their arguments on the report by their expert anthropologist Ron Brunton. They adopted the classical model of social and territorial organisation integrated by the native title legislation to demonstrate that there was no Noongar society at sovereignty. Instead, Brunton claimed that there were several smaller social units with no overarching authority, even though he found himself unable to identify them. He suggested they could correspond to the eleven tribes identified for the South West by

4. The *Yorta Yorta* case was a native title claim made by the Yorta Yorta Aborigines. The case was dismissed by the Federal Court in 1992, the Full Federal Court in 2001 and the High Court in 2002 on the grounds that the Yorta Yorta people had ceased to occupy their lands in accordance with their "traditional" laws and customs.

Norman Tindale.⁵ Brunton found there was insufficient cultural unity between these groups to support the idea of a single society: language, customs and beliefs – especially laws and customs concerning land – which did not distinguish them enough from other neighbouring groups to bind them together as Noongars.

The State and the Commonwealth held that contemporary Noongar society was not “traditional” because it had changed in a fundamental way, so much so that its rights and interests in land could not be recognised. According to Brunton, the contemporary Noongar community was not governed by a normative system and thus could not be considered as a society. Were it to be found otherwise, Brunton claimed that any such system is not a continuity of the pre-colonial normative system and therefore the contemporary Noongar community is not “traditional” in the accepted sense of the term. When they appealed Wilcox’s verdict before the Full Court, the State and the Commonwealth reiterated these arguments.

The Full Court confirmed the existence of a single Noongar society at sovereignty. However, the way the judges treated the other issues on appeal further reinforced the Noongars’ displacement initiated by the State and the Commonwealth. They decided that Wilcox had committed the error of focussing on the continuity of the community itself while he should have more closely analysed the laws and customs of the contemporary Noongar community. The judges found this issue critical since the definition of the *SNC* as a “communal claim” in itself did not suffice to give the Noongars communal title over the South-West. They suggested that these laws and customs could allocate different rights in land to the postulants. The judges also considered this would help identify Noongar individuals still connected to the area of the *Metro Claim*. They argued that Wilcox had wrongly attempted to demonstrate the postulants’ connection to the whole area of the *SNC*, and that his approach had failed to prove the specific connection to the area of the *Metro Claim*. This connection could be considered extinct (as claimed by the respondents) if the individuals related to that area had not continuously observed their “traditional” laws and customs.⁶ Moreover, the judges deemed the study of the laws and customs crucial, as their premise was that the continuity of a society did not necessarily prove the continuity of rights and interests. Indeed, in their legal understanding, the laws and customs forming the normative system of a society give rise to rights and interests, not the society itself.

The conception of the judges of the Full Court required that the postulants’ laws and customs remain unchanged if they wanted to have their native title recognised. They declared themselves open to the notion of change only in as much as the rights and interests in land were still “traditional,” otherwise change would be “unacceptable” (*Bodney* 74). The judges reproached Wilcox with not having sufficiently established whether the Noongars’ land tenure system had undergone “acceptable adaptations” or “unacceptable changes.” They declared that some elements even suggested discontinuity, and that Wilcox should not have taken into account the external causes for change, such as

5. Norman Tindale (1900–1993) was an entomologist and a self-trained anthropologist. In 1974, he published *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits, and Proper Names*, a map and a catalogue of the Aboriginal language groups at the time of European contact. This is the realisation of a project commenced in the 1920s with a revised version of a map he first published in 1940.

6. To obtain the recognition of their native title, the Aboriginal applicants have to prove their “connection” to the area they claim in accordance with their “traditional” laws and customs. This issue remains vaguely defined by the legislation and open to interpretation.

the European colonisation. To them, "[Wilcox]'s reasoning [had been] infected by an erroneous belief that the effects of European settlement were to be taken in account – in the claimants' favour – by way of mitigating the effect of change" (*Bodney* 97).

Lisa Strelein, director of the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), emphasises the problematic vocabulary employed by the judges of the Full Court and writes that "[instead] of focusing the inquiry around the seemingly objective test of 'traditionality,' the Court introduced overtly judgemental language as to what is 'acceptable' and 'unacceptable' change and adaptation in Indigenous society and determined that it is the Court's role to judge this" (102). The judges assigned themselves the power to define Noongar society and its social and territorial organisation, its internal allocation of rights, and the extent to which it can change. They increased the burden of proof that the postulants already have to provide to be recognised as "traditional" and obtain their native title.

The State, the Commonwealth and the Full Court displaced the Noongars once again by not granting them their native title. They refused to recognise the Noongars as "traditional" because, having endured the impact of colonisation, they were historicised. To curb the threat that the land claims are felt to represent to the integrity of the Australian nation and its territory, the Noongars were placed into "modernity" and deprived of their Aboriginality (Attwood; Wolfe). Ironically, while history was used by the State, the Commonwealth and the Full Court as a justification to reject the recognition of the Noongars and their land rights, at the same time, they negated their history and their capacity to adapt and survive as Noongars. However, the Noongars found ways to resist this displacement.

Replacement

The Noongars knew the burden of proof that the process of native title imposes on the applicants and prepared themselves accordingly. The experts working for them defended the existence of a single Noongar society at sovereignty which shared common laws and customs, beliefs and language. Their expert anthropologist, Kingsley Palmer, argued that the groups Tindale had mapped and which Brunton considered as the relevant "societies" for the *SNC*, corresponded to the different dialect groups of the Noongar language. He emphasised the fact that "[mapping] territories hides the complexity of the relationships between individuals and the implications that these relationships might have had for the exercise of rights to country in practice" (*Bennell* 84). His report was oriented towards the flexibility and adaptability of the Noongars' social and territorial organisation.

Wilcox listened to the arguments the Noongar applicants brought before him as well as the Noongar witnesses' testimonies, and stated that "in considering non-Aboriginal accounts of Aboriginal society, it is always necessary to make allowance for the authors' (and one's own) assumptions and prejudices, including any tendency to view Aboriginal society through a Eurocentric lens" (*Bennell* 106). He chose to use the term "community" to distance himself from the legal definition of "society" and its focus on the laws and customs of a group. Wilcox acknowledged that the legal term "society" could refer to social entities of varying sizes, and that it was difficult to identify those to apply it to for the purpose of native title. However, he argued that what needed to be determined was the relevant social entity of each claim, and that it did "not matter that there may

exist a smaller, or larger, group of people which may properly be regarded, for other purposes, as a 'society' or 'community'" (*Bennell* 425). The social entities defended by Brunton could well be regarded as "societies," he conceded, but in the Noongar case, he was convinced that the members of these groups were bounded by a larger normative system and recognised the existence of the pre-sovereign Noongar community.

Wilcox then turned his attention to the contemporary Noongar community and its relationship with that pre-sovereign one. He had to determine whether there was a continuing observance of its laws and customs, or a discontinuity with a recent revival that would have entailed the failure of the claim (Bernard). Palmer argued that "the rights and duties of the Noongar people in respect of their country have not changed in their *fundamentals* and the normative system upon which an owner is understood to relate to his or her country, remains founded upon the same principles as it did at sovereignty" (*Bennell* 704, emphasis added). The applicants stressed that it was a question of degree as to whether native title was satisfied. They said that "the question is likely to be whether the community or group, as a whole, has *sufficiently* acknowledged and observed the relevant traditional laws and customs" (*Bennell* 776, author's emphasis).

Wilcox found that, despite many factors of fragmentation, the Noongar families had remained connected through a "Noongar network," that could be regarded as a "community," and declared himself impressed by the Noongars' survival in the face of the drastic conditions that colonisation had imposed on them. He embraced the applicants' definition of continuity. He interpreted the judgement of the High Court in *Yorta Yorta* as conceding that, as long as "traditions" had been substantially maintained by the community, a certain degree of change was unavoidable, and not fatal to native title, given that the European settlement had had a profound impact on the Aboriginal groups. While the State, the Commonwealth and the Full Court subsequently would reproach him for this on appeal, Wilcox's judgement on continuity was informed by the effects that the historical context had on the Noongars. He acknowledged their history of dispossession, and was ready to accept a considerable degree of change. He argued that: "[...] one should look for evidence of the continuity of the society, rather than require unchanged laws and customs" and that "significant change [was] readily understandable [if] [it] was forced upon the Aboriginal people by white settlement" (*Bennell* 776, 785). According to him, what had to be determined was whether the changes, brought about by that specific historical context, were adaptations or a departure from "tradition." As already mentioned, this approach led him to conclude that contemporary Noongar society is the continuity of the 1829 society and, thus, the Noongars' laws and customs, and more specifically their rights to land, derive from the pre-sovereign normative system and are "traditional." In the Statement preceding his judgement, Wilcox made the following remark:

Undoubtedly, there have been changes in the land rules. It would have been impossible for it to be otherwise, given the devastating effect on the Noongars of dispossession from their land and other social changes. However, I have concluded that the contemporary Noongar community acknowledges and observes laws and customs relating to land which are a recognisable adaptation to their situation of the laws and customs existing at the date of settlement. (*Bennell* 7; emphasis added)

He decided to focus on the adaptability of the Noongar community rather than on its unchanging character. Hence, he accepted that the Noongars were part of the history

of the South West, and were not a fixed social entity, frozen in time. Social and cultural change could thus be perceived as a normal response to their changing historical context.

Wilcox identified native title rights that should be recognised subject to extinguishment. Considering that, in the *Metro Claim*, proofs were given from the entire area covered by the SNC and that “the whole includes its parts,” he declared that these rights should be recognised in the whole claim area (Bennell 82). Keeping his distance from the legal concept of “society,” he regarded these rights as communal and identified the Noongar community as the native title holding group, which implies that all Noongars can have rights and interests in the South West. As we have seen, this is another finding that the Full Court rejected. Wilcox thought that “[it] is not necessary (and it would be inappropriate) for the Court to become involved in issues as to the intracommunal distribution of special rights over portions of the total area, in relation to which native title has been established.” He concluded: “The Court leaves it to the community to determine those issues” (Bennell 78). This standpoint is confirmed by Strelein (111) who points out that the State, the Commonwealth and the Full Court’s position “is a dangerous and inappropriate infraction on the jurisdiction and authority of the Indigenous communities to determine membership of the group and entitlement or distribution of rights and interests under their own law and custom.”

The response of the Full Court to Wilcox’s findings shows that the Noongar applicants managed to unsettle the native title legislation. Noel Pearson, an Aboriginal lawyer and land rights activist, wrote that “[just] when the whitefellas were getting relaxed and comfortable about native title, Justice Murray Wilcox of the Federal Court has dropped a bombshell right in the centre of Perth” (n.p.). Wilcox “dropped a bombshell” because, given the harsh legislative response to previous claims, the positive outcome of the SNC was not expected. Glen Kelly, SWALSC Chief Executive Officer, explained to me in interview that the State thought the Noongars’ land claims would be easily defeated and was unprepared for the outcome:

The State’s legal strategy was: “We’ll try and take this part [Perth area] to court, we’ll knock that off and then the rest of them [SNC] will just fall from there. We go to court on the weakest part and then the rest will fall like dominoes after that.” Now, unfortunately for the State, they were very very badly prepared because they thought it was just going to be a walk-up start and they had seriously underestimated the strength of Noongar connection to country. Irrespective of the extinguishment of native title, the strength of people’s connection to country remains quite strong and the State really underestimated that, really badly, like massively. (Interview 08/05/2012)

The Noongars succeeded in convincing Wilcox that they were still “traditional” and had retained their land rights. The repressive category of “authentic” Aborigines excluded the vast majority of Aborigines. The Noongar judgement raised the prospect of replacing the official definition of Aboriginality with a more inclusive one that would give the historicised Aborigines the opportunity to access native title.

Relocation

Despite the fact that the Full Court confirmed the displacement initiated by the State and the Commonwealth, the Noongars built on Wilcox’s positive judgement and are now in the process of relocating themselves territorially, historically, socially, economically and politically. Empowered by Wilcox’s recognition of their “society” and the exis-

tence of their land rights, they decided not to run the risk of a new trial and, to resolve their land claims outside of the native title process, they pressured the State into negotiating. In spite of the financial cost and the slowness of the procedure, and given that native titles have been massively extinguished in the South West, the Noongars have more to gain from a negotiated outcome than the recognition of certain rights and interests in relation to land. As Glen Kelly told me: "Native title is not land. In native title, you go to the court, you don't get land. You do an alternative settlement, you get land but that's because we've been able to get the admission from the State Government that something more needs to be done than just the basics of resolving native title claims" (Interview 08/05/2012). Indeed, native title is a bundle of rights and interests in land which can be extinguished one by one. Native title is symbolic, as it neither grants land nor the possibility of developing the area over which title has been recognised in a non-"traditional" way.

The negotiations started in 2010 and the State made several offers that were presented to the Noongars through a series of meetings across the South West. In November 2014, the State made a final official offer which consisted in the official recognition of the Noongars as the "traditional" owners of the South West by an Act of the Western Australian Parliament; a land estate (of up to 320,000 hectares); a financial fund (AUD\$50m a year for 12 years to set up a "future fund" and \$10m a year for a further 12 years); the establishment of a Noongar system of governance; a community development package aimed at strengthening Noongar culture and society; the joint management of natural reserves and national parks; and the creation of a Noongar Cultural Centre. Between January and March 2015, SWALSC convened six Indigenous Land Use Agreement (ILUA) Authorisation Meetings in the South West, and all six claim groups voted to accept the negotiated settlement.⁷ The ILUAs were signed by Colin Barnett, the Premier of Western Australia, on 8 June 2015, but legal issues have to be finalised before they can become operational.

Instead of being submitted to the restrictions of the native title legislation and the discriminatory attitude of the Courts, the Noongars decided to take their future into their hands by negotiating with the State. This pushed them into strengthening and refining the process of identity-building they had initiated when getting ready to face the legal system. The *Single Noongar Claim* journey is finally leading the Noongars to physically and culturally relocate themselves in their "country". This also forced them into reflecting on their society and history (Bernard) and the demands of authenticity imposed on them. Ironically, while the recognition of native title requires that they should not have substantially changed since sovereignty, by going through the SNC legal process, they have ended up building themselves a flexible and dynamic identity which reconciles "tradition" and "modernity" and provides them with political and economic impetus.

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7. If the Noongars had rejected the offer, the SNC would have been sent back to the Federal Court for a new judgement.

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