Native title and the genesis of private property rights
By John Sheehan

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To garner a historical and legal understanding of Indigenous or non-Indigenous private property rights in Australia, it is necessary to first consider the genesis of such rights in Europe as the early modern nation state emerged. Indeed, the whole juridical notion of private property emerged in Europe contemporaneously with the emergence of the early modern nation state. Perry Anderson in his remarkable 1974 text Lineages of the Absolutist State notes this process never occurred in the Arab, Turkic, Indian or Chinese empires, nor in Japan.

European agricultural production was rooted in a feudal system which had as its characteristic conditional private property held by a noble class. European societies whilst arguably fragmented were nevertheless gathered in tribal groupings led by a noble class who formed alliances with other noble classes. As such the modern nation state was unrecognisable, and the ‘kings’ were merely the most powerful tribal leader or noble, relying upon force and fear for recognition. Prior to the emergence of the early modern state, conditional private property was at best tenuous, and if required by the ‘king’ any unwillingness to yield to the royal request could be very bad for one’s health. History tells us the condition under which property was held privately was homage to the most powerful tribal leader, noble or ‘king’, a reflection of the ‘individual’s status in the political, economic and legal order’.

With the emergence of the early modern nation state, Anderson notes the transition from conditional to absolute private property in land occurred early in the Renaissance. With absolutist private property, Anderson records that:

The increase in the political sway of the royal state was accompanied, not by a decrease in the economic security of noble landownership but by a corresponding increase in the general rights of private property. The age in which ‘Absolutist’ private authority was imposed was also simultaneously the age in which ‘absolute’ private property was progressively consolidated.

Early feudalism arguably emerged from the collapse of the classical world which was unable to undergo transition to capitalism, however the emergence of absolute private property in the Renaissance was according to Anderson:

... the indispensable preparation for the advent of capitalism and signified the moment at which Europe left behind all other agrarian systems...

2 Anderson 424
4 Anderson 424
5 Anderson 429
6 Anderson 420
From this point onwards the acquisition of one’s absolute private property by the early modern nation state could occur only in a manner which recognised the worth of such property in private hands. Property could no longer be confiscated at the will of the ‘king’, but acquired from other land holding classes only through just process. It is no coincidence clarity in property rights emerged at a time of great change in European society. The agrarian revolution and subsequent industrial revolution in particular necessitated the acquisition of long tracts of land firstly for canals, and then railways. This could only be done using the due process of law and at this point, ‘many of the most fundamental constitutive features’\(^8\) of property law emerged from the common law of torts, specifically the development of a form of distributive justice\(^9\) reshaped for the purpose of property compensation.

By the 18\(^{th}\) century Adam Smith observes absolute property in private hands was not only the liet motif\(^7\) of English society but rights to private property were now protected at law:

*Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government.*\(^{10}\)

Further with the emergence of absolute property in private hands, also emerged the early modern market for such rights between the 16\(^{th}\) and 18\(^{th}\) centuries. The commodification and hence the emergence of a market for private property was a direct response to the arrival of absolute private property and the early modern nation state. The market for such rights necessitated their definition and as John Lie points out in his important work on the social origins of English market society in the period between 1550 and 1750:

*...[t]here was nothing automatic or laissez-faire about the growth of market society.*\(^{11}\)

Finally, the English courts asserted the position of absolute property in private hands fashioning:

*...the common law into a body of rules that defined and protected property rights.*\(^{12}\)

Any presumption of arbitrary abrogation of private property rights by the state was not only swept away by the legal system, but also founded the political and social framework of the early modern nation state. As a result, Finn points out the current legal terrain is:

*...the individual accorded legal recognition and protection; and a heightened vigilance against improper imposition and unfair treatment by the state and its agencies. Case law on criminal*

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\(^7\) Anderson 425

\(^8\) Penner, 74.

\(^9\) Distributive justice can be described as society-wide desirable distribution of benefit or burden which alleviates the affected person of some or all of the injury or loss.


procedure, natural justice, and statutory and constitutional interpretation provide ample evidence of
the emphases given variously to human dignity and human rights, to privacy and physical integrity, to
the enjoyment of one’s reputation and one’s property, and to the “rights” of the individual said to be
inherent in our particular social and constitutional order...13

Paradoxically, the 1992 decision *Mabo No.2*14 similarly mirrored this legal fashioning albeit in the
Australian context centuries later. Native title was recognised by the High Court as having survived
the imposition in 1770 of British sovereignty, and as a result, recognised by the Australian common
law. Importantly, Boge points out the common law thus recognised a property right sourced from
other ‘laws and customs’15, a property right singularly not sourced from the Crown.

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14 (1992) 175 CLR 1

15 Boge, Christopher (2001) “A Fatal Collision at the Intersection? The Australian Common Law and