

BOOK REVIEW

Secher U *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014 Hart Publishing Oxford and Portland Oregon).

ISBN 978-1-84946-553-3

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Date of submission

25 October 2017

Date published

16 January 2018

Editor Prof C Rautenbach

How to cite this article

Du Plessis WJ "Secher U
*Aboriginal Customary Law: A
Source of Common Law Title to
Land* (Book Review)" *PER / PELJ*
2018(21) - DOI
<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3405>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3405>

Abstract

This contribution provides a short review of the book by Ulla Secher *Aboriginal Customary Law: A Source of Common Law Title to Land* on aboriginal customary law as a source of common law title to land published in 2014.

Keywords

Customary law; aboriginal law; common law; sources of common law; title to land.

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Review

In her book *Aboriginal Customary Law: A Source of Common Law Title to Land*, Ulla Secher engages on a highly theoretical level with the question of native title in the hope of developing an alternative approach to issues of land rights for Australian Indigenous People. Her proposed alternative approach is to frame Aboriginal customary law as a valid source of (English) common law title to land, in order to develop a new doctrine of tenure called *ad veritatem*. To do so, the author delves into the maze of British and Australian real-property law, by specifically focussing on its origin and application since 1788, in order to show how Aboriginal title can be a source of common law title.

The book is divided into four parts and contains eight chapters. The author makes clear the rationale for each chapter, and in that sense it is high quality research in that it continually remains focussed on the primary theme of the book: aboriginal customary law as a source of common law title to land. Throughout the work Secher's deep analysis questions the fundamental assumptions of the legal nature of Indigenous land rights. Part I is an extensive look at the history of land law pre-*Mabo*, and will have historians of land law (particularly those stemming from British law) in awe. Part II deals with the doctrine of tenure post-*Mabo*, where she argues for the emergence of the Doctrine of Tenure *ad Veritatem*. Part III looks at the meaning of radical title in Australia post-*Mabo*. In part IV she examines the implications of the crown's radical title in foreign jurisdictions, including South Africa.

She starts with an analysis of the decision of the High Court of Australia in *Mabo v Queensland (No 2) (Mabo)*,¹ where she focusses on the finding that upon the acquisition of sovereignty, the Crown acquired a radical title in land. She delves into the history of radical title to better understand the origins of this title, and what this means to Aboriginal land rights in Australia (and possibly other former British colonies). She then continues to make the argument that radical title is merely a bare title that bestows no beneficial entitlement to the related land for the Crown. It then consists of two aspects: one, it advances a doctrine of tenure as it applies in Australia, but it is also

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¹ (1992) 175 CLR (HCA).

connected to sovereignty, as it supports the Crown's power to convert this radical title to beneficial ownership.² This in effect rejects the court's finding that the Crown acquired beneficial ownership of land automatically (which was not subject to native title), because there was no other proprietor. Secher calls for a distinction between property and sovereignty.³

Once we accept that the unalienated land is not in the Crown's beneficial ownership, it becomes possible for Secher to bring in her earlier (very thorough and detailed) theoretical and historical arguments about the nature of pre-feudal forms of landholding and traditional exceptions to the feudal doctrine of tenure in the hope of classifying the legal status. Here folkland and tenure by ancient demesne, the origins and functioning of which she discusses thoroughly in part I, becomes important. As far as folkland is concerned, it provides Secher with the argument that fundamental common law principles and radical title make it possible for Aboriginal people to establish common law title in land, if they can prove title in the land through their own custom. This will imply that the people had rights before the sovereignty established the common law title, and that English land law applicable to pre-feudal landholding is applicable and subject to pre-existing Aboriginal rights. Hence, Aboriginal title as a source of common law.

Her analysis of the history, the theory and the cases is incredibly detailed with extensive argument being made. For a scholar who is not familiar with British or Australian real-property law, this often means having to reread some arguments in order to make sense of them.

The book will be of interest to scholars who wish to reconceptualise the Crown's title in former British colonies. It is debatable whether this would be of much help in South Africa given South Africa's history of having two colonial powers, with South African property law mostly resting on common law and legislation with, of course, the Constitution always motivating for the development of the common law in line with the Constitution. My reservation about the usefulness of her arguments lies in the fact that customary law is not a source of common law but a legal system in its own right, as recognised by the Constitution. One could perhaps argue that with the court's propensity, despite its reservations, to evaluate customary law land rights through a common law lens, Secher's theory opens up the possibility of allowing recognition for a greater range of indigenous land rights *as a source of common law title*. The test for the proof of common law customary title is also easily met: a demonstration "pre-sovereignty

² At 139.

³ At 3.

laws/customs of an identifiable Aboriginal group pursuant to which land was purposively occupied".⁴ Since this seems very similar to the test developed by the Constitutional Court in *Alexcor v Richtersveld Community*⁵ to prove customary title in land at annexation, the arguments made in the book might be of importance in the future, especially if the 1913 cut-off date for restitution claims is reconsidered.

Bibliography

Literature

Secher U *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing Oxford and Portland Oregon 2014).

Cases

Mabo v Queensland (No 2) (Mabo) (1992) 175 CLR (HCA)

Alexcor v Richtersveld Community 2004 5 SA 460 (CC)

⁴ At 355.

⁵ 2004 5 SA 460 (CC) paras 56 and 57.