Yugambeh Nation

Name: _____

Date: _____

AGES 15 AND UP · LAW AND IDENTITY

The Real Issue, Part II

The article begins by noting that over 60 definitions of Aboriginality have been used since colonisation, many made by Europeans from ideas of racial and cultural inferiority, such as Queensland's *Aboriginal Protection Act 1897*. Today's definition is owned by the people themselves: descent, identification, recognition.

Since the Commonwealth's introduction of the definition, the Tasmania Dam Case introduced its principles into law, which Mabo expanded upon and clarified in its ruling regarding Native Title, while Yorta-Yorta would lay the foundational elements of what would constitute an Aboriginal group, or an Aboriginal 'Society' - its law and custom.

Law and Custom, and the practise and observance of such, is the foundation for Native Title. Every group of people on earth live by some form of law and custom, rules of society that express how they are to behave, how they are to treat others, what rights they have to community resources, and what obligations they have to the community. It is the rights to land and waters from traditional law and custom that are recognised by Native Title, if a traditional law enabled people to hunt X animal, then on the simplest level, that groups native title will recognise that traditional right to hunt X animal.

Just as the High Court has recognised that these traditional law and customs decide what rights and interests a group has, the Court has also recognised these law and customs also decide who is a member of the group. This brings us back to that third-limb of the definition - recognition. As you can see, from the Commonwealth test to Mabo, there has been a progression and refinement:

In 2020, a landmark High Court case was decided which held that Aboriginal Australians could not be classified as aliens under section 51 of the Australian Constitution. The decision in this case relied on the application of the test developed in Mabo:

Love/Thoms was a landmark case that expanded on the rights and interests derived from traditional law and custom. Just as Mabo recognised landed rights and interests, Love/Thoms recognised that the possessors of those rights and interests had an inherent and unique connection to this country that excluded the possibility that Aboriginal Australians could be considered "Aliens".

This decision also reinforced other important principles of Australian law, particularly that Parliament cannot, simply by giving its own definition of a Constitutional term (like 'Alien'), expand a power under the Constitution to include persons who could not possibly answer the description of that term in the ordinary understanding of the word.

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THE REAL ISSUE, PART II

Questions

Questions

1. What does the article say Native Title is founded on?

2. Give the article's simple example of how traditional law becomes a native title right.

3. What else do traditional law and custom decide, besides rights to land?

4. In 2020, what did the High Court decide in Love and Thoms?

5. What principle about Parliament and the Constitution did the decision reinforce?

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