

BACKGROUND PAPER 2

THE RECOGNITION OF ABORIGINAL LAW AS LAW

When Europeans first arrived in Australia, under what legal doctrines could the new settlers claim to bring their own legal systems to the new lands, as opposed to considering themselves bound by the legal system already in place? This paper discusses how the assertion of British sovereignty resulted in establishment of the Australian legal system in a way that denied any general recognition of Aboriginal law.

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prepared for Committee of Inquiry into Aboriginal customary law
by the Northern Territory Law Reform Committee

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1 WHAT IS SOVEREIGNTY?

The term sovereignty has several meanings.¹ Sovereignty can be described as the right of a people to assert control over a particular area of land. This control is usually seen in internal acts, such as the making of laws for that area, and external acts, such as the making of treaties of extradition with foreign communities.

In the British tradition, sovereignty used to reside with the King or Queen as God's representative on earth, or at least in England. Thus the power of the King or Queen - also called *the sovereign* - was originally *absolute*. The sovereign could do whatever he or she wanted, and it was the *law* that whatever he or she did *could never be wrong*.²

Over time this changed. Beginning with *Magna Carta* in 1215 it was recognised that parliament also had some sovereign rights, that the making of future laws required the approval of parliament and that ordinary people had legal rights that the sovereign could not take away, without parliament's approval.

Following this tradition, in Australia we now say that sovereignty resides *with parliament*, and the people elect the members of the various Australian parliaments. However we also sometimes say that sovereignty resides *with the Crown*, by which we mean the Governor or Governor-General acting on the advice of his or her Ministers. Thus the Governor-General or a Minister signs extradition treaties, parliament does not approve them. Because the Australian Constitution limits or regulates the powers of the Governor-General and of all Australian parliaments and courts, it is often seen as a document embodying conceptions of sovereignty, as a fundamental or supreme law.

Thus, in Australia we do not see the consent of the people as relevant to the *legitimacy* of internal matters (such as a taxation law like the GST) or external matters (such as the decision to go to war). Even if *most* people do not want these laws or decisions, they will argue that the decisions are wrong, not that they are unlawful. Because parliament is sovereign, laws can take away the legal rights a person has. The only controls over the *sovereignty* of parliament are the limitations in the constitutional legislation of the Commonwealth or State or territory.

¹ Thomas Biersteker and Cynthia Weber (eds), *Sovereignty as Social Construct* (London, England: Cambridge Press 1996) at 12 defines sovereignty "as a political entity's externally recognized right to exercise final authority over its affairs".

² Sir William Blackstone (1723-80) British legal scholar, whose *Commentaries on the Laws of England*, published in the four volumes from 1765 to 1769, was, for more than a century, the foundation of legal education in Australia, Britain and the United States, restated the maxim as "The king is not only incapable of doing wrong, but even of thinking wrong: in him there is no folly or weakness.": W Blackstone, *Commentaries on the Laws of England* (Facsimile of 1765 edition) (Chicago: U Chicago Press, 1979) Vol 1 at page 246.

(a) External sovereignty

The principle of sovereignty dictates that a state has *exclusive* sovereignty over all persons, citizens or aliens, and all property, real and personal, within its own territory.³ While Australia became a federal self-governing British Colony in 1901, with effective internal sovereignty, it did not become a sovereign nation until sometime between 1938 and 1986.⁴

(b) Internal sovereignty

Generally speaking, the Commonwealth and States are recognised as sovereignty entities. The notion of sovereignty residing in the Crown or parliament permits the recognition of equal or lesser rights of sovereignty in Aboriginal communities. However, it has not been the constitutional history of Australia to recognise Aboriginal communities as possessing sovereign rights. This may be contrasted with the position in the USA.⁵

³ R v Finta [1994] 1 SCR 701 at 806.

⁴ Various dates have been proposed. The High Court said in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 “the Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people”.

⁵ Chief Justice Marshall called Indian nations “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 US 1 at 12 (1831); *Worcester v Georgia* 31 US 350 (1832) at 559, “independent political communities”. *United States v Wheeler* 435 US 313, 326 (1978): “Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations. The powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished.’” (Emphasis in original).

2 THE BRITISH ACQUISITION OF SOVEREIGNTY OVER AUSTRALIA

The legal effect of British acquisition of sovereignty over the Australian land mass was the English law applied to Australia.

(a) International law background

The association of nations has given rise to rules of behaviour known as international law. International law is primarily concerned with the conduct of States in their international dealings.

When land that was unoccupied by European powers began to be discovered by European nations, under various doctrines of international law, these nations allotted these territories among themselves. The function of these doctrines was to prevent European nations going to war against each other.

International law, that is, European ideas of international law, at the time of settlement of Australia, recognised various modes of acquiring sovereignty over land, the most relevant being: occupation of land that was *terra nullius* (land belonging to no-one), conquest, cession and prescription. These concepts were justifications that were accepted by other European nations, rather than a coherent doctrine of developed reasoning derived from principles of justice.⁶ Cession involved the transfer of sovereignty by treaty. This may have been voluntary, or as a condition of surrender at the end of a conflict. Prescription is the long acquiescence by other nations of the possession of territory and the exercise of sovereignty by a nation.

Applying the doctrine of occupation, early writers on international law regarded the indigenous peoples of the Americas as the owners of their territories, the land not being *terra nullius*. Grotius stated: “Equally shameless is it to claim for oneself by right of discovery what is held by another ... For discovery applies to those things which belong to no-one.”⁷

This view was prominent in the 16th and 17th century. It was qualified in the 18th century by the introduction of a distinction between land occupied by peoples with a social and political organisation recognised by European powers – and the key test was agricultural use of the land - and those without this type of organisation.⁸ European nations were permitted to acquire sovereignty over such territory by occupation. However today, the fiction by which an inhabited territory could be regarded as *terra nullius* is no longer supported in international law.⁹

⁶ Ian Brownlie, *Principles of Public International Law* (5 ed) (Oxford: OUP, 1998) at 129.

⁷ Grotius, *On the law of war and peace* (trans FW Kelsey, 1913 Oxford: Clarendon Press) at 550.

⁸ J Westlake, *Chapters on the Principles of International Law* (Cambridge: CUP, 1894) 141-43.

⁹ *Western Sahara* (1975) ICJR at pp 85-86: “[T]he concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned.”

(b) English/Australian law

The assertion of sovereignty over the east coast of Australia by the British Crown and the subsequent acts by which the Australian colonies became part of the dominions of the British Crown are considered “acts of state” and the validity of these actions cannot be challenged in domestic courts as a matter of Australian law.¹⁰

The way in which sovereignty was acquired was thought to determine the applicable legal system. In 1765 Blackstone described three ways of acquiring sovereignty over territory - occupation [sometimes called settlement], conquest and cession - and stated that English law provided that the law in force in a newly acquired territory depended on the manner of its acquisition.¹¹ In settled colonies, “where the lands are claimed by right of occupancy only, by finding them desert and uncultivated. . . all the English laws then in being, which are the birthright of every subject, are immediately there in force.”¹² In the case of conquered or ceded lands, the general rule was that the laws of the country continued until those laws were altered by the British parliament, or the Crown under its prerogative powers.¹³

Although the fiction of *terra nullius* was rejected by the High Court in *Mabo*, the court continued to assume that Australia is a settled colony.¹⁴ In any event, English law was introduced into Australia by British legislation.¹⁵

¹⁰ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 [*Mabo*], Brennan J at 31-32, Deane and Gaudron JJ at 78-79, Dawson J at 12; “The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.”

¹¹ Blackstone Commentaries, Vol 1, 104-5; *Cooper v Stuart* (1889) 14 App Cas 286 at 291; Privy Council Memorandum of 9 August 1722, set out in *Anonymous* (1722) 2 P Wms 75 [24 ER 646].

¹² Blackstone Commentaries op cit 104.

¹³ *Blankard v Galdy* (1693) Holt KB 341; *Campbell v Hall* (1774) Lofft 655 at p 741.

¹⁴ *Mabo* at 89.

¹⁵ The Australian Courts Act 1828 (Imp) (9 Geo IV c 83), section 24 stated that all English common law and legislation in force at the date of the Act (25 July 1828) was to be applied: “all laws and statutes in force within the realm of England at the time of the passing of it, shall be applied in the administration of justice in the courts of NSW so far as the same can be applied within the said colony and as often as any doubt shall arise as to the application of any such laws, the Governor, with the advice of the Legislative Council, may by ordinance declare whether such laws or statutes should be deemed to extend to such colony, and be in force within the same, with such limitations and modifications as may be deemed expedient; provided that in the meantime, and before such ordinances shall be actually made, it shall be the duty of the Supreme Court as often as any such doubts shall arise upon the trial of any information or action to adjudge and decide as to the application of any such law or statute in the said colony.”

3 THE NON-RECOGNITION OF CONTINUING ABORIGINAL SOVEREIGNTY

(a) Original Aboriginal sovereignty

As a result of various native title cases, it is clear that Australian law now recognises that Aboriginal communities possessed sovereignty in the sense of having a legal system before 1788.¹⁶

(b) Continuing Aboriginal sovereignty

In 1836 the Supreme Court of New South Wales held that it had jurisdiction to deal with Mr Murrell, an Aborigine, who was charged with the murder of another Aborigine. Counsel for the accused, put the following argument to the Court:

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, not a ceded country either; it, in fact, comes within neither of these, but was a country *having a population which had manners and customs of their own*, and we have come to reside among them; therefore in point of strictness and analogy to our law, *we are bound to obey their laws, not they to obey ours.*¹⁷ (*emphasis added*)

This argument was rejected. Australian law has rejected the idea of *continuing* Aboriginal sovereign rights to make laws after 1788.¹⁸

(c) The recognition of Aboriginal legal systems and laws generally

While Australian law recognises that Aboriginal legal systems existed, and traditional law continues to exist, at the moment, it only recognises an Aboriginal legal system for the purpose of establishing native title rights with respect to land (see below). There is only one legal system in Australia, and only one “law” and that is Australian law. Under the Australian legal system there are two types or sources of law: laws made by parliament (legislation) and laws made the courts (common law). Aboriginal law can only be recognised if Australian law says so.¹⁹

(i) The recognition of Aboriginal laws with respect to land

Under Australian law, all pre-sovereign Aboriginal interests in land survived the British assertion of sovereignty, *unless* expressly extinguished by some legal means.²⁰ Pre-existing interests in land are now protected by the *Native Title Act*.

¹⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 [Yorta].

¹⁷ *R v Murrell* (1836) 1 Legge 72 at 72.

¹⁸ *Coe v Commonwealth* (1979) 53 ALJR 403 Gibbs J at 408. A claim for a more limited form of sovereignty, that of an Aboriginal nation within the Australian nation, with sovereignty over Aborigines alone, was also rejected by Gibbs J.

¹⁹ *Mason v Tritton* (1994) 34 NSWLR 572 at 578 per Kirby P.

²⁰ *Mabo* at 68 per Brennan J.

(ii) The non-recognition of other Aboriginal laws

On what basis does the common law of Australia deny the recognition of Aboriginal laws not dealing with land?

The notion of sovereignty of parliament means that, at any time, parliaments can pass laws which extinguish forever native title rights and all the legal rights of all Australians, if they have constitutional power to do so.²¹ In *Mabo* and *Wik*, the High Court said that parliaments had not exercised the power to completely extinguish all native title rights, so some rights still remained.²²

In *Walker v New South Wales*²³ Mason CJ ruled that the notion of sovereignty meant that all Australian parliaments could pass laws that applied to Aboriginal people, whether or not the Aboriginal people consented to those laws. These parliaments had “legislative competence to regulate or affect the rights of Aboriginal people”.²⁴ Murrell's case has been taken as settling the matter that Australian courts have jurisdiction over Aboriginal people regardless of whether Aboriginal laws are relevant to the offence.²⁵

So, the Australian legal system does not need to ask, has the Northern Territory Criminal Code extinguished Aboriginal criminal law. It simply says, *whether or not Aboriginal law exists*, the courts can legally ignore it, *unless* the Criminal Code itself (or another law) says the court has to take Aboriginal law into account.

(iii) The non-recognition of Aboriginal legal systems

Australia is in the same position as many other colonised countries that introduced western legal systems. Aboriginal people were taught “to disdain their cultural heritage and [as a result, Aboriginal] legal systems slowly withered” in areas with European populations, while in the non-urban areas, “indigenous legal systems endure in varying degrees”.²⁶

It is clear from the consultations carried out by the Committee that Aboriginal law is the important regulator of life in many Aboriginal communities in the Northern Territory. In these communities people live their lives under traditional law, and many disputes are resolved in accordance with the Aboriginal legal system. For such people there is only one legal system and it is Aboriginal. The existence of Aboriginal legal systems in the Northern Territory and general discussion of their key features, is set out in the Committee's Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory.

²¹ *Kartinyeri v Commonwealth* (1998) 152 ALR 540; George Williams *The Federal Parliament and the Protection of Human Rights*, Research Paper 20, (Canberra: Department of Parliamentary Library, 1999).

²² *Mabo* at 68 per Brennan J, *Wik* at 217 per Toohey J.

²³ (1994) 182 CLR 45.

²⁴ *Ibid* at 55.

²⁵ *Tuckiar v The King* (1934) 52 CLR 335; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 [*Milirrpum*] at 261-62; *R v Wedge* [1976] 1 NSWLR 581.

²⁶ Leon Sheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism* (Portland, OR: Frank Cass 1999) at 69.

4 ABORIGINAL LAW AS LAW

(a) Western perceptions of Aboriginal law

When common law lawyers and judges, have looked for law in Aboriginal societies, there has been a tendency to treat law as divinely inspired revelations and not rules deriving their content and form from social needs; to treat law as religious rules, and not as dispute resolution mechanisms.²⁷ Many would query the appropriateness of such a classification. However, it is one that has appealed to the High Court.²⁸

(b) Aboriginal law and change

It is sometimes said that an Aboriginal person can only be truly said to be bound by traditional law if he or she is living a wholly “traditional” lifestyle, that is, no electricity, no fridge and no gun for hunting. This point of view fails to recognise the right of Aboriginal people to determine how they will exercise their right to life. It is also contrary to the way the High Court looks at native title rights and interests.²⁹ A person does not cease to exercise a traditional right by exercising the traditional right in a contemporary way. Accordingly, traditional laws may still operate in Aboriginal communities that have electricity and other material manifestations of contemporary life.

The examination of Aboriginal law as primarily a dispute resolution mechanism³⁰ has revealed, not surprisingly, that *non-fundamental* legal norms may ultimately be negotiable.³¹

Aboriginal people speaking to the Committee have similarly stated both aspects: fundamental law that has always been and cannot be changed; and law where the punishments can be adapted to meet modern circumstances. It was not the Committee’s endeavour to pin down those who spoke to us to define the line between the non-changeable and the changeable. However some speakers emphasised the non-changeable tradition to a much greater extent than others.

We were given an example of an accidental breach of a fundamental male adult ceremonial protocol, by a child, where some men believed that the child should be punished by the old penalty (death) and others felt that this was inappropriate. The lawmen discussed the matter and imposed a different penalty. Some communities have abandoned or significantly modified the penalties appropriate for murder/manslaughter, while other communities are not prepared to do this. The traditional law requirements to “cleanse” property after the death of someone are generally considered to have undergone change, to a “smoking ceremony”.

²⁷ In *Milirrpum* at 167 Blackburn J said: “the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole”.

²⁸ *Ward v Western Australia* [2002] HCA 28 at para 14 per Gleeson CJ, Gaudron, Gummow and Hayne JJ: “As is now well recognised, the connection which Aboriginal peoples have with “country” is essentially spiritual”.

²⁹ *Yorta* at para 52 per Gleeson CJ, Gummow and Hayne JJ.

³⁰ For example, Laura Nader (ed) *Law in Culture and Society* (Chicago, Aldine, 1969).

³¹ JL Comaroff and S Roberts, *Rules and Processes*, (University of Chicago Press, Chicago, 1981).

(c) Jurisprudential models of law

If one starts with the premise that a long term society simply could not exist without law, and the existence of the society is proof of the existence of law, much debate about Aboriginal customary law would be avoided.

Austin's definition of law, as the command of a sovereign authority,³² such as a dictator or parliament, is irrelevant to a society that does not have such entities, particularly one that functions at what might be called the community level. Such definitions are guilty of "overrating the need for a powerful sovereign while correspondingly underrating the law-like features of rules or customs that envisage regular and predictable sanctions for given wrongs".³³ In any event, "the inadequacy of the Austinian analysis of the nature of law is well known."³⁴

In *Milirrpum* Blackburn J said in respect of the Yolngu people of Arnhem Land:

I do not think that the solution ... is to be found in postulating a meaning for the word 'law'. I prefer a more pragmatic approach... What is shown by the evidence is, in my opinion, that the system of law was recognised as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of Aboriginals which made ritual and economic use of the subject land.³⁵

I hold that I must recognize the system revealed by the evidence as a system of law.³⁶

Most definitions of law require: a system of rules and imposition of a sanction for breach of the rules.

(i) The system of rules

The Committee has concluded that in the Northern Territory there are various systems of rules,³⁷ called Aboriginal customary law or traditional land and customs, which bind Aboriginal people in their daily lives.³⁸

³² John Austin, *The Province of Jurisprudence Determined* (London 1954).

³³ Samuel Stoljar, "How can Feud-Law be Law Properly So-Called" (1978) 13 UWALR 262 at 265. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 266 Blackburn J note this definition includes the "whims of an unprincipled autocrat" might be law.

³⁴ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 [*Milirrpum*] at 267.

³⁵ *Milirrpum* at 266.

³⁶ *Milirrpum* at 268.

³⁷ "Custom, then, far from being a problematic aspect of tribal life in the context of the modern world, becomes an integral aspect of a legal system, not an artificial addition reluctantly conceded, but an essential component of a meaningful law that is willingly accepted by the citizenry, because it is deeply embedded in their consciousness as a living part of their culture.": Sheleff *op cit* at 87.

³⁸ See the Report of the Committee of Inquiry and Background Paper 1: Aboriginal communities and Aboriginal law in the Northern Territory.

(ii) The sanction for breach of rules³⁹

When the breaking of a rule of general application is regularly punished by a known, society wide process, accepted by that society as legitimate, then the rule is a law and the process is a legal system.⁴⁰

(iii) The authorisation of the sanction

There are no permanent or separate Aboriginal courts or police, as the term is understood in western society. In western society, a judge/court can only exist as an “impersonal public institution”.⁴¹ However, if one were to start with a dispute that needed resolution, the idea that each party might agree on an appropriate mediator, drawn from a qualified pool, is understood and this in the form of alternative dispute resolution.⁴²

(d) A comparison of Aboriginal law and Anglo-Saxon law

Aboriginal legal systems bear similarities to Anglo-Saxon legal systems.

Anglo-Saxon law was law that applied in England from the 6th century until shortly after the Norman Conquest (1066). Similar systems existed in Scandinavia. Scholars have generally referred to Anglo-Saxon law as a system of law. Before the Norman Conquest, England was a confederation of communities and the laws were largely local. The Anglo-Norman rulers created a system of centralized courts that operated under a single set of laws which, over time, superseded the local rules.

Before the 10th century, a person's actions were considered not as acts of individual will but as acts of the kinship group. Personal protection and revenge for wrongs, promises made, marriage and succession were all regulated by the rules of kinship.⁴³ What the kinship group was the primary means of enforcing responsibility and keeping lawless individuals in order. In a system of communities, the structure of law is different to that of a centralised state.

[S]uch coercive machinery as exists lies not with the king but almost entirely with local groups; the state is in fact little more than a federation of self-supporting and self-administering village communities. ...[S]uch villages still possess this very special feature:

³⁹ The existence of a predefined and quantified maximum sanction is so fundamental a part of the western conception of law, and the legal tradition of the “rule of law”, that it is often seen as essential to a definition of “law”. It has been argued that the idea of pre-determined sanction is not essential: Michael Barkun, *Law Without Sanctions Order in Primitive Societies and the World Community* (New Haven: Yale University Press, 1968); E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge: Harvard University Press 1954); Karl Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press 1941).

⁴⁰ See generally HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 266-67.

⁴¹ Yasuhide Kawashima, “The Indian Tradition in Early American Law” (1992) 27 *American Indian Law Review* 99 at 100.

⁴² See generally Northern Territory Law Reform Committee Reports 17a, 17b and 17c.

⁴³ Chapter 56 of Cnut's secular laws were promulgated at Winchester in 1020. According to the traditional interpretation of chapter 56, this law requires that persons guilty of homicide be abandoned to the vengeance of the victim's kin.

that they are composed of connected but nevertheless distinct and discrete kindreds and families.⁴⁴

It is a world where the great majority of people are in known relationships.

[I]t is always for the kindred to decide whether, or how, to respond to an insult or injury: whether, in particular, to proceed to a vendetta, to fight for the rights of a kinsman or to revenge an injury to him, or whether, alternatively, to pursue a peaceable settlement with the opposing family ... The law, in other words, is not concerned with justice to or between individuals; its principal aim is to preserve a social .. balance, precisely because the law envisages conflict as an atoning and self-redressing mechanism between angered groups... Trespass or petty assault are ... settled informally. Even murder is seen as a matter entirely for the family.⁴⁵

The feud was the basic way of settling serious disputes. In the case of killing, the feud could end with the payment of money or a money equivalent (blood-money) or a revenge-killing. The point is that these sanctions were not random acts, but took place in accordance with rules that were acknowledged and accepted by the kinship groups of both victim and offender. Other Anglo-Saxon legal systems also embody similar principles of treating sanctions as a kinship matter.⁴⁶

The Norman Conquest brought an end to Anglo-Saxon laws, except for some local customs. The subsequent common law of England is a Norman creation. Serious wrongs became regarded as *public* crimes rather than as kinship matters. Government was centralised, a bureaucracy built up and Royal officials became responsible for the administration of justice. There was a “shift from a ‘private’ justice, administered by kinship groups, to a ‘public’ order depending on territorial communities.”⁴⁷

⁴⁴ Stoljar, “Public Order and Village Communities” (1973) 11 UWALR 44 at 44.

⁴⁵ Ibid.

⁴⁶ Byock, J, *Medieval Iceland* (Berkeley: Univ. of California Press 1988) at 20: “Unlike other Scandinavian law, Grágás was compiled without concern for royal justice or prerogatives. Its resolutions and rulings illustrate the limits and precedents of a legal system that operated without an executive authority... Grágás was the law of a society in which order was maintained principally through negotiation and compromise and in which the upholding of an individual’s rights through legal proceedings, such as prosecution and the exaction of penalties, was a private responsibility.”

⁴⁷ Stoljar, Public Order at 51.

5 LEGAL PLURALISM

If legal pluralism can be said to exist when a society recognises more than one *source* of law, then, in this sense, legal pluralism exists in Australia. There is the common law and legislation, and there are the separate *sovereign* law making powers of the Commonwealth and the States, plus the law making powers delegated to the territories by the Commonwealth parliament and the law making powers delegated to local governments by a state or territory parliament.

However, it is more common to describe legal pluralism as a situation where there is more than one *system* of law, as is the case with Britain⁴⁸ or Canada⁴⁹ or the USA,⁵⁰ even if there is only one sovereign source of law. Legal pluralism exists in most countries in East Asia.⁵¹

Legal pluralism can be consistent with the recognition of a separate sovereign source of Aboriginal law. Alternatively, and this has most often been the case in the common law world, legal pluralism avoids a recognition of Aboriginal sovereignty, but recognises Aboriginal law as a source of law in the nation state, under a law of a parliament, often a constitutional law. This was indeed the model of recognition of Aboriginal law proposed by the Northern Territory Statehood convention.⁵² This option makes a discussion of Aboriginal sovereignty irrelevant for practical purposes.

Legal pluralism⁵³ is the existence of distinct legal systems within a country. In one sense a federal political system is legal pluralism as federal, state or provincial and local government laws all operate over the same area.

Sometimes pluralistic systems are based primarily on geographic divisions, at other times on the status of the persons involved in the legal matters.

Many countries, including former British colonies, have been able to accommodate distinct non-federal legal systems operating over the same land mass.⁵⁴ In Australia, and Canada excluding Quebec, there has been only one legal system based on English law.

If one body is the law finder for both systems, then it is a mixed system, as in Quebec and Scotland. If the law finders are essentially separate, then it is usual to describe the legal system

⁴⁸ Eg a separate legal system exists in Scotland and Jersey: In the Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of Jersey [London, 1861] it was said at pages ii-iii: "The common or customary law of Jersey is based upon the common law of the ancient Duchy of Normandy."

⁴⁹ A separate system of civil law exists in Quebec.

⁵⁰ A separate system of civil law exists in a number of territories, and Louisiana has a civil law system.

⁵¹ See generally Poh-Ling Tan, *Asian Legal Systems* (Sydney: Butterworths, 1997).

⁵² See Background Paper 3: Legal Recognition of Aboriginal customary law.

⁵³ MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford, Clarendon Press, 1975); AN Allott & G Woodman (eds) *People's Law and State Law* (The Bellagio Papers) (Dordrecht: Foris Publications, 1985).

⁵⁴ Eg, the Cameroons consists of unified former British and French Colonies and has "an uneasy cohabitation of two alien legal systems superimposed on a multitude of more than 250 different ethnic customary practices and usages": Charles Fomard, "An Experiment in Legal Pluralism: The Cameroonian Bi-Jural/Uni-Jural Imbroglia" (1998) 16 *University of Tasmania Law Review* 209 at 210.

as pluralistic. It has been argued that mixed systems are either a sign of cultural strength or cultural weakness.⁵⁵

In Quebec, at the time it was ceded to Britain under the Treaty of Paris in 1763, there was a practically autonomous, unified and exclusive legal system based on French law. One mixed legal system now applies in Quebec: public law based on English common law and private (civil) law based on French civil law.

Because many Aboriginal people consider themselves bound by their own laws as well as Australian law, it is sometimes said that there is a pluralistic legal system in Australia as a matter of fact, rather than law.

⁵⁵ Robin Evans-Jones, "Reception of law, mixed legal systems and the myth of the genius of Scots private law" (1998) 114 LQR 228.

6 RECOGNITION OF ABORIGINAL LAW

The existence of Aboriginal law, and how English law deals with it, has been discussed for several hundred years in a general English law context, mostly in respect of former African colonies,⁵⁶ and more recently in an Australian legal context.⁵⁷ There are three options for English law to respond to prior Aboriginal law:

- (a) recognition under common law doctrines;
- (b) non-recognition under common law doctrines;
- (c) recognition under legislation.

(a) Recognition under doctrines of Australian law

The common law has always recognized the existence of certain “customs” as “local common law”, that is, the common law of a particular part of England, even if it is inconsistent with the general common law.⁵⁸ The custom must be:

- certain;
- have been exercised since “time immemorial”⁵⁹ without interruption;
- reasonable and not oppressive at the time of their inception;
- observed as of right and not pursuant to any permission granted by another;
- not inconsistent with any statute law.

Courts, applying the common law, have a long history of recognising native “custom” as part of the common law itself. A number of specific rules have developed. Courts decline to apply a native custom if it is inconsistent with English law notions of “natural justice”.⁶⁰ Customs are not assumed to be frozen in time. They can change as long as they retain their essential character.⁶¹

Under the common law there is a well defined process for ascertaining the content of Aboriginal law on a particular matter⁶² and Australian courts have been doing this task in

⁵⁶ For example, TO Elias, *The Nature of African Customary Law* (Manchester University Press, 1956); Kristin Mann and Richard Roberts (eds) *Law In Colonial Africa* (Portsmouth, Heinemann 1991).

⁵⁷ The Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (3 volumes) (Canberra: AGPS, 1986) [ALRC Report].

⁵⁸ Halsbury’s *Laws of England* (4 ed) Vol 12, “Customs and Usage” esp para 406.

⁵⁹ The words “time immemorial” in English law mean the time when King Richard I commenced to reign in 1189: *Mercer v Denne* [1905] 2 Ch 538, 577. Time immemorial in England means prior to 1189, but in looking at customs outside England phrases such as “beyond living memory” are used: *Abinabina v Enyimadu* [1953] AC 207.

⁶⁰ *Eleko v Government of Nigeria* [1931] AC 662 at 673 - thus a “barbarous” custom like the killing of a deposed chief cannot be applied, but if the custom is modified to a form of banishment then it can be applied.

⁶¹ *Ibid.*

⁶² AN Allott, “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *Modern Law Review* 244; ALRC Report Vol 1 Chapter 24 - “The Proof of Aboriginal Customary Laws” focusing on India and Africa; *Hanasiki v OJ Symes* (Unreported, High Court of the Solomon Islands, 17 August 1951, the decision being discussed at length in Solomon Islands Law Reform Commission Report No. 1, “Land below high water mark and low water mark” (1997). The reception of traditional evidence is discussed in the following pre-Mabo cases: *Milirrpum* at 158; *Daera Guba* at 374.

respect of Papua New Guinea, while it was a territory of Australia.⁶³ Indeed since 1976 the Aboriginal Land Commissioners have been setting out tests for finding Aboriginal law.⁶⁴ However, Australian courts have not recognised any traditional law under the law of custom.

(b) Non-recognition of Aboriginal law

How was it that Australian courts managed not to recognise the existence of Aboriginal law, when all around them courts applying doctrines of English law were coming to the opposite conclusion? The existence of Aboriginal laws have been recognised as both a matter of government policy and law by Britain⁶⁵ and other colonial powers⁶⁶ for hundreds of years, even when the colonists brought their own legal system to the new land.

There are early instances where Australian courts in New South Wales⁶⁷ and South Australia⁶⁸ thought that there was real doubt about whether English law could legally be applied to actions between Aboriginal people, even between Aboriginal people from different groups. Thus judges had to make a policy decision on whether English law was going to apply to purely Aboriginal matters. In other parts of the world the decision was that some of the laws of the colonisers would not be applied.⁶⁹

In 1837 the House of Commons Select Committee on Aborigines, noted that to require from Aborigines “the observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust”.⁷⁰ But these views were not reflected in the actual recommendations of the Committee, nor in subsequent policy decisions. Also in 1837, the Colonial Office directed the Governor of New South Wales to ensure that all

⁶³ Prior to 1963 see BJ Brown (ed) *The Fashion of Law in New Guinea* (Sydney: Butterworths, 1969) at 62-63; DP Derham, “Law and Custom in the Australian Territory of Papua New Guinea” (1963) 30 *University of Chicago Law Review* 495. The Native Customs (Recognition) Ordinance 1963 (PNG) dealt with the matter after that date.

⁶⁴ See generally: *Borroloola Land Claim* (1978) paras 47-48.

⁶⁵ For example: *Angu v Attah* (1916) *Gold Coast Privy Council Judgments* (1874-1928) 43; JC Bekker, *Seymour’s Customary Law in Southern Africa* (5 ed) (Cape Town: Juta 1989).

⁶⁶ For example, *Nederlands (South Africa)* - see JC Bekker, *op cit*, 1-8 for an extensive list of legislation and case law going back to 1864.

⁶⁷ In 1829 the New South Wales the Supreme Court advised the Attorney General that it would be unjust to apply English law to the killing of one Aborigine by a member of a different tribe: B Bridges, “The extension of English law to the Aborigines for Offences Committed Inter Se, 1829-1842” (1973) 59 *Journal of the Royal Australian Historical Society* 264 at 264; *R v Bonjon* (SC NSW Willis J, Port Phillip Gazette, 18/9/1841); *Milirrpum* at 267; B Bridges, “The Aborigines and the Law: New South Wales 1788-1855” (1970) 4 *Teaching History* 40.

⁶⁸ The Colonial Office took the view that Aborigines were British subjects and thus subject to English law: see SD Lendrum, “The Coorong Massacre: Martial Law and the Aborigines at First Settlement” (1977) 6 *Adelaide Law Review* 26, referring to decisions by Cooper J of the South Australian the Supreme Court in 1840, see CSO 511/1840 and Colonial Office response CO396/3, 351-352; Castles, *op cit*, at 524-6. However, there is a long history of “summary justice” in respect of aboriginal people: “In those days (1880s) there were no police within three hundred miles. Every man was his own policeman; and the letter of the law was often ignored in favour of summary justice.” G Buchanan, “Packhorse and Water Hole - With the First Overlanders to the Kimberley” (Sydney: Angus and Robertson, 1934) at 117. N Green, “Forrest River Massacre” (Fremantle Art Centre Press, 1995) describes events in 1926.

⁶⁹ Allott, *op cit*.

⁷⁰ Report from the Select Committee on Aborigines (British Settlements) HC 1837, (Shannon : Irish University Press, 1968-69).

Aborigines within his jurisdiction were to be treated *as British subjects*. Aborigines and non-Aborigines were to be governed by the *one introduced law*:

I would submit, therefore, that it is necessary from the moment the Aborigines of this Country are declared British Subjects they should, as far as possible, be taught that the British Laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their own laws.⁷¹

This then remained the general policy applied throughout all the Australian colonies. The extent to which the common law of Australia is able to take account of traditional law is dealt with in Background Paper 3: Legal Recognition of Aboriginal customary law.

(c) Recognition of Aboriginal law under legislation

This issue is dealt with in Background Paper 3: Legal Recognition of Aboriginal customary law.

⁷¹ Correspondence Lord John Russell to Sir George Gipps 8 October 1840 in the Report by Grey on the method for Promoting the Civilisation of Aborigines, 21 HRA Series 1 p 358.