CHAPTER 1

DISPOSSESSION AND COLONISATION

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INTRODUCTION

A decade from the time of writing, two practically and symbolically significant events took place with respect to Aboriginal and Torres Strait Islander peoples' legal relations with the colonial state. The first was in June 2007, when the Australian federal government announced the Northern Territory Intervention under the Howard Liberal government. This program of law reform required suspension of the *Race Discrimination Act 1975* (Cth) and the assumption, initially by the Australian Defence Force, of control over 73 Aboriginal communities in the Northern Territory. It was a program which was premised on the idea that Aboriginal peoples' citizenship and human rights could be suspended until they conformed to a western notion of responsible behaviour—a theme that, as is demonstrated across this chapter, has a long lineage in Australian settler–state relations. (The NT Intervention is discussed further in a number of chapters but see in particular Chapter 3). In September 2007 the Draft Declaration on the Rights of Indigenous Peoples was voted upon and overwhelmingly adopted by 143 countries at the General Assembly of the United Nations. Australia was one of four countries to vote against adoption of the Declaration. The Declaration affirms the rights of Indigenous peoples to their culture, land, natural resources and self-government. While the Declaration was belatedly adopted by Australia in 2009, these two events are reflective of a broader contest between and shift from liberal to neoliberal values. With this shift there is a decline in the moral consensus with

respect to, and persuasiveness of, human rights values. There is also a greater focus on 'personal responsibility' rather than systemic, structural and historical factors as an explanation for discrimination and inequality. This shift in values creates a new justification for, and iteration of, a much longer contest between colonial domination and Indigenous Australian peoples' claims to their country, communities, families and culture. The contest between these two opposing positions is discussed across this book.

But as Ellison has guided us, to understand this story we need to go back to the beginning (Ellison 1952, p. 9). The beginning takes us to history and mythology, the events and their retelling in stories, artwork, documents, monuments and national holidays that are foundational to Australia's past, present and future. These stories are contested in our national imagination and the conflict is evident in the legal histories of Australia's colonisation. This is a contest about might and its relation to power and authority. It is a contest about morality and justice, about greed and inequality, about pluralism and reconciliation. The history wars, that is, contests about how Australia was colonised, are highly emotional battles (Rowley 1970; Attwood 1996; Markus 1994; Reynolds 1981; Read 1992; Windshuttle 1994; Maynard 2007; Nugent 2009; Ryan 2012). This is not surprising. They are battles about identity and legitimacy. They are battles about a past which is difficult to reconcile with the basic tenets of human rights which have been widely accepted by the international community post the Second World War but which are challenged by neoliberal values. Neoliberal values preference a narrative of individuals creating their own fate, on a blank palette, through work and assumption of personal responsibility. Yet, we cannot understand ourselves without understanding our relations to others across time. At a national level, we cannot understand Australia's constitutional foundations without addressing the colonial relationship between the state and the original occupiers.

The understanding that imperialism offends foundational international human rights principles of self-determination is evident in UN resolutions and support for processes of decolonisation, in particular with respect to the European colonies which had majority non-European populations (General Assembly Resolution 1514 (xv), 14 December 1960). These processes, however, left a gaping moral and practical hole: what of Indigenous peoples who form a minority in post-colonial democracies? Over the last three decades the UN has attempted to address the position of Indigenous peoples with the recognition of Indigenous peoples' rights to land, culture and a distinct identity in a number of treaties including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Discrimination and the Convention on the Rights of the Child (Anaya 2004). The Declaration of Indigenous Peoples Rights is the most comprehensive international statement with respect to Indigenous peoples' rights. (See Chapter 13 for a discussion of contemporary domestic and international human rights issues with respect to self-determination.) Australia has lagged behind comparable democracies such as Canada, New Zealand and the US in recognising Indigenous peoples' rights. It continues to be slow and ambivalent in its willingness to recognise the broader political and legal implications of prior Indigenous occupation. The recognition of native title in 1992 exposed, but left unresolved, issues with the legitimacy of Australia's constitutional foundations. These issues are discussed in this chapter with respect to the dispossession of Indigenous peoples by law and war in the late 19th and 20th centuries and some reference is

made to cases which contest Indigenous jurisdiction in the 21st century. (*Mabo v Queensland (No 2)* and native title are discussed in Chapter 9.)

Captain Cook is an iconic symbol of Australia's foundation as a nation. The contest between competing understandings of Australia's identity and legitimacy are evident in competing versions of Captain Cook's story (Beaglehole 1955; Healy 1997; Rose 1984; Nugent 2008). Accounts of Cook may be located at times and in places which Cook never literally visited but which engage allegorically with truths about colonisation. Symbolically, the iconography of Captain Cook and the arrival of the First Fleet at Botany Bay on 26 January 1788 converge in many cultural and popular accounts of these events. Aboriginal artists including Julie Gough, Daniel Boyd and Jason Wing and colonial artists such as E. Phillip Fox recount different perspectives on the Cook narrative, explorers and 'settlement'. They use artistic licence to embellish these events with normative meaning which legitimates a moral lesson about Australia's past. Julie Gough's work engages extensively with unresolved histories, memory, place and race, often reclaiming colonial spaces with her experience as a Trawlwoolway woman from what is currently called Tasmania. One of her early works, 'The Whispering Sand Ebb' (1998), explores the erasure and presence of memory through the installation of 16 life-size portraits of British colonists in the tidal flats of Eaglehawk Nest, southern Tasmania. Like many of the Indigenous people whose lives these colonial authorities degraded through child, land and cultural theft, the colonists depicted in her work are left anonymous. The figures submerged and re-emerged with the ebb and flow of the tide, presenting haunting images which carry hidden memories into an unresolved present. Other works address Captain Cook more directly. Both Daniel Boyd and Jason Wing represent Captain Cook as a pirate and a criminal. Wing's bronze statue of Captain Cook wearing a black balaclava, entitled 'Australia was Stolen by Armed Robbery', won the Parliament of New South Wales Aboriginal Art Prize in 2012. Daniel Boyd's 'We Call Them Pirates Out Here' appropriates the famous colonial painting of the 'birth' of Australia by Phillip E. Fox, 'Landing of Captain Cook at Botany Bay', with irony and humour. As Maria Nugent points out, in the painting by E. Phillip Fox Cook is signalling to his men, who are pointing rifles at two Indigenous men in the distance, to hold their fire. She notes that this is a 'flourish which the artist appears to have added because it has no basis in the historical records' (Nugent 2008, p. 469). Within Boyd's painting Cook is presented as a pirate, wearing an eye-patch and claiming possession of Australia with a skull and cross-bone Union Jack. Wing's and Boyd's art challenges the memorialisation of events which have caused great harm to their culture and communities. Memorials, monuments and days of commemoration reflect public acknowledgment of people and events. In 2017 Indigenous and non-Indigenous advocates campaigned to change the date for celebration of Australia Day from 26 January, which marks a date of mourning and loss for many Indigenous Australians.

The stylised accordance of significance to Australia's 'foundational story' is also evident in the legal history of colonisation, aspects of which will be recounted below. The events of the past and the principles of justice and legitimacy, which they either support or undermine, are of ongoing material significance in terms of the current experiences of Indigenous Australians as well as in terms of the moral legitimacy of the nation. This history is crucial to the contemporary relationship which Indigenous peoples have with the law in all spheres of life. Contemporary

legacies of the past, and how they impact on Indigenous peoples' relationship with the law, are discussed in the subsequent chapters.

DISCUSSION QUESTIONS

- 26 January marks the anniversary of the arrival of the First Fleet at Port Jackson and the raising of the British flag by Governor Phillip. Discuss how the anniversary of this event could have different meanings for contemporary Australian communities.
- Research and discuss Indigenous and non-Indigenous stories with respect to Captain Cook's landing at Botany Bay.
- Research Indigenous and non-Indigenous monuments and memorials and discuss the role they play in creating or supporting accounts of Australia's legal history.

DISPOSSESSION POST MABO

Justice Brennan claimed in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 that the common law could not be complicit in the violent and unjust dispossession of Aboriginal and Torres Strait Islander peoples. This was one reason offered for recognising native title and purporting to end the era of terra nullius. This claim is problematic for a number of reasons. The *Mabo* decision, while bold in descriptors of past wrong, is timid and evasive in its exploration of the implications of recognition of prior ownership by Indigenous peoples. Most troublesome is its failure to address the implications of its own recognition of an existing system of laws within Aboriginal and Torres Strait Islander communities. How can Aboriginal and Torres Strait Islander peoples' laws be acknowledged for the purpose of recognising native title while simultaneously denied for all other purposes? How can the common law take the moral high ground with its recognition of prior ownership while leaving this title vulnerable to extinguishment by governments? (For a discussion of native title see Chapter 9.) Although the recognition of native title had not been challenged in the High Court before *Mabo (No 2)* in 1992, it would be disingenuous to suggest that the common law was not implicated in the regulation of Aboriginal and Torres Strait Islander peoples in a way that was fundamental to their dispossession. Indigenous peoples have had the law applied to them in discriminatory ways for as long as English law has operated in Australian colonies. The status of Indigenous peoples was ambiguous at the time of colonisation and, as the early case law discussed below suggests, the legal characterisation of Indigenous peoples appears to be closely tied to the needs and capacities of the colonial powers.

LEGAL PROCESS OF DISPOSSESSION

In English law a legal distinction is made between the acquisition of territory and the acquisition of land. It is this distinction which enabled the High Court of Australia in *Mabo (No 2)* to recognise Indigenous peoples' right to native title without fundamentally reviewing the legitimacy with which Australia was colonised. While technically and legally this distinction could be made,

the recognition of Aboriginal and Torres Strait Islander peoples' original ownership of land inevitably leads to questions about the legitimacy of the colonisation of Australia which remain unanswered. If recognising native title addresses the myth of terra nullius with respect to title, what about the parallel presumptions about Indigenous Australians with respect to the acquisition of sovereignty? While the common law sustains a distinction between territorial sovereignty and the acquisition of land, this distinction is not part of Indigenous laws and social organisation.

At the time of colonisation, the method for acquisition of colonies was outlined in international and municipal English law. English law gave the Crown the prerogative to acquire new territories, and did not require the acquisition to be made in compliance with international law. For the purpose of English law, it is the intention of the Crown which is ascertained by its own acts and surrounding circumstances which determines whether sovereignty has been attained. Classification of how a territory has been colonised formally determines the law operating in a colony and the power of the Crown to legislate in the colony. In conquered or ceded territories, local law remained in place to the extent that it was not 'unconscionable' or incompatible with the acquired sovereignty. In these territories, the Crown had the power to make laws which were not incompatible with existing law until a representative legislative assembly was established. In settled colonies, which were classified as those areas which were uninhabited or virtually uninhabited, English law accompanied colonisation to the extent that it was suitable to the local circumstances (McNeil 1989, pp. 109–133).

These simple classifications with clear consequences did not have easy or obvious application in many colonial contexts, including Australia. As the discussion of case law below illustrates, a mix of 'customary' and English law was applied to Aboriginal and Torres Strait Islander peoples for at least the first 40 years of colonisation. The relationship between the common law and customary law still remains contested and ambiguous as is evident in the development of native title law, the controversy surrounding the revocation of customary law considerations in sentencing of criminal matters, and the development of alternative court and decision-making processes with respect to dispute resolution relevant to Indigenous peoples in the criminal justice and child welfare systems (see Chapters 3–7). While there was no single definition of what constituted an 'uninhabited' country, one of the clearest indicators used by colonial courts was the lack of an established system of law as understood by colonial courts. Lord Watson made the following assessment of New South Wales in *Cooper v Stuart*:

> There is a great difference between the case of a colony acquired by conquest or cessation, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class (*Cooper v Stuart* 1889, p. 291).

This decision was made on presumptions with respect to Aboriginal societies rather than evidence. The presumptions with respect to a lack of law and with respect to peaceful settlement were clearly wrong. The question of whether Indigenous law continued/s to operate once British sovereignty has been declared, while ambiguous in parts of the 19th century, has been categorically rejected by the High Court in contemporary cases both before and after *Mabo (No 2)*.

DISCUSSION QUESTIONS

- Should laws be based on a factual foundation or is the established and long-standing acceptance of a law sufficient to give it legitimacy?
- What role do past or present moral values play in the legitimacy of current laws?

CONTEXT OF COLONISATION

The disregard for Aboriginal and Torres Strait Islander peoples' occupation of Australia at the time of colonisation appears to be founded in a combination of expedience and racist philosophical and political ideas. Theories about race at the time of colonisation were both influenced by and contributed to colonial expansion. During the period of European exploration from the 16th century onwards, ideas about different races were developed to explain the different peoples who were encountered in the 'new world'. From the 1750s, racial theories ostensibly based on scientific evidence developed typologies which divided people into races. These typologies were developed with notions of 'civilised' and 'barbaric' races, forming a chain of human evolution. This chain of human evolution, which placed Europeans at the top of the hierarchy and Indigenous peoples in a state of nature, also influenced legal thinking. This is evident in the frequent reference to Aboriginal peoples as barbaric and uncivilised in the 19th-century cases discussed below.

It is likely that Cook and Banks believed that there were few Indigenous people along the coast and even fewer inland. Australia was colonised at a time when the ideas of John Locke influenced understandings of property ownership. Locke's ideas provided a useful justification for the imperial project which required dispossession of Indigenous peoples. Locke argued that if there was no sign of agriculture then the natives must still be living in a state of nature. This view coincided with the mid 18th-century writings of Sir William Blackstone in *Commentaries on the Laws of England*, which were influential in providing legal arguments to justify colonisation. Blackstone argued that there were two types of colonies: those that were 'desert and uncultivated' which were discovered and occupied by colonial powers, and those which were already cultivated and were gained through conquest or ceded by a treaty to the colonial power (Blackstone 1765). While Australia was colonised as a settled colony, as the cases discussed below illustrate, these categorisations did not fit neatly with experience on the ground. While Australia was classified as settled, in practical terms it was recognised that Aboriginal peoples had systems of laws which governed relations between them. More than half a century after colonisation, the application of the English criminal law between Aboriginal peoples, with respect to the most serious of criminal offences—murder—remained unsettled. The paucity of cases brought against Aboriginal peoples for crimes committed in the colony, in the first half-century, also evidences a more complex experience of race relations than the simple categorisation as a settled colony would suggest.

CONTESTED SOVEREIGNTY

The idea of a single body of law applying to Indigenous and other Australians has been contested in Australian courts at least since 1828, starting with the case of *R v Ballard* as discussed below. The contemporary judiciary's obsession with a singular sovereignty seems to be founded in what could be considered to be an outdated understanding of nation states as operating almost exclusively autonomously. This defies the experience of globalisation, which has impacted on the autonomy of all nations. It defies the development of international law, which has attempted to balance the human rights of individuals with recognition of states' autonomy and independence since the Declaration of Human Rights. In more recent years, international human rights law has developed jurisprudence which attempts to balance not only individual but also collective minority and Indigenous peoples' rights with state rights. (For a discussion of the gradual response of international human rights jurisprudence to Indigenous peoples' claims to be recognised, see Chapter 13.) Australian courts have, however, been very slow to accept that recognising legal pluralism, in particular the distinct identity of Indigenous peoples, will not cause the sky to fall. It could in fact strengthen the Australian political system and provide greater, rather than less, certainty and security.

DISCUSSION QUESTION

- Discuss ways in which sovereignty for nation states is different in the 21st century compared with the 19th century.

THE RULE OF LAW

The position of Aboriginal peoples, as British subjects, at the time of colonisation was at best ambiguous. The two basic tenets of the rule of law have been denied to Aboriginal and Torres Strait Islander people consistently from the time of colonisation. The first is that laws should not be exercised arbitrarily, and the second is that law should sustain a normative order and thereby contribute to the maintenance of law and order within communities. It is plain from the evidence of frontier violence, and the role of police in this violence, that laws were arbitrarily applied to Aboriginal communities. The ongoing arbitrary exercise of laws with respect to Aboriginal and Torres Strait Islander people is evident in discussion throughout this book, but it was particularly pronounced in the Protection era (see Chapter 2). The failure of the courts to recognise Aboriginal law and custom, as outlined below in cases from *R v Murrell* to *Wik Peoples v Queensland*, has denied Aboriginal peoples a fundamental way of maintaining social cohesion and reinforcing understood community standards of behaviour. Both these denials have ongoing repercussions for Indigenous peoples in terms of their right to equality and law and order within their communities.

Governor Phillip's original instructions from the Colonial Office in Britain distinguished Aboriginal people from 'our subjects' but also required Governor Phillip to provide legal protection to Aboriginal people. What ensued was a combination of attempts to manage and

pacify Aboriginal resistance to the taking of their land and violence against their communities. This took many forms, including military-style responses to resistance and turning a blind eye to vigilante responses to threats or incursions experienced by colonists from Aboriginal groups. The Royal Commission into Aboriginal Deaths in Custody reported on some of the responses to Aboriginal resistance which breached the rule of law:

> In 1797, Governor Hunter declared Aboriginal people a danger and sent out armed parties to pacify them. By 1816 [Governor] Macquarie had made a martial law-style proclamation. He banned Aboriginal meetings, the carrying of weapons (including those used for hunting), abolished their own system of punishments and reconciliation, and entitled settlers and the military troops to use Force of arms; on armed Aboriginal people or unarmed groups of six or more (Johnston 1991).

Declarations and proclamations such as the one above suggest the difficulty colonial governments had in maintaining law and order, and their acute awareness of Indigenous resistance to dispossession from their lands. The extent to which officials and colonists recognised Indigenous peoples' prior ownership of their land and their resistance to being dispossessed is not reflected in legal doctrine. It was particularly detached in cases such as *Cooper v Stuart*, which was heard in the House of Lords and was therefore divorced from evidence or practical experience of the frontier.

DISCUSSION QUESTIONS

- Discuss arguments with respect to how recognition of Indigenous peoples' laws and customs could strengthen or abrogate the application of the rule of law.
- Research and discuss the English common law's capacity for plurality in other British colonies.

'QUIETENING' THE FRONTIER

Although colonial governments did not officially endorse violence against Aboriginal peoples, it was often condoned. British colonists arrived in Port Jackson ill-equipped to respond to the tasks they faced, including the levels of resistance from local Aboriginal tribes. Considerable evidence points to the intentional spread of smallpox leading to the 1789 outbreak in Port Jackson (Foley 2001a; Bennett 2009; Warren 2014). Smallpox had been deployed and documented as an imperial war strategy from at least the 1770s (Fenn 2000). Warren argues that British officials, rather than rogue convicts, were most likely to have spread smallpox as their 'only' means to defend the colony (Warren 2014). While the doctrine of settlement enabled the colonial government to grant Aboriginal land, at a practical level it usually had to be taken by force. The response of numerous governors to groups of Aboriginal people, including declarations of martial law and banning of Aboriginal meetings, is indicative of the level of fear generated among the colonists by conflict over land. Aboriginal people were often dispersed or 'quietened'

by native or general police. There are many accounts of killings and massacres by both civilians and police (Elder 1988; Evans et al. 1988; Reynolds 1989; Markus 1990; Richards 2008; Bottoms 2013; Ryan interactive map ongoing). Some, such as the Coniston massacre in the Northern Territory, took place in the 20th century (Markus 1990, pp. 135–136). While prosecution of violent offenders was rare, there are some examples, such as the trial and execution of the perpetrators of the Myall Creek massacre in 1838. As Bottoms demonstrates, in Queensland, despite documentation of excessive and brutal killings, there was largely a conspiracy of silence in response to this knowledge (Bottoms 2013).

CASE STUDY: THE MASSACRE AT WATERLOO CREEK

Detailed accounts of the extensive and indiscriminate killing by the New South Wales mounted police, under the command of Major James Nunn, at Waterloo Creek in 1838, reached Governor Gipps in Port Phillip by the time Nunn returned from his expedition. It is estimated that he and his troops killed 40–50 Aborigines in a single encounter at Waterloo Creek. Bruce Elder describes the aftermath of the massacre:

> And then his men engaged in a typical frontier style mopping-up operation which meant that any Aborigine they came into contact with, they killed. After the massacre they hunted the survivors through the riverbank scrub, shooting and slashing at them. Those Aborigines who tried to swim to freedom were shot mid stream. The creek ran with blood. The women who had been at the camp were captured and forced to lead the troopers to other camps where similar massacres occurred. Nunn kept no record. The details and the scale remained imprecise … Somewhere between the Gwydie and the Namoi, Nunn left the niceties of British law behind him … he was lionised all the way back to Sydney (Elder 1988, p. 70).

While Nunn was not prosecuted, the perpetrators of the Myall Creek massacre, which occurred less than a year later, were brought to justice. Elder interprets this prosecution as a sign of Governor Gipps' intolerance of indiscriminate frontier violence. Others have argued that it was easier for Governor Gipps to prosecute the ex-convict stockmen who were responsible for the Myall Creek massacre than the mounted police who were responsible for more extensive killings. Historian David Neal points out the equivocal position faced by Governor Gipps with respect to addressing police violence on the frontier. The first problem he faced was that he depended on the mounted police to protect colonists. The second problem was that colonisation, by definition, required the quashing of resistance and protection of white land-holders. Neal suggests that the mix of law and power at the frontier 'was heavily weighted towards the latter and, in the case of Nunn, it clearly spilled over into lawlessness' (Neal 1991, p. 154).

The use of Aboriginal people as police and their involvement in violent attacks or assisting perpetrators has caused considerable controversy. The Queensland Mounted Police, who were

under the command of British officers, have been described as the most lethal force used against Aboriginal people. According to a Queensland Police Department history of the group, they were recruited and deployed to work against groups who were alien to them and in places a long distance from their own home, making it difficult for them to desert their post (Queensland Police Department 1982, p. 1). The terror experienced by Aboriginal peoples across Queensland has been extensively documented (Reynolds 2013; Richards 2008; Bottoms 2013).

Governor George Arthur's notorious 1830 'Black Line' assembled more than 2000 civilians and soldiers with the express purpose of forcing Aboriginal nations from their homelands in eastern Van Diemen's Land (Tasmania) onto a reserve in the Tasman Peninsula. The larger number were likely conscripted as convicts or soldiers (Clements 2013). The line was described as a failure by many historians, because only two Aboriginal people were captured and another two were killed. However, it was a strategy which marked the end of the 'Black War' and surrender of Aboriginal nations in Van Diemen's Land (Ryan 2013b). A number of the civil officers who prepared maps, planned routes and coordinated food, weapons and other supplies for the Black Line had served in military campaigns in other parts of the British empire (Ryan 2013a, pp. 8–9). Ryan argues that the Black Line strategy was part of the British imperial arsenal which was used to dispossess Indigenous peoples from their homelands in many parts of the empire (Ryan 2013b). This observation of imperial military strategy in Van Diemen's Land echoes Warren's observation, referred to above, of the intentional spread of smallpox in Port Jackson and beyond.

The police in Australia carried out paramilitary functions which in other colonial countries were carried out by the military. The role of police at the frontier and in implementing 'Protection' and assimilation policies, which involved child removal and forcing people off their lands, has had an enduring impact on many Aboriginal and Torres Strait Islander peoples' perceptions of police and, more broadly, the failure of the rule of law. The memory of massacres and the mistreatment of Aboriginal and Torres Strait Islander people, some of which occurred in the relatively recent past or is still occurring, are a living part of many communities' oral histories and memory.

DISCUSSION QUESTION

- How can maps connect present trauma and responsibility with past history? Discuss with respect to the interactive map of colonial massacres which is an ongoing project led by Professor Ryan (<https://c21ch.newcastle.edu.au/colonialmassacres/map.php>) and/or the mapping of massacres by Aboriginal artists such as Judy Watson, Rover Thomas and Queenie McKenzie.

DISPOSSESSION BY LAW

While limited attempts were made in the 19th century to present the appearance of Aboriginal and Torres Strait Islander people as being equal before the law, the formal status and rights of Aboriginal and Torres Strait Islander people remained unequal. As later chapters in this book illustrate, these rights still remain substantively unequal. As to equality, opinions among colonists, Indigenous peoples, governors and others were diverse. As discussed above, some recognised the injustice of violent dispossession while others treated Aboriginal people with utter disregard. The following letter to the *Launceston Advertiser* on 26 September 1831 raises the ambivalent status of Aboriginal people:

> Are these unhappy people, the subjects of our King, in a state of rebellion or are they an injured people, whom we have invaded and with whom we are at war?
>
> Are they within the reach of our laws; or are they to be judged by the law of nations?
>
> Are they to be viewed in the light of murderers, or as prisoners of war?
>
> Have they been guilty of any crime under the laws of nations which is punishable by death, or have they only been carrying on a war in their own way?
>
> Are they British subjects at all, or a foreign enemy who has never been subdued and which resists our usurped authority and domination (Reynolds 1989, pp. 11–12).

From as early as 1829, we see questions about the recognition of Indigenous laws being raised in Australian courts. The following cases look at whether the Supreme Court of New South Wales has jurisdiction to try disputes between Aboriginal people. The court had already determined in *R v Lowe* in 1827 that Aboriginal people in conflict with Europeans were subject to its jurisdiction. The records suggest that there was minimal engagement of the courts with respect to violence between settlers and Indigenous peoples between 1788 and 1827. When this did occur, settlers were usually exonerated for violence, usually murder, against Aboriginal peoples on the basis of self-defence, provocation or a lack of evidence. Aboriginal people were also not considered competent to give evidence (Salter 2008). With respect to crimes committed between Aboriginal peoples in the later 19th and early 20th centuries, the cultural and practical differences between the courts adjudicating and those appearing before the courts provided a less neat interface than clear-cut rules suggest. In a review of cases over this period, Finnane observes a mixed response of ignoring or glossing over the social and cultural context of the crime or, alternatively, broadly referring to 'customary' law as a mitigating factor with minimal attempt at engagement with Indigenous law. While some jurisprudence in this period was influenced by the interchange of laws, there was clearly an ongoing deeper failure to engage with legal difference (Finnane 2011).

CASE STUDY: *R V BALLARD*

In 1829 in *R v Ballard* the Supreme Court of New South Wales was asked by the Attorney General if an Aboriginal person could be prosecuted for the alleged murder of another Aboriginal person at the Domain near Sydney. In separate judgments, Justice Forbes and

Justice Dowling held that 'it had always been the policy of the judges and the government of New South Wales not to interfere in disputes between Aborigines' (Kersher 1998, p. 412). In his judgment, Justice Forbes noted:

> I believe it has been the practice of the Courts of this country, since the colony was settled, never to interfere with or enter into the quarrels that have taken place between or amongst the natives themselves … But I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort or crime … It may be a question admitting of doubt, whether any advantages could be gained, without previous preparation, by engrafting the institutions of our country, upon the natural system which savages have adopted for their own government … If their institutions, however barbarous or abhorrent from our notions of religion and civilisation, become matured into a system and produced all the effects upon their intercourse, that a less objectionable course of proceeding (in our judgement) could produce, then I know not upon what principle of municipal jurisdiction it would be right to interfere with them … With these general observations, I am of opinion that this man is not amenable to English law for the act he is supposed to have committed (Kersher 1998, p. 413).

Justice Dowling, in a short separate judgment, noted:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such interference were practicable (Kersher 1998, p. 414).

While both judgments are plainly racist and characterise Aboriginal people as 'savages' and less 'civilised' than the British colonisers, they also clearly recognise that Aboriginal peoples exist with their own system of laws governing relations between them. Paradoxically, while some judges in more contemporary courts have acknowledged the subtle and complex system of laws governing Aboriginal and Torres Strait Islander peoples, they have refused to find space within the common law for recognition of the operation of these laws.

Less than a decade after the decision in *Ballard* was handed down, the full bench of the Supreme Court of New South Wales, including Justices Forbes and Dowling, concurred with Justice Burton in a decision which completely reversed the findings in *Ballard*.

CASE STUDY: *R V MURRELL*

In 1836 in *R v Murrell* the defendant, Jack Congo Murrell, was charged with murder and his counsel argued that the court had no jurisdiction to try him. Mr Murrell's counsel, Mr Stephen, argued before the full bench of the New South Wales Supreme Court that Aboriginal people had their own laws and customs which governed relations between them:

> The reason why subjects of Great Britain are bound by the laws of their country is that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot claim recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection (Kersher 1998, p. 415).

Justice Burton, delivering the opinion of the court, found that Aboriginal people are:

> entitled to be regarded by civilised nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them, yet the various tribes had not attained at the first settlement of the English people amongst then to such a position in point of numbers and civilisation, and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by law of their own (Kersher 1998, p. 416).

He went on to hold that the land from the far north extremity known as Cape York, to the southern extremity of territory known as New South Wales and embracing all the country inland to the west as far as 129° and including all the islands to the east in the Pacific, had been taken into 'actual possession by the King of England'.

Justice Burton concluded his judgment with the following opinion:

> That the greatest possible inconvenience and scandal to this community would be consequent if it were to be holden by this Court that it has no jurisdiction in such a case as the present – to be holden in fact that crimes of murder and others of almost equal enormity may be committed by those people in our Streets without restraint so they be committed only upon one another! and that our laws are no sanctuary to them (Kersher 1998, p. 416).

CASE STUDY: *R V BONJON*

Only five years after *Murrell* was handed down, the question of the New South Wales Supreme Court's jurisdiction to try criminal matters between Aboriginal people was raised again in *R v Bonjon* (16 September 1841, Melbourne). Bonjon, a Wadora man, was charged with the shooting murder of Yammowing of the Colijon people at Geelong in Port Phillip. The case was heard before Justice Willis, a single judge of the Supreme Court of New South Wales. Bonjon's counsel, Mr Barry, argued that occupation did not give the Crown authority over Indigenous inhabitants as subjects unless there was a treaty or agreement between the parties and Indigenous people had elected to come under English law. He argued that:

> Aborigines have their own modes of punishments under their own regulations. Their regulations, like those of all societies, extend to murder. The Aborigines live in self

> governing communities. English law then, was not the only law in the colony, and it could not be imposed upon them by terror (Kersher 1998, p. 417).

The Crown prosecutor, Mr Coke, argued that it was lawful for a civilised country to occupy the territory of uncivilised persons so long as they were left land for subsistence. He argued that the Crown brought the law of England to New South Wales, that Aboriginal people were protected by the law and that they were bound to obey it.

Justice Willis started his considerably lengthy judgment—longer than those in *Murrell* or *Ballard*—with reference to the 1834 Report of the Select Committee of the House of Commons on the Aborigines where British settlements are made. He emphasised statements from the Report which recognised Aboriginal peoples' civil rights and that Europeans had entered Aboriginal lands uninvited. Justice Willis cited the following observation from the Report:

> Europeans have entered their borders uninvited, and when there, have not only acted as if they were the undoubted lords of the soil, but have punished the natives as aggressors if they evinced a disposition to live in their own country. If they have been found upon their own property (and this is said with reference to the Australian Aborigines) they have been hunted as thieves and robbers – they have been driven back into the interiors as if they were dogs or kangaroos (Kersher 1998, p. 419).

Justice Willis went on to provide a history of the colonisation of New South Wales, looking comparatively at how 'uncivilised' tribes had been treated in other British colonies. He provided a rendition of Captain Cook's arrival at Botany Bay suggesting that the numbers, intellect and social organisation of Aboriginal nations were misunderstood. He provided evidence from the former Attorney General of New South Wales to the Senate Committee, which suggested that New South Wales Aboriginal nations had laws which should have been operative at the time of the report. The New South Wales Attorney General noted that an interpreter could not be found for court hearings and that:

> we ought forthwith to begin, at least, to reduce the laws and usages of the Aboriginal tribes to language, print them, and direct our courts of justice to respect these laws in proper cases (Kersher 1998, p. 420).

Justice Willis outlined his perceptions of Aboriginal languages, culture and ceremonies. He also referred to the illegal attempt by Mr Batman in 1835 to treat with Aboriginal people for 600 000 acres of land. While he noted how the terms of this illegal agreement were unjust, he also commented that it was to be 'regretted' that the government had not made a treaty with the Aboriginal people of Port Phillip.

Justice Willis then posed what he perceived to be the central question before him:

> Whether the Sovereignty thus asserted within the limits defined by the Commission of His Excellency the Governor legally excludes the aborigines, according to the law of nations, as acknowledged and acted upon by the British Government, from the rightful sovereignty and occupancy of a reasonable portion of the soil, and destroys their existence as self

> governing communities, so entirely as to place them, with regard to the prevalence of law among themselves, in the unqualified condition of British subjects or whether it has merely reduced them to the state of dependant allies, still retaining their own laws and usages, subject only to such restraints and qualified control as the safety of colonists and protection of the aborigines required, (subject to that right of pre-emption of their lands, which is undoubted) is the point upon which the present question mainly rests (Kersher 1998, p. 422).

Judge Willis reviewed overseas authorities, including the judgments by Chief Justice Marshall of the US Supreme Court, which recognised Indigenous peoples in America as domestic dependent nations. Judge Willis concluded:

> I repeat that I am not aware of any express enactment or treaty subjecting the Aborigines of this colony to English colonial law, and I have shown that the Aborigines cannot be considered as foreigners in a kingdom which is their own. From these premises rapidly indeed collected, I am at present strongly led to infer that the Aborigines must be considered and dealt with, until some further provision be made, as distinct though dependant tribes governed among themselves by their own rude laws and customs. If this be so I strongly doubt the propriety of my assuming the exercise of jurisdiction in the case before me (Kersher 1998, p. 425).

Judge Willis was aware that the governor and Chief Justice did not approve of his judgment in *Bonjon's* case. He therefore sent his judgment to the Law Officers of the Crown in London for an opinion. The Colonial Office dealt with his request curtly and it was simply noted that the matter had already been decided in *Murrell's* case. As John Hookey noted, Judge Willis' 'independence of mind was so little appreciated in New South Wales that by June 1843 he was removed from office' (Hookey 1984, p. 5).

These 19th-century cases, like many of the letters to editors in contemporary newspapers, reflect a diversity of views about the morality and legal consequences of colonisation. They illustrate how legal pluralism, through the recognition of the operation of Aboriginal and Torres Strait Islander laws and customs co-existing with British law, was considered a possibility. They also illustrate an awareness of the different manner in which colonised minority Indigenous peoples were accorded rights in comparative overseas jurisdictions.

DISCUSSION QUESTION

- In what ways do you think Australia's legal history and contemporary race relations would have been altered if *Ballard* and *Bonjon* rather than *Murrell* were followed as precedent?

PLURALISM REVISITED IN THE 20TH CENTURY

The manner and extent of recognition of Aboriginal and Torres Strait Islander laws and customs by the common law, and more broadly in mainstream Australian law, has been raised more recently in a number of areas including native title, child welfare and criminal law (see Chapters 3, 6 and 9). The contemporary significance of questions of the coexistence of Aboriginal and English laws and customs, and more broadly the just resolution of the foundations and ongoing basis for colonisation, are discussed in Chapters 13 and 14.

In *R v Wedge*, decided in 1976, Mr Wedge was charged with murder. He claimed that the court had no jurisdiction to hear the matter because he was an Aboriginal person and a member of a sovereign people. Justice Rath followed the decision in *Murrell's* case and held that upon settlement there was only one sovereign, namely the King of England, and only one law, namely English law. Upon settlement the Aboriginal people in the colony became the subjects of the King and, as such, were not only entitled to the protection of the law but were liable for breaches of the law.

In *Coe v Commonwealth*, decided in 1979, Mr Coe attempted to raise fundamental questions about the basis on which Australia was colonised and the implications of that basis for Aboriginal peoples' land and civil rights. Mr Coe claimed that, prior to colonisation, Aboriginal people enjoyed exclusive sovereignty over Australia, and that after conquest their law and ownership of land continued. He sought a declaration restraining the Commonwealth from interfering with Aboriginal possession of lands still held by Aboriginal nations, and an order for compensation for lands which had been wrongfully taken away. The hearing in the High Court focused on the refusal by Justice Mason to allow Mr Coe to amend his statement of claim. The Court, with four judges sitting, was equally divided as to whether to allow the statement of claim to be amended, and as a result Mr Coe's appeal failed and the substantive issues were not heard.

However, Justice Gibbs reiterated the view that Australia's sovereignty could not be challenged in a domestic court. He said:

> If the amended statement of claim intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the parliament are more limited than is provided in the Constitution, or that there is an Aboriginal nation which has sovereignty over Australia, it cannot be supported … The contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain (*Coe v Commonwealth* 1979, p. 409).

This view has been sustained in cases heard after *Mabo (No 2)* where the Crown's absolute title to land, rather than sovereignty, was successfully challenged. The sovereignty of the Crown, although not challenged by the plaintiffs, was confirmed in *Mabo (No 2*).

Since *Mabo (No 2)* the High Court's opinion that sovereignty is non-justiciable in a domestic court has been reaffirmed in *Coe v Commonwealth (the Wiradjuri claim)*, *Walker v New South Wales* and *Wik Peoples v Queensland*. In *Walker v New South Wales,* Justice Mason refers to a statement which he made in *Coe v Commonwealth (the Wiradjuri claim)*:

> *Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependant nation' entitled to self government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law (*Walker v New South Wales* 1994, p. 48).

In these cases, we see the limited capacity of Australian courts and law to recognise Indigenous peoples' law. This is despite awareness from a very early time, as indicated in *Ballard* and *Bonjon's* cases, of the possibility of a domestic dependent nation status and subsequently other forms of limited self-determination. Both international human rights law and the domestic federal system of laws provide examples of how pluralism within the legal system can exist without undermining the Australian state or fracturing what is described in *Mabo (No 2*) as the skeleton of the common law. Recognition of Aboriginal and Torres Strait Islander peoples' prior sovereignty offers an opportunity for just co-existence and reconciliation between Indigenous and non-Indigenous Australians. As discussed above, the High Court has reaffirmed in cases as recent as *Mabo (No 2)* and *Wik Peoples v Queensland* that questions pertaining to Australia's sovereignty are not justiciable in a domestic court. This is perhaps because of a limited conception of sovereignty as singular and indivisible. These more divisible understandings of a limited exercise of internal jurisdiction had been conceptualised in the 1830s by Chief Justice Marshall of the US Supreme Court. However, as discussions with respect to self-determination in Chapter 13 suggest, a complex and nuanced understanding of Indigenous self-determination has been developed in international law over the past 30 years. More broadly, the idea of nation states as islands of sovereignty no longer holds sway in a globalised and interdependent world. With some flexibility and imagination, Indigenous peoples' sovereignty could be recognised in a manner which enhances, rather than fractures, Australia's democratic system of governance. Such recognition is not precluded by our history or the shaky legal grounds on which Australia was colonised. Rather, it provides a way of addressing what was, in practice, an ambivalent exercise of authority over Aboriginal and Torres Strait Islander peoples in the 19th century, offering a way forward in the 21st century.