Australian Law as Applied To Aborigines

As held in ***R v Wedge [1976] 1 NSWLR 581***, English law recognises three methods of acquisition of foreign land – conquest, cessation and settlement. Settlement occurs when a colony is founded in a land in which there are no settled inhabitants or a settled system of law. In such a case, English law is immediately in force in the new settled colony, and only those laws are applicable. According to the express authority of the Privy Council in ***Cooper v Stuart (1889) 14 App Cas 286***, New South Wales was acquired by settlement, and since it was decided that it was a 'settled' colony under the doctrine of *terra nullius*, the English law was immediately transferred to it and therefore applied to all the inhabitants.

The Colonial Office treated Australia, for the purposes of its acquisition and the application of English law, as a settled colony, that is, one uninhabited by a recognised sovereign or by a people with recognisable institutions and laws. Thus there were no treaties concluded with the Aboriginal group, and no arrangements were made with them to acquire their land, or to regulate dealings between them and the colonists. They were treated as individuals, not as groups or communities. The decision to classify the 'new' country of Australia as a settled colony, rather than as conquered or ceded, meant that the new settlers brought with them the general body of English law, including the criminal law.

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In ***Mabo v Queensland (No.2) [1992] HCA 23***, the doctrine of *terra nullius* was finally overturned. If Australia were truly *terra nullius*, the Crown's so-termed *"radical title"* would become absolute beneficial title of the Crown. However, since Australia was not *terra nullius*, radical title did not imply full beneficial ownership. The High Court concluded that the Crown's radical title only conferred sovereignty, and sovereignty did not extinguish native title by default. Therefore, while the sovereignty remained with the Crown, the beneficial ownership or title remained with the original inhabitants. Nevertheless, native title only confers what is directed by the Crown, being the sovereign entity representative of the people as a collective.

https://freemandelusion.com/wp-content/uploads/2022/01/Mabo-v-Queensland-No-2-1992-HCA-23.pdf

There have been consistent cases challenging the jurisdiction of the Crown, and asserting Aboriginal sovereignty was never ceded. In ***Coe v Commonwealth of Australia [1979] HCA 68*** it was stated:

> *"The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain."*

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Another such case was ***Walker v NSW [1994] HCA 64***, in which it was argued that Aboriginal customary law survived the assertion of sovereignty by the British, and continued until extinguished by clear and unambiguous legislation. It was claimed that general laws failed to extinguish Indigenous laws in that way.

Chief Justice Mason, and Judges Ashley, Neave and Redlich, unanimously rejected the notion that a system of law could operate along side the Australian legal system. It was held the notion of parliamentary sovereignty means that Australian parliaments can pass laws that apply to Aboriginal people, and have the legislative competence to regulate or affect the rights of Aboriginal people, as equally as they do regarding any other race, and that this is not subject to their acceptance, adoption, request or consent.

https://freemandelusion.com/wp-content/uploads/2019/06/walker-v-new-south-wales-1994-hca-64.pdf

Regarding the acquisition of sovereignty, the court has numerous times relied on the principle stated by Gibbs J. in ***New South Wales v. The Commonwealth [1975] HCA 58*** (at 14), that: *"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."* and that the principle *"…precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions."*

The High Court's single source of authority, and the extent of the parameters of its jurisdiction are derived solely from the Crown itself, therefore it had no authority or jurisdiction to hear challenges to the legitimacy of the Crown's jurisdiction. As Kenna, J. stated in *Mabo (No.2)*: *"There is no indication in Mabo (No.1) that the High Court is prepared to recognize Aboriginal sovereignty, the High Court is unable to inquire into the actual acquisition of sovereignty."* and in *Walker* the Court confirmed received doctrine on sovereignty, putting the matter beyond the reach of review in domestic Australian courts.

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As pointed out by Logan J in ***Electoral Commissioner of Australian Electoral Commission v Wharton (No 3) [2021] FCA 742***, the enduring authority of the view as to an absence of Aboriginal sovereignty or any form thereof expressed by Gibbs J in *Coe* had recently been affirmed by a majority of the High Court in ***Love v Commonwealth [2020] HCA 3***, and that there was no disagreement as to the enduring authority of *Coe*, citing Kiefel CJ, (at 29); Gageler J, (at 102-103); Keane J, (at 199-205); Nettle J, (at 266); and Gordon J, (at 356).

> *"Australian courts before and after Mabo, as well as in the reasoning in Mabo itself, have consistently rejected the existence of Aboriginal or Torres Strait Islander sovereignty..."*

And that like conclusions as to an absence of Aboriginal sovereignty were reached by Kirby J in ***Thorpe v Commonwealth (No 3) [1997] HCA 21*** and by Spender J in ***Turrbal People v Queensland [2002] FCA 1082***.

https://freemandelusion.com/wp-content/uploads/2022/04/Love-v-Commonwealth-of-Australia-2020-HCA-3.pdf

The effect of R v Murrell and Bummaree (1836) 1 Legge 72; [1836] NSWSupC 35:

R v Murrell in 1836 is a landmark case in Australia in two main points. It settled both the question of jurisdiction over the Aboriginal people, and declared that Aboriginal people were British Subjects.

https://freemandelusion.com/wp-content/uploads/2022/04/R-v-Murrell-and-Bummaree-1836-1-Legge-72-1836-NSWSupC-35-Macquarie-Law-School.pdf

The following is an interesting and detailed historical account on the way this case impacted on future decisions of the courts in Australia. Source: *Recognition Of Aboriginal Customary Laws (Australian Law Reform Committee Report 31) / 4. Aboriginal Customary Laws And Anglo-Australian Law After 1788 / **"Australian Law As Applied To Aborigines"***:

The application of English law to Aborigines was in practice less certain, especially for offences (especially killings) committed by one Aborigine against another. For some time the practice was to apply English law at least to offences committed by colonists against Aborigines and by Aborigines against colonists, so as to provide a measure of protection for each group against the other. Although these figures are unrepresentative of the actual number of killings during this period, from 1788-1855, 68 whites were committed and 59 tried for murder of Aborigines; 44 Aborigines were committed and 29 tried for murder of whites or other Aborigines. (See B Bridges, 'The Aborigines and the Law: New South Wales 1788-1855' (1970) Teaching History 40, 47.)

However the amenability of Aborigines to English law presented many problems, whether the victims were colonists or other Aborigines. The Colonial Office condemned the military execution of two Aborigines in South Australia for the murder of certain whites, as itself murder, because it lacked due process of law. But the judge of the Supreme Court had declared himself without jurisdiction to try the Aborigines. (See SD Lendrum, 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 Adel L Rev 26; K Hassell, The Relations Between the Settlers and Aborigines in South Australia, 1836-1860, Libraries Board of South Australia, Adelaide, 1966, 52-72.)

In 1829 the New South Wales Supreme Court advised the Attorney-General that it would be unjust to apply English law to the killing of an Aborigine by members of another tribe. (See B Bridges, 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (1973) 59 JRAHS 264, 264.)

Similar doubts were entertained in South Australia (See Lendrum; Castles (1982) 524-6.) and in Melbourne. (R v Bon Jon (1841); see para 41.)

In Jack Congo Murrell's Case, that the Aborigines were British subjects seemed to have been conclusively settled, so far as colonial courts were concerned, by the various proclamations and statutes establishing the Australian colonies, but the implications of this status for the application of English law took surprisingly long to establish. The Proclamation of Governor Hindmarsh (28 December 1836) extending *'the same protection to the native population as to the rest of His Majesty's subjects'* (See JM Bennett & AC Castles, A Source Book of Australian Legal History, Law Book Co, Sydney, 1979, 258.) Similarly the official proclamation of Western Australia conferred the protection of the law on Aborigines as equals of *'other of His Majesty's subjects'* (See R Cranston, 'The Aborigines and the Law: An Overview' (1973) 8 U Queens LJ 60, 61 citing H Schapper, Aboriginal Advancement to Integration: Conditions and Plans for Western Australia (1970) 11. also Australian Courts Act 1829 (9 Geo IV c 83) s 3, 24.)

The decisive case was ***R v Jack Congo Murrell (1836) 1 Legge 72***, in which the Full Court of the New South Wales Supreme Court held unanimously that it had jurisdiction to try one Aborigine for the murder of another. The Full Court had to deal with two distinct cases.

In Murrell's case, the defendant alleged that he was so drunk he could not help killing. In the other case, the defendant relied on Aboriginal customary laws. His victim was, apparently, a member of the group which had killed his brother: *'this was clearly a case of obedience to the native custom of revenge killing'*. (See Bridges (1973) 264.) The argument for the defence was lucidly put by Alfred Stephen:

"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. The reason why subjects of Great Britain are bound by the laws of their own 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 obtain 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."

Although not reported in Legge, apparently Stephen also argued from the fact of double jeopardy: *'even if acquitted, a native would have to face another trial in the bush according to native law'* (See Bridges (1973) 265.)

In response, the Court simply denied that the binding quality of the laws was contingent upon their effectiveness as 'protection': *"If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious cases might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction."* (See Bridges (1973) 265-6.)

Despite the reality of the coexistence of two laws for Aborigines, the case came to be regarded as having settled the question for Australian law. It has since been reaffirmed on numerous occasions, ***Tuckiar v R (1934) 52 CLR 335***; ***Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141***, 261-2 (Blackburn J); ***R v Wedge [1976] 1 NSWLR 581***. In the latter case, ***Rath J concluded*** at p. 587 that *`all the reasons of the court in R v Murrell are as valid today as they were when judgment in that case was given'.*

But in practice, both before and after 1836, the law was applied differentially and, especially in remoter areas, haphazardly, so that few killings (whether an Aborigine was offender or victim) were prosecuted. (See RHW Reece, Aborigines and Colonists, 1974, 194-5, 225-7.) Such recognition as was given to Aboriginal customary laws and traditions was thus a matter of 'administrative flexibility', or simply the result of a policy of non-involvement in Aboriginal quarrels or disputes which did not affect the British settlements. Colonial Office policy required that every effort be made to live peacefully with and respect local Aborigines. Governor Phillip and later Governors were directed to 'educate and Christianize the Aborigines, to protect their persons and the enjoyment of their possessions, to prevent and restrain violence and injustices towards them, and to punish any of our subjects who harmed them'. Thus the Aborigines were to be protected by the punishment of white offenders 'according to the degree of the offence'. (See Instructions to Arthur Phillip Esq (25 April 1787) Historical Records of Australia (hereafter HRA) ser 1 vol 9, 13-4.)

Similarly, Governor King, in his Port Regulations of 1800, warned that *'If any of the natives are killed, or violence offered to their women, the offenders will be tried for their lives'.* (See HRA ser 1 vol 4, 143.) However, official ambivalence soon emerged; it is recorded that during Governor King's time, *'(military) officers kept the crowd back to give native duellists room to spear each other, according to native custom, in the streets of Sydney, and then led troops out against the natives for spearing whites'.* (See Sydney Gazette (29 December 1805) cited by Bridges (1973) 42.)

In his Port Regulations and Orders of 1810, Governor Macquarie stated:

"The natives of this territory are to be treated in every respect as Europeans; and any injury or violence done or offered to the men or women natives will be punished according to law in-the same manner and in equal degree as if done to any of his Majesty's subjects or foreigners residing there." (See Historical Records of New South Wales vol 7, 1901, 418.) But ironically, in the same paragraph he banned the supply of intoxicants to Aborigines.

But Macquarie's famous Proclamation to the Aborigines of 4 May 1816 (See HRA ser 1 vol 9, 141.) is ambivalent as to whether Aborigines were to be considered British subjects, subject to British law. The proclamation imposed certain restrictions upon Aborigines and stated that those who wished to be considered under the protection of the British Government and who were *'disposed to conduct themselves in a peaceful, inoffensive, and honest manner'* would, upon application to the Secretary's office on the first Monday of each month, be provided with a passport signed by the Governor which would entitle them to protection so long as they did not break his regulations against carrying arms. This in effect made protection of the law for an Aborigine a privilege to be granted or withheld at the Governor's discretion. Macquarie's Proclamation of 1816 also represented the first explicit regulation of Aboriginal traditional practices as such. The Proclamation prohibited Aborigines from carrying any spears, and prohibited them from pursuing their customary punishment against transgressors of customary law at or near Sydney or other settlements, stating that such practices were repugnant to British laws. (See HRA ser 1 vol 9, 142-3.)

Such prohibitions were legally unnecessary, on the theory, established by Murrell's case, that Aborigines were British subjects equally subject to British law. Those who argued against this sometimes did so because if Aborigines where amenable to the law this implied that whites could also be punished for killing or harming Aborigines. (See Reece, 182, 194.)

But the reality in many cases was that Aborigines neither understood nor felt allegiance to that law. In such cases, judicial punishments was usually mitigated through the Governor's exercise of the prerogative of mercy, under which he could remit or mitigate punishment for all offences other than treason and willful murder (where he was limited to postponing execution until the Monarch's pleasure was known). Another safeguard for Aborigines lay in the fact that in the Colony, the Attorney-General exercised the functions of a Grand Jury. Without his initiative, an Aborigine would not be sent for trial. Thus both the initiation and final review of criminal prosecutions against Aborigines lay with the Government. According to Bridges (1970) 62:

"On the whole executive review took much of the sting out of major sentences in that a significant proportion of capital sentences imposed on natives were commuted to transportation which in effect often becomes a term for Cockatoo or Goat Islands (in Sydney Harbour) for instruction in secular and religious matter preparatory to an early release. A review of the cases tried (for the period 1788-1855)

leads one to believe that with the sole exception of Charley, no Aboriginal was executed who would not have qualified for death also under native laws … Governor Gipps stated explicitly that this was the test applied by the Executive Council in his time."

While the attitude of Gipps' Executive Council may have been enlightened for its time, in practice, law enforcement and the activities of private citizens were not at all consistent with it. (See Reece, ch 5.)

Meanwhile there was considerable debate and controversy in Britain over the treatment of native peoples in Britain's overseas colonies, including the Australian Aborigines. In 1835 the Aboriginal Protection Society was established in Britain. The Society helped to bring about the establishment of a Select Committee of the House of Commons to examine the conditions of Aborigines in British settlements. As has been noted, the Committee in its Report in 1837 recognised the absurdity and injustice inherent in applying British notions of law automatically to Aboriginal people. (See House of Commons Select Committee on Aborigines (British Settlements) Report, Parl Paper, House of Commons no 425, 1837, 79-80.) However, the Committee reaffirmed the position that Aborigines should be subject to that law, provided that its full rigours were tempered by the exercise of discretions, for example, by reducing the penalty in certain cases. The Committee stated that:

"…when British law is violated by the Aborigines within the British dominions, it seems right the utmost indulgence compatible with a due regard for the lives and properties of others, should be shown for their ignorance and prejudices. Actions which they have been taught to regard as praiseworthy we consider as meriting the punishment of death. It is of course impossible to adopt or sanction the barbarous notions which have urged the criminal to the commission of the offence, but neither is it just to exclude them from our view in awarding the punishment of his crimes."

The Committee (at 84.) recommended further study on the possibility of special measures for Aborigines:

"To determine under what special regulations they should be placed is a task to be performed only by those who can study the case with the aid of the most minute and close observation. It should therefore be part of the duty of the Protector to suggest to the Local Government, and through it to the local legislature, such short and simple rules as may form a temporary and provisional code for the regulation of the Aborigines, until advancing knowledge and civilisation shall have superseded the necessity for any such special laws."

This — one of the first of many suggestions for special laws and special studies — does not appear to have been taken particularly seriously by the Australian colonies.

In 1840, the British Government set out its views on the application of British laws to Aborigines, in a despatch to all Governors in Australia and New Zealand. (See Lord Russell to Sir George Gipps, HRA set 1 vol 21, 33.) These despatches contained a Report from Captain (later Sir George) Grey with the advice that his recommendations:

"…appear … fit for adoption generally within your Government subject to such modifications as the varying circumstances of the Colony may suggest."

Grey was critical of allowing Aborigines to exercise their customary law in any circumstances. He stated:

"The Aborigines of Australia having hitherto resisted all efforts which have been made for their civilization. it would appear that. if they are capable of being civilized. it can be shewn that all the systems, on which these efforts have been founded, contained some common error. or that each of them involved some erroneous principles: the former supposition appears to be the true one, for they all contained one element, they all started with one recognized principle, the presence of which in the scheme must necessarily have entailed its failure.

This principle was that. although the Natives should, as far as European property and European subjects were concerned. be amenable to British laws, yet, so long as they only exercised their own customs upon themselves and not too immediately in the presence of Europeans. they should be allowed to do so with impunity.

This principle originates in Philanthropic motives and a total ignorance of the peculiar traditional laws of this people."

In Grey's view, English law should entirely supersede customary law, in order to protect an Aborigine from the violence of his fellows, and to prevent the older natives from obstructing the civilisation of members of their tribe. (See HRA ser 1 vol 21, 35.) Grey commented: *"… I do not hesitate to assert my full conviction, that whilst those tribes, which are in communication with Europeans, are allowed to execute their barbarous laws and customs upon one another, so long will they remain hopelessly immersed in their present state of barbarism."*

Grey's views on punishment, which echoed those of the Select Committee, (at 36.) were clear: *"To punish the Aborigines severely for the violation of laws to which they are ignorant, would be manifestly cruel and unjust, but to punish them in the first instance slightly for the violation of true laws would inflict no great injury on them…*

I imagine that this course would be more merciful than that at present adopted, viz., to punish them for the violation of a law they are ignorant of, when this violation affects a European, and yet to allow them to commit this crime as often as they like, when it only regards themselves."

In addition to the House of Commons inquiry and Captain Grey's Report, several early inquiries on related questions were conducted within the Australian colonies, though none were specifically concerned with Aboriginal law.

NSW: Select Committee on the Conditions of the Aboriginals, Votes & Proceedings (Legislative Council) (1845); Report from the Select Committee on the Native Police Force, id (1856-7)

Qld: Report of the Select Committee on the Native Police Force and the Conditions of the Aboriginals Generally, Votes & Proceedings (1861)

Vic: Report of the Select Committee on the Aboriginals, Votes and Proceedings (Legislative Council) (1859 no D8)

SA: Select Committee of the Legislative Council on the Aboriginals, Report (Part Papers 1860 no 165).

The Colonial Office entertained no doubts that Aborigines were to be treated as British subjects for all purposes, but the appropriateness and justice of applying this principle was questioned by members of the colonial judiciary even after the decision in R v Jack Congo Murrell. In 1841, (See CSO 511/1840, Advice from Cooper J to the Government of South Australia.) Justice Cooper of the South Australian Supreme Court still held the view that it was:

"… impossible to try according to the forms of English law, people of a wild and savage tribe whose country although within the limits of the province of South Australia, has not been occupied by Settlers, who have never submitted themselves to our dominion and between whom and the Colonists there has been no social intercourse."

Similar views were expressed by Justice Willis in Melbourne in 1841 in the Bon Jon case. (See Port Phillip Gazette (18 September 1841) Justice Willis stated that 'there is no express law which makes the Aborigines subject to our Colonial Code'. The case did not proceed and Bon Jon was handed over to the Protectorate to be educated. The Chief Protector, Robinson, was accused by the victim's kin of being an accessory to his escape (See Dixon Library, Sydney Add 77, Robinson to La Trobe (9 April 1842).) and Bon Jon himself was murdered in a payback killing, (See A Sutherland, Victoria and its Metropolis, Melbourne, 1888, vol 1, 249.) thus lending weight to the argument of Stephen in Murrell's case that 'the British were not filling a void with their laws and it was absurd to ignore native law while its practice continued'. (See Bridges (1973) 267.)

Willis requested Governor Gipps to bring the question to Lord Stanley's notice for reference to the Law Officers. (See Sir George Gipps to Lord Stanley, 24 January 1842: HRA set 1 vol 21, 653-4.) Gipps himself considered having legislation passed to clarify the position that Aborigines were amenable to the courts like any other of Her Majesty's subjects. (See Colonial Secretary Thomson to Sir James Dowling (4 January 1842): id, 654-5.) However he was advised by the Supreme Court that Murrell's case had decided the matter and that no legislative action was necessary. (See Sir James Dowling, advice to Sir George Gipps (8 January 1842): id, 656.)

In South Australia Justice Cooper remained unwilling to concede that Aborigines should always be tried for offences under British law. In 1846, an Aborigine was brought before the court for killing another Aborigine. Justice Cooper argued that he required a legislative direction if such cases were to be justiciable and the accused was discharged because no competent interpreter was available. (See Larry v R, The Register 14, 25, 28 November 1846. Cooper J referred the matter to the Governor: CSO 1564 (1851).) In 1848, Justice Cooper accepted jurisdiction but indicated before the trial commenced that *'in the case of conviction he would stay any execution required by law and specifically refer the case to the Governor'*. (See Castles, 530, citing The Register 14, 17 June 1848; Robe to Grey, 10 July 1848, GRG 2/6/4.)

In Western Australia, Captain Grey's Report, which confirmed the view of the British authorities that Aborigines were and should be subject to European law for offences committed on each other, was rejected by Governor Hurt. According to Hasluck:

"In spite of the indication given by the Secretary of State of his views, Hurt held to his own opinion regarding disputes between natives, and during his term no notice was taken of acts by natives against natives in accordance with their own law."

(See P Hasluck, Black Australians, Melbourne UP, Melbourne, 1942, 129.) By contrast Hutt's successor, Governor Fitzgerald, adopted a policy of *'cognisance of all aggravated cases of assault committed even by bush natives inter se'.* This policy produced considerable debate, and attempts were made in successive years to mitigate its effects by reduced sentences or by non-prosecution. But there were cases in which severe penalties were imposed. (See Hasluck 129-34. See generally Castles (1982) 520-42; Bennett & Castles, 247-63.)

Applying British law to Aborigines produced special difficulties in the presentation of Aboriginal evidence. In theory Aborigines were British subjects, but in practice they were not, and perhaps could not be, given the same rights as British subjects in judicial proceedings. The paradox caused considerable concern to colonial administrators. Captain Grey put the problem thus: *"The greatest obstacle that presents itself in considering the application of British Law to these Aborigines is the fact that, from their ignorance of the nature of an oath, or of the obligations it imposes, they are not competent to give evidence before a Court of Justice …*

The fact of the Natives being unable to give testimony in a Court of Justice is a great hardship on them, and they consider it as such: the reason that occasions their disability for the performance of this function is at present quite beyond their comprehension and it is impossible to explain it to them. I have been a personal witness to a case in which a Native was most undeservedly punished for the circumstance of the Natives, who were the only persons who could speak as to certain exculpatory fact s, not being permitted to give their evidence …

The Natives being ignorant of our Laws, of the forms of our Courts of Justice, of the language in which the proceedings are concluded, and the sentence pronounced upon them, it would appear that but a very imperfect protection is afforded to them by having present in the Court merely an interpreter … who knows nothing of legal proceedings and can be but very imperfectly acquainted with the Native language: it must also be borne in mind that the natives are not tried by a jury of their peers, but by a jury having interests directly opposed to their own and who can scarcely avoid being in some degree prejudiced against Native offenders …"

(See HRA ser 1 vol 21, 37.) Attempts were made in South Australia, New South Wales and Western Australia to relax the rules regarding the administering of oaths and the admissibility of evidence for Aborigines, and in some instances to enable magistrates to award summary punishment in certain offences. (See Bridges (1970) 65-70; Hasluck, 135-43.) But these early attempts were defeated by hostile local legislatures, or disallowed by British law officers as being *'contrary to the principles of British jurisprudence'.* (See Campbell and Wilde to Russell (27 July 1840): HRA ser I vol 20, 756.) Any such special measures for Aborigines, it was said, (Lord John Russell to Hutt (30 April 1841) cited in Hasluck, 136-7.) were:

"…dangerous in its tendency and faulty in principle. By thus establishing inequality in the eye of the law itself between the two classes, on the express ground of national origin, we foster prejudices, and give a countenance to bad passions."

In 1839 (See HRA ser 1 vol 20, 303.) the British Aboriginal Protection Society commented on the paradox of regarding Aborigines as British subjects while at the same time refusing Aboriginal testimony, unless they had been converted to Christianity:

"It is evident that the rejection of the Evidence of these Natives renders them virtually outlaws in their Native Land which they have never alienated or forfeited. It seems to be a moral impossibility that their existence can be maintained when in the state of weakness and degradation, which their want of civilisation necessarily implies; they have to cope with some of the most cruel and atrocious of our species, who carry on their system of oppression with almost perfect impunity so long as the Evidence of Native Witnesses is excluded from Our Courts."

Local opponents, echoing WC Wentworth's comparison of Aboriginal evidence with *'the chatterings of the ourang-outang',* managed to postpone the enactment of such legislation for many years. (See Reece, 181 for Wentworth's statement, and generally id, 179-82 for the issue. See further para 605n.)

As this brief account reveals, most, if not all, of the debate was focused on the criminal law (and on problems of Aboriginal evidence in criminal cases). This obscured what was perhaps the more fundamental point, which was never questioned or debated — that is, the complete absence of recognition of Aboriginal rights to land, or of the recognition of Aboriginal customary laws in the civil law. Aborigines were not treated as trespassers on Crown land, but the Crown freely alienated land to settlers who then displaced local Aborigines, often by force. (See para 41-2, 899-902.)

Aboriginal marriages were not recognised (See para 237 for the few early cases.) and rights to the custody of children were precarious or non-existent. Although Aborigines as British subjects had formal capacity to make contracts, to own property, and to sue in the courts, in practice these facilities were irrelevant. These common law rights were modified or removed by legislation under the 'protection' policy.

Despite doubts and uncertainties, it was firmly established by 1850 that no formal recognition of Aboriginal customary laws should be accorded. This remained the situation until this century. Instead the emphasis moved to policies based on 'protection' (with the underlying expectation that Aboriginal identity and tradition was a rapidly passing phenomenon). But there was a distinguishable phase during the 1920s and 1930s when some attempt was made to recognise Aboriginal customary laws. These legislative and administrative responses are of considerable interest.

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