

# ‘SKELETAL LEGAL PRINCIPLES’ THE CONCEPT OF LAW IN AUSTRALIAN LAND RIGHTS JURISPRUDENCE<sup>1</sup>

Simon Chesterman

[R]ecognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. (*Murray Islands case* 1992: 43)

The ‘official’ history of Aboriginal land claims in Australia is a story told through the eyes of a white lawyer. From the “peaceful annex[ation]”<sup>2</sup> of the continent to the belated recognition of a form of ‘native’ title inferior to the commonest forms of tenure, this has been a discourse of one voice, one perspective. Such an account is, of course, completely alien to the experience of Australia’s colonisation and Aboriginal resistance. (See e.g: Reynolds 1987; Royal Commission 1991: Vol. 4, 1-3.) But the white law that was imposed on the southern land performed the double movement of proclaiming its own universality at the same time that it effaced whole nations of people from the face of the new continent. *Terra Australis* was thus constituted as *terra nullius* (land belonging to no one) when it became part of New South Wales in 1788, and the “Indians” observed by Captain James Cook in 1770<sup>3</sup> were largely erased from the legal record. (See also Australian Courts Act 1828.)

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<sup>1</sup> I would like to thank André Hoekema, Franz von Benda-Beckman and Gordon Woodman for their critical comments on earlier versions of this paper. Errors and omissions remain my own.

<sup>2</sup> *Cooper v Stuart* (1889) 14 App Cas 286, 291, Privy Council.

<sup>3</sup> Lieutenant Cook’s Official Log, in Clark 1950: 25-6.

When finally “our” common law came to recognise the rights and interests of Australia’s indigenous inhabitants in the *Murray Islands Case* in 1992, that single perspective nevertheless remained paramount, imposing two limitations on Aboriginal claims to land: (i) they could be recognised only in so far as they were cognisable within the white legal framework; and (ii) their recognition must not threaten to fracture a “skeletal principle” of “our” legal system.

In this paper I discuss Australian case law up to and including the *Murray Islands Case* in the context of the ongoing debates within the fluid disciplines of sociology and anthropology of law over the concept of law. I argue that the academic debate over the concept of law has lost sight of the essential element of power, which is not only vital to any meaningful definition of law, but is crucial to the question of who is constituted as being in a position to make any such definition (cf von Benda-Beckmann 1997).

In Parts I and II I review the search for a social scientific concept of law in the context of early Australian land rights cases. I argue that academic debate in this area has proceeded with a primary focus on anthropological research, without acknowledging the important role that anthropologists have come to play in land rights cases before the courts (e.g. Wilmsen 1989: 6). This role has become so important that it has even been suggested that anthropologists lost for the Aboriginal claimants Australia’s first major land rights case, the *Gove Land Rights Case*, in 1971 (Middleton 1977; Maddock 1989: 157). What has been lacking from the various definitions of law adopted is a meaningful critique of power. In Part III I consider the landmark *Murray Islands Case* in which Aboriginal claims to land received their strongest judicial recognition. I argue that this case attempts but is unable to resolve the tension between the discrete concepts of law identified in Part I. The conflict of legitimation that arises is evocative of both the import attached to the concept ‘law’ and the limitations of reform of the existing system facing those trying to work within it for the interests of indigenous peoples.

## I. The Concept of Law and the Use of Law

In my opinion ... there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests (*Gove Land Rights Case* 1971: 273).

The search for a definition of law, or the elaboration of a social scientific concept

of law, has been a stumbling block for legal sociologists and anthropologists that is said to have stalled the development of theory for over two decades (Tamanaha 1995: 501). Agreement on this threshold question has been seen as important for the coherence of the discipline, but also because of the very real effects that flow from determining that a society is “without law” (Moore 1978: 215; Merry 1988: 873). As the quotation from the *Gove Land Rights Case* suggests, the absence of ‘law’ can continue to be a central political issue for indigenous peoples. But Blackburn J.’s finding there that the Yolngu people of Yirrkala lacked proprietary interests in the land they had occupied since time immemorial is complicated by the fact that he also found that they did in truth have “a subtle and elaborate system of law”, leading him to conclude that “[i]f ever a system could be called ‘a government of laws, and not of men’”, it was theirs (*Gove Land Rights Case* 1971: 267-268). The problem in this case, then, was not that the Yolngu lacked law, rather that they lacked the right law.

In this Part, I consider the implications of this tension between law and law ‘properly understood’ as complicating the search for a concept of law. I draw particularly on Tamanaha’s ‘analytical map’ and his attempt to reduce social scientific approaches to the concept of law to two fundamental categories. Crucially, I argue that the concept of law as it has emerged in Australian land rights jurisprudence straddles these categories, but in a way very different from that envisaged by Tamanaha.

#### *A social scientific concept of law?*

In his review of social scientific approaches to the concept of law, Tamanaha argues that the many different positions on this issue are reducible to two basic categories: the first sees law in terms of actual patterns of behaviour, the second in terms of the state law model (Tamanaha 1995: 503).

The first category can be traced to the pioneering work of Ehrlich and Malinowski, and their claim that law consists of and can be found in the regularised conduct or actual patterns of behaviour in a community, association, or society (Tamanaha 1995: 503; Cotterrell 1992: 25-28). The crucial move here is the dissociation of law from the state:

It is not an essential element of the concept of law that it be created by the State, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth

## 'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

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element remains, and that will have to be the point of departure, i.e. the law is an ordering. (Ehrlich 1936, quoted in Tamanaha 1995: 502-503.)

The problem that emerges here is how to distinguish such a broad concept of law from any social relationship whatever that involves a sense of obligation (Moore 1978: 220) - relationships that range from religion and custom through to fashion and etiquette (Cohen 1960: 187). This expansion of the definition of law makes sense in the context of legal anthropologists' claims to anti-ethnocentrism (Tamanaha 1993: 197-198; Merry 1988: 873) and their study of non-state societies, but in the process the question of what is law is largely deferred to the equally vexing question, what is not?

The need to restrain this explosion of 'law' in part dictated the development of Tamanaha's second broad category, in which law is viewed in Weberian terms as institutionalised norm enforcement (Tamanaha 1995: 506; Cotterrell 1992: 148-161). This may properly be seen as the inheritor of Austinian positivism, which understood law as the command of the sovereign backed up with sanctions (Austin 1954: 175), and made possible a 'test' for law (as opposed to other normative systems) based upon the severity and nature of the sanction imposed upon infractions of a given norm (Tamanaha 1995: 507). Such an approach doubtless satisfied the need for scientism in the discourse (Tamanaha 1993: 198-199), but it was at the expense of the more political claim that law was to be found in all societies. Attempts to modify this definition to include non-state societies by reducing state legal institutions to their functional components proved artificial and led some legal anthropologists to abandon the term 'law' entirely (Roberts 1979: 198).

As Tamanaha observes, both these categories adhered to core tenets of scientific positivism in that they sought to produce explanations of observed phenomena based on the formulation of causal rules (Tamanaha 1995: 511). Importantly, the positivism adopted was largely that of behaviourism (as opposed to structuralism or functionalism) and the phenomena observed were those of actual behaviour. The distinction between the two categories can thus be seen as a difference in their objects of study: for the first category, it was the behaviour of people within the community or social group; for the second, it was that of the legal actors or the legal institutions themselves (Tamanaha 1995: 511-512). Moreover, Tamanaha argues, the subsequent abandonment of positivist and behaviourist approaches to legal sociology and anthropology in the wake of the turn to interpretation has not radically altered the basic presumptions implicit in these categories; most new theoretical frameworks, such as Luhmann's autopoiesis, can still be classed as falling within the second category, the primary difference from earlier theories in

this category being the substitution of more complex analyses of meaning and communication for a limited analysis of behaviour (Tamanaha 1995: 513; cf Cotterrell 1992: 65-68). I return to this very questionable claim shortly.

Tamanaha locates the basic distinction between his two categories by reference to the fact that they represent two sides of the same fundamental belief with its roots in Hobbes: that law maintains social order (Tamanaha 1995: 513-514). Whereas the first category traced the existence of social order up to the existence of norms defined as 'law', the second worked its way down from a functional view of the state law model. And herein lay the source of confusion as to the concept of law: each category represented a form of functional analysis. The first posited the function served by law (that of maintaining social order) and worked backwards to find 'law'. The second presumed the existence of 'law' (predominantly state law) and proceeded to observe its function. In both cases, it was necessary for 'law' to be posited before functional analysis could be engaged (Tamanaha 1995: 515-517). The *a priori* definitions involved are in turn said to be referable to distinct views of the manner in which social control was seen to be manifest: either in the various processes of socialisation, or through institutional responses to deviance (Tamanaha 1995: 519-20).

The significance of Tamanaha's investigations is not apparent until the end of his essay, when he reveals that his goal is the displacement of law from its privileged place at the centre of sociological inquiry. He notes that modern society is increasingly ordered, but argues that the rationalisation of society is distinct from its legalisation (Tamanaha 1995: 532-533). Identifying what he terms "passive" legal institutions and rules, he argues that the view that law increasingly "penetrates" the life world confuses such standardising procedures and the expansion of law into the cultural arena with the coercive activities of legal institutions. He concludes that

[w]hat law is and what law does cannot be captured in any single scientific concept. ... Law is whatever we attach the label *law* to. ... *If there is a shared trait to the various phenomena which carry the tag 'law', it's that they all lay claim to legitimate authority, to rightful power.* This quality more than anything else is what makes law - in all of its many incarnations - so potentially dangerous. (Tamanaha 1995: 534-535, emphasis added.)

Thus Tamanaha claims to step outside the conflict and reveal 'what went wrong and why' in the search for a social scientific concept of law. But instead he ends

up with a sort of weak interpretivism. In his attempt to reduce decades of scholarship and countless discrete legal systems to a two dimensional matrix, he constructs a neat 'map' of diverse concepts of law but fails to explain why it should be that different approaches have proved useful. In Wittgensteinian terms, he has privileged the meaning above the use. In his own argot, he has performed the remarkable cartographical feat of constructing a map and then designing a landscape to fit it.

*Getting lost in Tamanaha's map*

Tamanaha's cartography is problematic for two reasons that are illustrative of deeper problems facing legal anthropology generally.

First, he fails to identify the 'we' that is in the privileged position to attach the label 'law'. This is more than intellectual pedantry: the issues he is considering go beyond those of the demarcation of academic terrain. His failure to acknowledge that the identification of one or other normative construct as 'law' itself has potentially far-reaching consequences suggests some political ingenuousness in his warning of the "dangerous" phenomenon of law (Tamanaha 1995: 535). The question 'what is law' is indeed unanswerable in scientific terms, but this has hardly precluded answers in black and white terms in the engagement between colonisers and colonised. Simply dismissing the question as an intriguing little academic puzzle with no resolution ignores the serious implications of each (albeit provisional) answer.

Different answers are assumed for different purposes. An anthropologist seeking to legitimate the right of a community to continue living as it has despite the encroachment of the state will cast his or her net broadly so as to describe the social order of that community as 'law'. A lawyer operating within the domestic legal system of a modern state, by contrast, has little interest in looking beyond the positive law as it is recognised in that system.<sup>4</sup> Tamanaha is of course right that no single 'concept of law' could provide a basis for both these approaches, and he is right to suggest that the reasons why the actors take these different approaches is an important area of study, but he provides no suggestion as to how the study might be conducted.

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<sup>4</sup> Cf Griffiths' distinction between what he terms the 'social science' view of legal pluralism, denoting an empirical state of affairs in a society, and a 'juristic' view of legal pluralism as a particular problem of dual legal systems that arises when European states have established colonies and superimposed their legal systems on pre-existing systems (Griffiths 1986: 5, 8).

The second problem is the absence of any place for power in his analysis. This is disappointing because he suggests a possible way forward when he identifies, as a “shared trait” of the various phenomena which go by the name of ‘law’, their claim to “legitimate authority to rightful power” (Tamanaha 1995: 535). However, in this he does not go far enough. Contrary to his statement, power is more than a ‘trait’ of law. Law, when it exists at all, is rather a manifestation of power. A central problem in Tamanaha’s analysis is his instrumentalist view of law (and, implicitly, of power) (cf Geertz 1983: 231). For all his criticism of the functionalist predisposition of most legal anthropologists, his weak interpretivism continues to be coloured by the view that law must serve some basic observable function in order to be classified as ‘law’ (Tamanaha 1995: 513, 531-533). He fails to recognise that the message of postpositivist interpretive analyses of law is not a demonstration that there has been a “real tightening of the iron grip of law” (1995: 533), but that law operates as a discourse through which social order is constituted.<sup>5</sup>

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<sup>5</sup> See Geertz, arguing that law

is not a bounded set of norms, rules, principles, values, or whatever from which jurial responses to distilled events can be drawn, but part of a distinctive manner of imagining the real (Geertz 1983: 173).

See also Merry 1988: 875-879, 881. Cf Foucault’s work on discipline in the modern state and the constitution of subjectivity (Foucault 1979). A central aspect of poststructuralist approaches to law is the interrelation between law and subject, a relation which Foucault describes in *Discipline and Punish* as positioning the subject (here the ‘delinquent’) not outside the law, but

*in* the law, at the very heart of the law, or at least in the midst of those mechanisms that transfer the individual imperceptibly from discipline to the law, from deviation to offence (Foucault 1979: 301).

The individual-as-subject (and, by extension, the state-as-subject) is, therefore, seen not as an atomised actor that reacts to law-as-power, but as one of the prime effects of power.

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike.... In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come

This is different from saying that law reflects or creates social order, which is the reason that Tamanaha's critique of Luhmann is incomplete. In presenting autopoiesis as a farrago of functionalist assumptions that occupies both categories of the concept of law only by altering the meaning it gives to 'law' in the course of its account, Tamanaha sets up a straw man to knock down with the argument that any "successful attempt to overcome the two categories must be consistent in the meaning it applies to the term 'law'" (Tamanaha 1995: 522). As Tamanaha observes some thirteen pages later, this is (I would submit, by his own definition) impossible. The true significance of approaches such as autopoiesis theory lies in the attention that they bring to precisely the problem Tamanaha identifies but with which he does not engage: what are the preconditions for the privileging of certain norms that become elevated to the status of law? how do these norms enter into discourse and with what effects and what limitations?<sup>6</sup>

I consider these questions in the next Part, attempting to meet the criticism that such an approach is too abstract to be useful (e.g. Cotterrell 1992: 68-69) by grounding them firmly in the jurisprudence of land rights in Australia over the last 26 years and the moves towards the recognition of Aboriginal 'law'. These moves produced the conditions for the *Murray Islands Case*, considered in Part III, which shifted the inquiry into the equally complex question of legal pluralism, and the limitations on the acceptance or appropriation of one legal order by another.

## II. 'Law' in Australian Land Rights Jurisprudence

People were up there, Aboriginal people. He should have come up and: 'hello', you know, 'hello'. Now, asking him for his

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to be identified and constituted as individuals. (Gordon 1980: 98)

<sup>6</sup> See e.g: von Benda-Beckmann 1988: 897; Geertz 1983: 181-183. Cf Geertz' description of the Islamic jurisprudential term *haqq* as

a conception that anchors a theory of duty as a set of sheer assertions, so many statements of brute fact, in a vision of reality as being in its essence imperative, a structure not of objects but of wills. The moral and ontological change places, at least from our point of view. It is the moral, where we see the 'ought', which is a thing of descriptions, the ontological, for us the home of the 'is', which is one of demands. (Geertz 1983: 187.)



place, to come through, because [it's] Aboriginal land. Because Captain Cook didn't give him fair go - to tell him 'good day', or 'hello', you know. Give people a fair go. (Oral history, Hobbles Danayarri, October 1980, Yarralin. Rose 1991: 15; cf Healy 1990: 516.)

*The interpretive gaze: the Gove Land Rights Case*

The foundational lie of Australian history is articulated in a journal entry of Joseph Banks, botanist aboard Cook's ship 'The Endeavour'. He wrote that the "Indians" observed by those on board were so scarce that "we may have liberty to conjecture that [the land is] totally uninhabited" (quoted Reynolds 1987).

The black 'natives' were something of an anthropological mystery to many observers, but their status was relatively clear:

Of the origins of this race of human beings, and the Country whence they emanated, little can be said. From the approximation of features to the African, I feel little hesitancy to classify them with the progeny of him who was cursed to be 'a servant of servants to his brethren'. (Missionary William Walker, writing to the Rev. Watson of the Wesleyan Missionary Committee in England, 5 October 1821. Brook and Kohen 1991: 109.)

As to their nature, opinions ranged from those who looked upon them as "pitiable savages" under the divine trust of the colonist nations, to those who saw them as a race that had "fallen from grace" (Rowley 1986: 5, 103). An 1838 Select Committee Report to the British House of Commons recommended the protection, civilisation and conversion of the "natives" to Christianity (Rowley 1986: 108).

One hundred and thirty-three years later, in the *Gove Land Rights Case*, a Northern Territory Supreme Court Judge found that government policies showed that "there was always an official concern for the welfare of the aboriginals - even where punitive measures were applied", but that this never took effect in the creation of "law relating to title to land, which the aboriginals could invoke" (*Gove Land Rights Case* 1971: 256).

In 1911, on its acquisition of the Northern Territory from South Australia, the Commonwealth commissioned Professor W. Baldwin Spencer to investigate the

'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

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Aborigines and make recommendations as to future government policy. He found that “he [sic] is a pure nomad with no fixed abode”. Although he recognised that the Aborigines had links with the land approximating to ownership, he made no recommendations as to the recognition of their land tenure system (Williams 1986: 150-151). In the *Gove Land Rights Case* Blackburn J. dismissed the claims on the ground that they were “not in the nature of proprietary interests” (*Gove Land Rights Case* 1971: 273).

Central to Blackburn J.’s decision against the Yolngu was his finding that there was no basis in Australian law for the doctrine of communal native title (*Gove Land Rights Case* 1971: 245). His judgment on this point has been variously described as “incomprehensible” (Bartlett 1985: 297), “surprising” (Hocking 1979: 175) and a “flawed interpretation of colonial history” (Reynolds 1987: 141). But perhaps the most damning criticism is that of Hall J. in the Canadian case of *Calder v Attorney-General of British Columbia* (1973: 218), that it was “wholly wrong”. Blackburn J. had considered the inferior court decisions in this case to be weighty authority (*Gove Land Rights Case* 1971: 223), but eighteen months later the Canadian Supreme Court overturned the decision. Six of the seven justices interpreted the law as directly opposed to Blackburn’s view, holding that native title was not ‘created’ but was recognised as flowing from occupation, and continuing unless and until the sovereign legislated otherwise.<sup>7</sup> This was in line with the views of the Privy Council in *Amodu Tijani* (1921),<sup>8</sup> (which Blackburn J. had held to be confined to the particular facts of the case, *Gove Land Rights Case* 1971: 231), and has been supported by subsequent cases (e.g: *Narragansett Tribe v Southern Rhode Island Land development Corporation* 1976: 807; *Guerin v The Queen* 1985: 335.) International law has also recognised that “territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*”.<sup>9</sup>

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<sup>7</sup> *Calder v Attorney-General of British Columbia* 1973: 218. Hall, Spence and Laskin JJ. held that native title existed and had not been extinguished; Judson, Marland and Ritchie JJ. held that it existed but had been extinguished by the conduct of the Crown in the circumstances of the case. Only Pigeon J. argued that the question of title was beyond the jurisdiction of the Court. The appeal was thus dismissed, but prior existence of title was recognised.

<sup>8</sup> “A mere change in Sovereignty is not to be presumed as meant to disturb the rights of private owners.” (*Amodu Tijani v Secretary, Southern Rhodesia* 1921: 410, Viscount Haldane).

<sup>9</sup> *Western Sahara* [1975] ICJ Rep 12, 39 (concerning state practice in 1884 and the annexation of territory by Spain).

There is further evidence that Aboriginal title to land was recognised morally if not legally. The Letters Patent of 1836 that established South Australia as a colony and the concomitant promises of Lord Glenelg (Cassidy 1979: 366, 369), the (rejected) proposals of Governor Macquarie in 1820 (Brook and Kohen 1991: 93, 102), and the treaty signed by John Batman in 1835, and subsequently revoked by Governor Burke<sup>10</sup> - though not legally binding - show at least a recognition that the Aboriginal peoples had some original claim to the land on which they stood when the whites arrived.

While it is perhaps understandable that a relatively junior court did not feel competent to make a decision which would be contrary to what had been accepted as settled law for two centuries, a more basic criticism of Blackburn J. points to his unwillingness to recognise “concepts of property other than those traditional to the English common law itself” (Hocking 1979: 174-175). This emerged in his hypothetical consideration of the criteria for establishing native title if it were in fact recognised under Australian common law (i.e., if he were wrong in his initial decision that it was not). He noted that the Aboriginal plaintiffs thought and spoke about the land as ‘theirs’, but stated that the law would consider the substance of proprietary interests, rather than their outward indicia. The criteria that he laid down were threefold. First the right must be a right to use and enjoy the subject land. In the case in point, the plaintiffs’ exclusive rights to the land were restricted to religious ceremonies. The second criterion was the right to exclude others. This too he found to exist only “in the realm of ritual”. The third was the right to alienate the land, a right repudiated by the plaintiffs themselves in their statement of claim.

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<sup>10</sup> The treaty was executed on 6 June 1835 with the “chiefs of a certain native tribe” to acquire land near Melbourne and Geelong and promised a “yearly rent or tribute”. On 2 September of the same year, Governor Burke declared

every such treaty, bargain, and contract with the Aboriginal Natives ... for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales ... is void and of no effect against the rights of the Crown; and that all Persons who shall be found in possession of any such Lands as aforesaid, without the license or authority of His Majesty’s Government, for such purpose, first had and obtained, will be considered as trespassers, and liable to be dealt with in like manner as other intruders upon the vacant lands of the Crown within the said Colony. (Clark 1950: 90-93.)

Blackburn J.'s legal aphorism that the clan belonged to the land rather than vice-versa (*Gove Land Rights Case* 1971: 270-1) was subsequently supplanted by a statutory recognition of "common spiritual affiliations" as a form of ownership (Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s. 3(1)(a); cf Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth) Preamble). But as early as 1789 there had been some recognition of a relationship with the land that was more than simply 'spiritual', though it was far from clearly understood (e.g. Williams 1986: 142-149).

In the light of the discussion in the previous Part, however, another explanation presents itself. From the text of Blackburn's judgment, it is clear that, at least intellectually, he recognised the complex social order that existed within the Aboriginal community, taking a view of law which perhaps corresponded to that in Tamanaha's first category.<sup>11</sup> However, this clearly conflicted with the judicial function of applying the common law, a mandate that ultimately led him to dismiss the Yolngu claim because the legal system that they possessed was not sufficiently compatible with that of the state. This conclusion is grounded firmly in the state law model, but the tension between the two views is hardly referable to a simple question of arbitrary use of terminology, as Tamanaha's schema would appear to suggest.

Something more is happening here. The existence of alternative law is acknowledged but deprivileged in the face of a greater (more specific, universal, comprehensive) legal order. The power of the label 'law' is lost because its attachment is coincidental to its sterilisation by the dominant legal order: even as Aboriginal people are acknowledged as having a history (on which see also Healy 1990), the reified history of the common law reaffirms its invulnerability to external critique. It is this notion of the external challenge to the legal order that explains the tension within Blackburn's judgment, and articulates the central problem of legitimacy that confronted the Aboriginal claimants in this case. In short, it is not possible to step outside 'the law': the state law régime constitutes itself as a coherent whole, which constitutive act defines all that lies outside the whole as incoherent. Herein lies the power of definition that Tamanaha fails to comprehend.<sup>12</sup>

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<sup>11</sup> It is primarily this aspect of his judgment that has been praised, with his discussion of the Aboriginal system of law being described as "lucid, if not masterful" (Hocking 1979: 175).

<sup>12</sup> Cf Geertz, criticising most basic approaches to comparative law:

The main approaches to comparative law - that which sees its task

*The Gaze of Power: Coe v Commonwealth of Australia*

The second major Australian land rights case directly challenged this coherence of the Australian legal order: in *Coe v Commonwealth of Australia*, ('Coe') the Aboriginal plaintiff Paul Coe challenged nothing less than the validity of the Commonwealth of Australia's claim to sovereignty over the continent itself. Perhaps not surprisingly, the claim got no further than the procedural stages of its High Court hearing.<sup>13</sup> But the manner of its dismissal and the dissents of two of the judges bear examination.

The long statement of claim alleged, *inter alia*, that an Aboriginal nation had existed prior to European settlement and continued to enjoy exclusive sovereignty over the whole of Australia (*Coe* 1979, Amended Statement of Claim: paras. 1A, 1B, 1, 4A, 6A, 7A, 11A, 16A, 16B, 23A). Captain Cook had thus wrongly proclaimed sovereignty and dominion over the East coast of Australia in 1770, and Captain Phillip had wrongly claimed possession and occupation of that land in 1788 (*Coe* 1979, Amended Statement of Claim: paras. 2A, 3A, 3B, 3C, 3D, 8A, 13A, 13X, 13M). Gibbs J., delivering the majority judgment, rejected these claims on the ground that they related to "acts of state whose validity cannot be challenged", saying:

If the amended statement of claim intends to suggest either that

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as one of contrasting rule structures one to the next and that which sees it as one of contrasting different processes of dispute resolution in different societies - both seem to me rather to miss this point [that different notions about the interconnections of norms and happenings *are* notions]: the first through an overautonomous view of law as a separate and self-contained 'legal system' struggling to defend its analytic integrity in the face of the conceptual and moral sloppiness of ordinary life; the second through an overpolitical view of it as an undifferentiated, pragmatically ordered collection of social devices for advancing interests and managing power conflicts. (Geertz 1983: 214.)

<sup>13</sup> The case was an appeal against a decision by Mason J. sitting alone dismissing the plaintiff's application for leave to amend his statement of claim. By agreement between the parties, however, the appeal was treated as an application by the Commonwealth to strike out the statement of claim *in toto*.

'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

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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 (*Coe* 1979: 130, Gibbs J., and citing *New South Wales v Commonwealth* 1975: 388 ).

With regard to the question whether Australia was *terra nullius* at the time of its acquisition by the British Crown (*Coe* 1979, Amended Statement of Claim: paras. 2-3M, 8M, 9M), Gibbs J. relied on the 90 year old authority of *Cooper v Stuart* to justify the statement that it was “fundamental” to “our” legal system that the Australian colonies became British possessions by settlement and not by conquest:

For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class. (*Coe* 1979: 130)

He concluded his judgment with the following admonition:

The question of what rights the aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better, but the resolution of such questions by the courts will not be assisted by imprecise, emotional or intemperate claims. In this, as in any other litigation, the claimants will be best served if their claims are put before the court *dispassionately, lucidly and in proper form*. (*Coe* 1979: 130, emphasis added)

The question of why the legal fiction of *terra nullius* persisted for so long despite the historical, and, arguably, legal evidence to the contrary goes to the heart of the ‘form’ to which Gibbs J. refers at the end of his judgment. The doctrine has been described as having “taken on a reality of its own” (Brennan 1986: 13), but other commentators have noted that the law is, ultimately, pragmatic and, if it is necessary for stability, will and must prefer a fiction to truth (Kerruish 1989: 124). A more cynical explanation is that “the theory of an uninhabited continent

was just too convenient to surrender lightly” (Reynolds 1987: 32), though this is not far from the opinion expressed by Murphy J. in his dissent, discussing the authority on which the majority had relied:

Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. *The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines’ land.* (Coe 1979: 138, Murphy J., emphasis added)

It is clear that *Coe* was in part a political gesture, most notably in the statement that

members of the aboriginal nation ... planted their national flag on the beach at Dover, England, in the presence of witnesses and natives of [the United Kingdom] and claimed sovereignty over all of the territory of [the United Kingdom]. (Coe 1979, Amended Statement of Claim: para 23A. Gibbs J. described this aspect of the claim as “absurd and vexatious”.)

It is clear that an Australian court could not entertain such a claim, but the manner of its rejection demonstrates the difficulties facing indigenous claimants attempting to establish legal claims within the institutions of the state. Leaving aside the “intemperate” aspects of the action, the attempt to step outside the established discourse of law by challenging the sovereignty of the state (and thus indirectly the competence of the Court itself) was struck out as “embarrassing” (Coe 1979: 131). A simple reading would see this as inevitable in a case so clearly intended to challenge the legitimacy of the legal order, but this underestimates the significance of the power that the Court holds simply through the interpretive régime that dictates the “proper form” such causes of action must take.

Nevertheless, *dicta* in *Coe* gave hope for future, “better defined” claims (e.g. *Coe* 1979: 131 (Gibbs J.), 136 (Jacobs J.), 138 (Murphy J.)) Subsequent judgments demonstrated a better understanding of the relationship Aboriginal people have with the land (e.g. *Re Toohey, ex parte Meneling Station* 1982: 87, Brennan J.), and an appreciation that the law should be reformed (e.g. *Gerhardy v Brown* 1985: 532, Deane J.). It was clear, however, that any recognition of land rights

## 'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

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would ultimately be on terms that the state legal system dictated.

The tensions that are evident in both the *Gove Land Rights Case* and *Coe* reflect the limitations of attempts to challenge the universality of existing state legal orders. Whereas the Yolngu claim in the *Gove Land Rights Case* was unsuccessful because it failed to fit inside the box labelled 'property law', the attempt to challenge Australian sovereignty in *Coe* fell down precisely because it denied the legitimacy of the box. In each case the state law faced a challenge from outside: in the first case, it came from an alternative legal form; in the second, an alternative legal order.

Returning to Tamanaha's discussion of the distinct concepts of law in social scientific inquiry, these failed challenges highlight the utility of seeing law as a self-contained interpretive régime (Geertz 1983: 218). The decision in the *Gove Land Rights Case* demonstrates the limitations of an attempt to bring about land rights reform within a system grounded in racist assumptions about the indigenous inhabitants. The decision in *Coe* clearly shows the impossibility of going outside that system. In the absence of decisive legislative intervention, the Aboriginal land rights cause in Australia was caught between a rock and a hard place. When the High Court finally heard argument in the *Murray Islands Case*, it was unclear whether or how these tensions could be resolved.

### III. 'Skeletal Legal Principles'

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. (*Murray Islands Case* 1992: 29, Brennan J.)

#### *The Murray Islands Case*

The case took ten years from the lodgement of a statement of claim until the final decision in 1992. One of the more interesting measures adopted by the Queensland Government to try to block the possible implications of a successful land rights claim was the passage of the Coastal Islands Declaratory Act 1985. This brief Act purported to declare that the Torres Strait Islands (including the Murray Islands) were free from all other rights, interests and claims of any kind which might impinge upon the Crown's title (s. 3). It further provided that any disposal of the lands in question was valid (s. 4), and any extinguishment of rights inconsistent with the Crown's title gave rise to no right of compensation (s. 5). Of



particular note is the speech of the Deputy Premier of Queensland when he introduced the Bill:

The passage of this Bill will, it is hoped, remove the necessity for limitless research work being undertaken in relation to the position of the relevant Torres Strait Islands prior to annexation and will prevent interminable argument in the Courts on matters of history (W. Gunn quoted in Brennan 1986: 15)

The Act was subsequently struck down as contravening Australia's Federal racial discrimination legislation (*Mabo v State of Queensland [No 1]* 1988, following the Racial Discrimination Act 1975), but it discloses the prevailing attitude towards (white) history and 'settled' law that for so long precluded judicial recognition of Aboriginal land rights.

When the High Court finally came to consider the substance of the plaintiffs' claim, it faced the invidious choice between directly confronting these issues of history and law, or acquiescing in the conspiracy that was the doctrine of *terra nullius*. In finally declaring that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands" (*Murray Islands Case* 1992: 217), the Court attempted to reconcile the tensions discussed in the previous Part. The Court could not step outside its discursive régime, as it had been asked to do in *Coe*, but a majority of judges were now prepared to recognise a claim to land inconsistent with that régime, as Blackburn J. had not.

In the leading judgment Brennan J. reviewed the line of cases which supported the theory of universal and absolute Crown ownership over the lands of a settled colony. These cases had long been thought to establish that, on settlement, the law of England so far as applicable to colonial conditions became the law of the colony, and that by that law the Crown acquired absolute and beneficial ownership.<sup>14</sup> But if this interpretation were correct,

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<sup>14</sup> *Attorney-General of NSW v Brown* (1847) 1 Legge 312. This was followed in *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 71 and *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 194, holding:

The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning - all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne.

‘SKELETAL LEGAL PRINCIPLES’

Simon Chesterman

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the *common law itself* took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned. (*Murray Islands Case* 1992: 29, Brennan J., emphasis added.)

Herein lie the seeds of Brennan J.’s finding that it was not the common law that took the land from Australia’s indigenous inhabitants, but the Crown.<sup>15</sup>

Brennan J. later noted that the theory that the indigenous inhabitants of a ‘settled’ colony had no proprietary interest in the land “depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs”:

As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher ‘in the scale of social organization’ than the Australian Aborigines whose claims were ‘utterly disregarded’ by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not. (*Murray Islands Case* 1992: 40, Brennan J.)

Following the latter course would, however, be precluded if it would threaten a “skeletal principle” of the legal system (*Murray Islands Case* 1992: 43, Brennan J.).

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See also *Seas and Submerged Lands case* (1975) 135 CLR 337.

<sup>15</sup> It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty’s indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands (*Murray Islands Case* 1992: 39 (Brennan J.)).

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One such skeletal principle is the doctrine of tenure, which gives English land law its “shape and consistency” (*Murray Islands Case* 1992: 45, Brennan J.). Under this doctrine ownership of land is held either mediately or immediately of the King, who is the Lord Paramount, the term ‘tenure’ referring to the relationship between tenant and lord (*Murray Islands Case* 1992: 46, Brennan J.). If this doctrine is accepted, it is an essential postulate that the Crown must have title sufficient to invest the Sovereign with the character of Paramount Lord. In the colonies the Crown was invested with the character of Paramount Lord by attributing to it a title, adapted from feudal theory, that was called a “radical, ultimate or final title”.<sup>16</sup> If the relevant land were uninhabited - truly a *terra nullius* - the Crown would take an absolute beneficial title to the land (an allodial title). But in the case of land occupied by with inhabitants holding rights recognised by the common law, the acquisition of radical title is not inconsistent with the recognition of native title to land. Radical title is, in such a situation, merely a “logical postulate” required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory) (*Murray Islands Case* 1992: 50-52, Brennan J.).

The crucial finding, then, is that, although the acquisition of sovereignty over Australia cannot be challenged in an Australian municipal court, it gives the Crown only a ‘radical title’ to the land. Without more, that is, without action by the Crown to grant an interest in land or appropriate land to itself, rights that are recognised by the common law continue to subsist. Moreover, these rights are not restricted to rights that accord with the English notion of a proprietary right.

The fact that individual members of the community, like the individual plaintiff Aborigines in [the *Gove Land Rights Case*], enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title ... [T]here is no impediment to the recognition of individual non-proprietary rights that are derived from the community’s laws and customs and are dependent on the community title. (*Murray Islands Case* 1992: 51-52, Brennan J. Cf von Benda-Beckmann 1995: 320-322.)

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<sup>16</sup> *Murray Islands Case* 1992: 48, Brennan J. See also: *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 403, 404, 407; *Nireaha Tamaki v Baker* [1901] AC 561, 580. Cf *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 396-397.

The title held by the Meriam people was, however, subject to the power of the Queensland Parliament and Executive to extinguish it by a valid exercise of their respective powers, which was in turn subject to the laws of the Commonwealth (for example, the racial discrimination legislation that struck down the 1985 Act) (*Murray Islands Case* 1992: 217).

The landmark ruling was met with dismay by parts of white Australia, notably the mining industry which launched an advertising campaign to lobby the government for immediate legislative intervention, particularly in mineral rich Western Australia.<sup>17</sup> Some Aboriginal groups were also critical of the High Court's decision, largely because of the inferior title given to the plaintiffs and because the more basic issue of sovereignty was not argued (as it had been in *Coe*) (e.g. Mansell 1992). The important issue of what exercise of power was required to extinguish native title had been purposely left unresolved by the Court and was the subject of some concern given the large tracts of Australian land subject to pastoral leases. In the recent case of *Wik People v State of Queensland* the High Court found that native title and pastoral leases could co-exist, but that where there was a conflict between the two interests, the pastoral lease would prevail.<sup>18</sup>

#### *Legal pluralism and the limits of judicial reform*

For present purposes the most significant aspect of the High Court decision is its attempt to balance the needs of justice against the need for legitimacy.<sup>19</sup> The case

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<sup>17</sup> See now *Western Australia v The Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*'). See the full page advertisements taken out by the Australian Mining Industry Council prior to the enactment of the Native Title Act 1993 (Cth) in *The Age* (Melbourne), 14 August 1993, and *The Weekend Australian* (Sydney), 21-22 August 1993.

<sup>18</sup> *Wik People v State of Queensland* (High Court of Australia, Brennan C.J., Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ., 23 December 1996).

<sup>19</sup> Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning (*Murray Islands Case* 1992: 30, Brennan J.).

demonstrates that the legitimacy of a legal order is not always served by consistency. Brennan J. (now Chief Justice) was at pains to show that it was not the common law that had dispossessed Australia's Aboriginal population of their ancestral lands, but the actions of the Crown. Deane and Gaudron JJ. expressed a comparable sentiment in terms unusually emotive for a High Court judgment:

If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority.... Far from being ordinary, however, the circumstances of the present case make it unique.... [T]he two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. (*Murray Islands Case* 1992: 109, Deane and Gaudron JJ.)

The sole dissent of Dawson J. eloquently expressed the contrary view:

The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, *a change in view does not of itself mean a change in the law* (*Murray Islands Case* 1992: 145, Dawson J., emphasis added).<sup>20</sup>

The limitations of the approach adopted by the majority are most evident in the decision on the question of compensation. The primary finding of the Court that native title was recognised by the common law and survived as a burden on the

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<sup>20</sup> His Honour continues:

It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided. (*Murray Islands Case* 1992: 145.)

## 'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

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Crown's radical title was by a majority of six to one. But by a lesser majority of four to three, the Court found that the extinguishment of native title did not give rise to a right to compensation (cf Australian Constitution, s 51 (31)). This was primarily justified on the basis that native title is not granted by the Crown and thus does not give rise to the principle of non-derogation from grant.<sup>21</sup>

It is clear, then, that the *Murray Islands Case* is of extremely limited use as an example of state law opening up to receive its 'other'. It implicitly suggests that, through the fiction of judicial law-making, the common law *always* recognised the rights of Aboriginal peoples to native title. At the same time, however, although the form of title recognised is broader than that posited by Blackburn J. in 1971, it remains subject to the structural limitations of the common law. Conversely, precisely *because* it arises from outside that legal régime it does not attract common law protection such as the right to compensation in case of extinguishment.

Ultimately the *Murray Islands Case* is perhaps best seen with hindsight as a catalyst for change. The enactment of the Native Title Act 1993 (Cth) sought to provide a legislative framework for implementing the principles laid down by the High Court, though the issue of Aboriginal land rights remains hotly contested.<sup>22</sup>

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<sup>21</sup> *Murray Islands Case* 1992: 63-64, Brennan J. Mason C.J. and McHugh J. agreed with Brennan J., and on this point the sole dissident on the major issue, Dawson J., joined them to form a majority on the secondary issue of compensation.

<sup>22</sup> A recent example is provided by the Hindmarsh Island Bridge saga. As part of a building project approved in 1989, a bridge was to be built subject to compliance with *inter alia* the Aboriginal Heritage Act 1988 (SA). Ngarrindjeri people had occupied Kumarangk (Hindmarsh Island) prior to and for many years following colonisation of the area. Some members of that group wrote in 1993 and 1994 to the Ministers concerned expressing concern about the bridge proposal and seeking protection under the state Act or its federal counterpart. Among their concerns was the existence of beliefs particularly important to women, to whom knowledge of the beliefs was restricted. On the basis of a report by Professor Cheryl Saunders, the Federal Minister made a declaration prohibiting development of the area for 25 years. Other Ngarrindjeri women subsequently came forward to deny the existence of the 'women's business', which led to the establishment of a South Australian Royal Commission, at the same time as the Commonwealth Minister announced a second inquiry and report by Federal Court Justice Jane Mathews. The South Australian Royal Commission found that the "whole of the 'women's business' was a fabrication". A High Court challenge to the second federal inquiry on the ground that it granted non-judicial power to a federal judge was successful: *Dorothy Ann Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR

## Conclusion

The law of Aboriginal people is still in existence, in practice, has impact on people's lives and determines our responses... Aboriginal people have their own forms of institutions that have controlled and cared for us for far longer than the last 200 years, being more like 40,000 years. These have not been able to be re-established because they are seen as a threat to the country that has usurped and stolen not only the land, but also the capacity of many Aboriginals to rectify the tragedy that has taken place ...

It is simply a white Western legal system that has to go through the farcical situation of handing back people their own title deeds when it is, in fact, land that belongs to Aboriginal people; as does what is in that land - given to us from the Dreaming. It is a spiritual relationship that very few whites can ever enter into, because there is no monetary gain to be made from it; only a complex intimacy between Aboriginal people and their country that is also part of the whole ideological basis of why we exist, and why we continue to battle some of the useless apparatus in the Western system to try and achieve minimal gains. (Dodson 1988: 138-140. Dodson is Chair of the Council for Aboriginal Reconciliation.)

It is clear that Australian property law is at least as concerned with its own stability and coherence as it is with the more abstract search for justice. Brennan J.'s caveat with respect to the protection of the skeletal principles of Australian property law was, however, stated in a case where the High Court took a major step and acknowledged at a more than symbolic level that gross injustices have hidden as skeletons in white Australia's closets for too long.

The central finding in the *Murray Islands Case*, that it was not the common law but the Crown which dispossessed Australia's Aboriginal population, bears some

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220. Rather than appoint a new reporter, the Government introduced legislation to enable the bridge to proceed. (See generally Tehan 1996.)

further analysis. Its essence is an engagement by the High Court in revisionist historiography of its own doctrine that sought to balance its twin claims to legitimacy: doctrinal coherence and concordance with prevailing societal norms. In its own way, this reflects the two categories of concepts of law identified by Tamanaha and discussed in Part I, but leaves only marginal space for the incorporation of 'other' concepts of law that exist outside the state law model. Making sense of these disparate views of law and legitimacy demands a recognition that such moves within the discourse do not merely reflect different perspectives on power, but rather that these operations are themselves modalities of power.

Since the emergence of legal realism, it has been acknowledged that the judicial function goes beyond merely applying the law. But in cases concerning 'other' legal orders, judges become involved in crucial determinations as to what is within or without the law. The importance that this holds for future litigation on behalf of indigenous peoples is clear, but its theoretical import is no less significant. Crucially, those involved in fieldwork have a responsibility to analyse and be critical not merely of the definition of 'law' that they adopt, but of the discursive position that enables them to impose such definitions and of the consequences and effects that accompany them.

## References

### *Statutes and cases*

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

Aboriginal Heritage Act 1988 (SA).

Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

*Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.

*Amodu Tijani v Secretary, Southern Rhodesia* [1921] 2 AC 399.

*Attorney-General of NSW v Brown* (1847) 1 Legge 312.



Australian Courts Act 1828 (Imp) 9 Geo IV c 83.

Australian Constitution.

*Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

Coastal Islands Declaratory Act 1985 (Qld).

*Coe v Commonwealth of Australia* (1979) 24 ALR 118.

*Cooper v Stuart* (1889) 14 App Cas 286.

*Gerhardy v Brown* (1985) 57 ALR 472.

*Gove Land Rights Case (Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia)* (1971) 17 FLR 141 (Supreme Court of the Northern Territory).

*Guerin v The Queen* (1985) 13 DLR (4th) 321.

*Mabo v State of Queensland [No 1]* (1988) 166 CLR 186.

*Murray Islands Case (Mabo v State of Queensland [No 2])* (1992) 175 CLR 1.

*Narragansett Tribe v Southern Rhode Island Land development Corporation* 418 F Supp 798 (1976).

Native Title Act 1993 (Cth).

*New South Wales v Commonwealth* (1975) 135 CLR 377.

*Nireaha Tamaki v Baker* (1901) AC 561.

Racial Discrimination Act 1975 (Cth).

*Randwick Corporation v Rutledge* (1959) 102 CLR 54.

*Seas and Submerged Lands case* (1975) 135 CLR 337.

*Re Toohey, ex parte Meneling Station* (1982) 44 ALR 63.

*Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

*Western Sahara* [1975] ICJ Rep 12.

*Wik People v State of Queensland* (High Court of Australia, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 23 December 1996).

*Dorothy Ann Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220.

*Texts*

AUSTIN, John

1832 *The Province of Jurisprudence Determined*. London: Weidenfeld and Nicolson.

BARTLETT, R.H.

1985 'Aboriginal land claims at common law.' *Western Australian Law Review* 15: 293.

BENDA-BECKMANN, Franz von

1988 'Comment on Merry.' *Law & Society Review* 22: 897.

1995 'Anthropological approaches to property law and economics.' *European Journal of Law and Economics* 2: 309.

1997 'Citizens, strangers and indigenous peoples: conceptual politics and legal pluralism.' *International Yearbook for Legal Anthropology* 9: 1.

BRENNAN, Frank

1986 *Finding Common Ground*. 2nd ed. Blackburn: Collins Dove.

BROOK, J. and J.L. KOHEN

1991 *The Parramatta Native Institution and the Black Town*. Kensington, NSW: NSW University Press.

CASSIDY, J.

1979 'A reappraisal of Aboriginal policy in colonial Australia: imperial and colonial instruments and legislation recognising the special rights and status of the Australian Aboriginals.' *Federal Law Review* 10: 365.

CLARK, Manning (ed.)

1950 *Select Documents in Australian History: Volume 1, 1788-1850*. Sydney: Angus & Robertson.

COHEN, Felix S

1960 *The Legal Conscience*. New Haven: Yale University Press.

COTTERRELL, Roger

1992 *The Sociology of Law: An Introduction*. 2nd ed. London: Butterworths.

- DODSON, Pat  
1988 'Policy statement.' In Barbara Hocking (ed), *International Law and Aboriginal Human Rights*. Sydney: Law Book Company.
- EHRlich, Eugen  
1936 *Fundamental Principles of the Sociology of Law*. Cambridge, Mass.: Harvard University Press.
- GEERTZ, Clifford  
1983 *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.
- GORDON, Colin (ed.)  
1980 *Power/Knowledge*. New York: Pantheon Books.
- GRIFFITHS, John  
1986 'What Is Legal Pluralism?' *Journal of Legal Pluralism* 24: 1-55.
- HEALY, Chris  
1990 'We know your mob now: histories and their cultures.' *Meanjin* 49: 512.
- HOCKING, Barbara  
1979 'Does Aboriginal law now run in Australia?' *Federal Law Review* 10: 161.
- KERRUISH, Valerie  
1989 'Reynolds, Thompson and the rule of law: jurisprudence and ideology in *terra nullius*.' *Law in Context* 7: 120.
- MADDOCK, Kenneth  
1989 'Involved anthropologists.' In Wilmsen.
- MANSELL, Michael  
1992 'The court gives an inch but takes another mile.' *Aboriginal Law Bulletin* 2/57: 4.
- MERRY, Sally  
1988 'Legal pluralism.' *Law & Society Review* 22: 869-896.
- FOUCAULT, Michel  
1979 *Discipline and Punish: The Birth of the Prison*. London: Penguin.
- MIDDLETON, H.  
1977 *But Now We Want the Land Back: A History of the Australian Aboriginal People*. Sydney: New Age Publishers.
- MOORE, Sally Falk  
1978 *Law as Process: An Anthropological Approach*. London: Routledge.
- REYNOLDS, Henry  
1987 *The Law of the Land*. Ringwood, Vic: Penguin.
- ROBERTS, Simon  
1979 *Order and Dispute: An Introduction to Legal Anthropology*. Oxford: Martin Robertson.

'SKELETAL LEGAL PRINCIPLES'

Simon Chesterman

---

ROSE, Deborah Bird

1991 *Hidden Histories: Black Stories from Victoria River Downs, Humbert River and Wave Hill Stations*. Canberra: Aboriginal Studies Press.

ROWLEY, C.D.

1986 *Recovery: The Politics of Aboriginal Reform*. Ringwood, Vic: Penguin.

ROYAL COMMISSION (ROYAL COMMISSION APPOINTED TO INQUIRE INTO ABORIGINAL DEATHS IN CUSTODY)

1991 *Final Report*. Canberra: Australian Government Publishing Service.

TAMANAH, Brian Z.

1993 'The folly of the "social scientific" concept of legal pluralism.' *Journal of Law and Society* 20: 192-217.

1995 'An Analytical Map of Social Scientific Approaches to the Concept of Law.' *Oxford Journal of Legal Studies* 15: 501.

TEHAN, Maureen

1996 'Case Note: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.' *Melbourne University Law Review* 20: 1212.

WILLIAMS, N.M.

1986 *The Yolngu and their Land: A System of Land Tenure and the Fight for Its Recognition*. Canberra: Australian Institute of Aboriginal Studies.

WILMSEN, Edwin N.(ed.)

1989 *We Are Here*. Berkeley: University of California Press.